COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

January 6, 2012, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor – Follow the Signs

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1. Approval of minutes - May 6, 2011 meeting [pages 1-14]

2. Report on Supreme Court action on proposed amendments to C.R.C.P. 251.5(b) [Marcy Glenn, page 15]

3. Report from Code of Judicial Conduct Subcommittee [Judge Webb, pages 16-19]

4. Report from Pretexting (C.R.P.C. 4.1/4.3) Subcommittee [Tom Downey, pages 20-60]

5. New business:

   a. Potential amendment to comment to C.R.P.C. 3.3 to address "candor" issues [Michael Berger, pages 61-67]

   b. Collaborative law developments [Marcy Glenn and Tony van Westrum]

6. Administrative matters:

   a. Select next meeting date

7. Adjournment (before noon)

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On May 6, 2011
(Thirtieth Meeting of the Full Committee)

The thirtieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:10 a.m. on Friday, May 6, 2011, by Chair Marcy G. Glenn. The meeting was held in a conference room of the Office of Attorney Regulation.

Present in person or by conference telephone at the meeting, in addition to Marcy G. Glenn and Justice Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Neeti Pawar, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., James S. Sudler III, David W. Stark, Anthony van Westrum, and E. Tuck Young. Excused from attendance, in addition to Justice Monica Márquez, were Cynthia F. Covell, Marcus L. Squarrell, and Judge John R. Webb. Also absent were Judge William R. Lucero, Cecil E. Morris, Jr., Eli Wald, and Lisa M. Wayne.

I. *Meeting Materials; Minutes of August 21, 2009 and January 21, 2011 Meetings.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the both the twenty-fifth meeting of the Committee, which was held on August 21, 2009, but for which the secretary had not previously submitted minutes; and of the twenty-ninth meeting of the Committee, held on January 21, 2011 Those minutes were approved, with minor corrections to the minutes of the twenty-ninth meeting.

II. *Status of Committee's Proposals to the Court.*

John Gleason distributed to the members printed copies of the amendments the Court has adopted modifying Rule 1.5(b) and striking its existing Comment [3A], effective July 1, 2011.

The Chair noted that the Court adopted the minority report to the Committee's proposal to amend Rule 1.5(b) to deal with mid-stream modifications to lawyers' fee agreements. She noted that the Court's deletion of Comment [3A] is not obvious from the presentation of the Court's action on its website,[1] which reports that there are no changes to Comments [1] through [3] and no changes to Comments [4] through [18] and thereby merely implies that Comment [3A] has been deleted. But the Chair confirmed that the Court *did* delete Comment [3A] in its entirety, and another member added that Westlaw has reported the amendments to reflect that deletion.

The Chair added that the Court has now acted on all of the proposals for amendments to the Colorado Rules of Professional Conduct ("CRPC") that the Committee has proposed to it since the adoption of the "Ethics 2000" Rules on January 1, 2008.

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1. *See* http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2011/2011_05%20redlined%281%29.pdf.

III. *Interplay between Rules of Professional Conduct and Revised Code of Judicial Conduct Regarding* ex Parte *Communications.*

At the Chair's request, and in the absence of the designated subcommittee's chair, Judge Webb, Alexander Rothrock reported to the Committee on the subcommittee's further consideration of the interplay between amended Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC") and Rule 3.5 of the Colorado Rules of Professional Conduct ("CRPC"), which had first been discussed by the full Committee at its Twenty-Ninth Meeting, on January 1, 2011.[2]

Rothrock began by noting that, at its Twenty-Ninth Meeting, the Committee had postponed taking action on the subcommittee's proposal that references in CRPC Rule 1.12 to the Model Code Of Judicial Conduct should be revised to be, instead, direct references to the analog provisions in the CJC and that a member had suggested that that effort be delayed until the numbering of the CJC was stabilized — that is, until after completion of a pending effort by the Colorado Judicial Discipline Commission to update the Commission's procedural rules, an effort that would entail renumbering of some of the provisions in the CJC — and the proper references to the CJC are known.

John Gleason reported that the Judicial Discipline Committee had now completed its work in that respect and that the numbering that the subcommittee had used in the changes it proposed to CRPC Rule 1.12 at the Twenty-Ninth Meeting was accurate. The Chair commented that there was, then, no need for further discussion of the subcommittee's proposed changes to CRPC Rule 1.12, which seemed not to be controversial.

Rothrock then recounted the Committee's deliberations, at its Twenty-Ninth Meeting, about lawyers' *ex parte* communications with judges under CRPC Rule 3.5 and judges' *ex parte* communications with lawyers under CJC Rule 2.9.[3] At that meeting, the Committee had been informed that, although the Code of Judicial Conduct permits judges to engage in certain *ex parte* communications with lawyers, there is no corresponding provision in the Rules of Professional Conduct permitting lawyers to participate in those same communications. But, at its Twenty-Ninth Meeting, the Committee had rejected the proposal of the subcommittee that language matching CJC Rule 2.9 be added to CRPC Rule 3.5(b).

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2. The minutes of the Twenty-Ninth meeting describe the subcommittee's initial recommendations as follows:

> The first change — which the subcommittee characterized as a housekeeping matter — would be to text in Comment [1] to Rule 1.12, dealing with restrictions on a lawyer's practice when the lawyer previously served as a judicial officer. The second change deals with the possibility that a lawyer who engages in an *ex parte* communication with a judge could be disciplined for violation of Rule 3.5, even if the judge initiated the communication *sua sponte* and even though, from the judge's perspective, the communication was proper under Rule 2.9 of the Code of Judicial as a communication for "scheduling, administrative, or emergency purposes."

3. CJC Rule 2.9 provides in part as follows:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

Rothrock directed the Committee's attention to the subcommittee's revised proposal, which had been included in the package of materials that was provided to the members for the current meeting, which proposal would amend CRPC Rule 3.5 as follows:

> RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, ***or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct.***;
>
> (c) communicate with a juror or prospective juror after discharge ~~of the~~ ***of the*** jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate;
>
> (3) the communication involves misrepresentation, coercion, duress or harassment; or
>
> (4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or
>
> (d) engage in conduct intended to disrupt a tribunal.
>
> COMMENT
>
> [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. ***The exception in the Rule for communications initiated by a judge enables a lawyer to respond to an ex parte communication that is initiated by a judge under the authority of a rule of judicial conduct. See, e.g., Rules 2.9(A)(l) and (4) of the Colorado Code of Judicial Conduct (permitting nonsubstantive ex parte communications for scheduling, administrative, or emergency purposes, or to facilitate settlement). This exception does not authorize the lawyer to (a) initiate such a communication, even if a rule of judicial conduct would authorize the judge to engage in it; or (b) include matters not within the exception when responding to such a communication. A lawyer must therefore discontinue a communication if and when the lawyer reasonably believes that the communication exceeds the authority granted to the judge by a rule of judicial conduct.***

Rothrock pointed out that the subcommittee's modifications would do these things:

1. Rather than make specific reference in CRPC Rule 3.5 to the provision in CJC Rule 2.9(A)(1) permitting a judge's *ex parte* communications for scheduling, administrative, or emergency purposes, the subcommittee's proposed amendments to CRPC Rule 3.5(b) would make a generic reference to communications that are "within the scope of the judge's authority under a rule of judicial conduct." This would encompass communications permitted to a judge, whether under the Colorado rules of judicial conduct or otherwise.

2. To answer the question of how the lawyer is to know that the judge is permitted to engage in the communication, proposed CRPC Rule 3.5(b) would apply if "the lawyer reasonably believes" that the judge's authority extends to the communication.

3. The subcommittee would revise Comment [2] to CRPC Rule 3.5 to refer both to CJC Rule 2.9(A)(1)[4] and to CJC Rule 2.9(A)(4)[5] as examples of *ex parte* communications that are permitted to the judge and thus are permitted also to the lawyer under CRPC Rule 3.5.

4. But, under the subcommittee's proposal, the lawyer would not be permitted to *initiate* the communication with the judge; any communication would have to be initiated by the judge. Rothrock said that the subcommittee's proposal would only allow the lawyer to react to the judge's initiative; he noted that there may still be circumstances where it is not entirely clear whether the lawyer would be permitted to respond to the judge under the subcommittee's proposal, as where the judge says, conditionally, "If we are to deal with this, you need to call me."

5. And, under the subcommittee's proposal, the lawyer would not be permitted to stray beyond the permitted "subject matter" of the communication; as the proposed revised comment would clarify—

> This exception does not authorize the lawyer to . . . (b) include matters not within the exception when responding to such a communication. A lawyer must therefore discontinue a communication if and when the lawyer reasonably believes that the communication exceeds the authority granted to the judge by a rule of judicial conduct.

Rothrock explained that the subcommittee's proposal would not permit the lawyer to talk *ex parte* about anything that is outside the judge's *ex parte* authority: If, for instance, the judge initiated a call to set an emergency hearing, the lawyer would not be permitted to raise any matter of substance. Further, Rothrock said, the proposal would require the *lawyer* to cut off the conversation if the *judge* had strayed beyond the permitted scope — that is, if the lawyer were not reasonably believe that the expanded subject matter of the conversation remains within the judge's authority.

Rothrock commented that the subcommittee "made up" the last two points — they were not included in the directions the Committee gave to the subcommittee at its Twenty-Ninth Meeting.

The Chair, Rothrock, and another member confirmed that William J. Campbell, Executive Director of the Colorado Commission on Judicial Discipline, has indicated his approval of the subcommittee's current proposal.

Opening discussion, a member affirmed her view, expressed at the Committee's Twenty-Ninth Meeting, that this proposal is simply not practicable for the smaller judicial districts within the state, where judges carry their own calendars and, accordingly, lawyers commonly initiate communications with the judges to set matters for hearing. The subcommittee's proposal would not permit that kind of communication. Further, she believed, the amendments should not "hide the ball" as is done in the amended Comment [2] but, rather, should explicitly state for the lawyer what *ex parte* communications are permitted to judges under Rule 2.9 of the Code of Judicial Conduct.

Another member added that it is common in family law practice, where there is a heavy volume of cases, for practitioners to "network" with the judges and to encounter the judges frequently, as, for example, at professional luncheons. An informal howdy-do may lead to a judge's instruction to "email me to set a hearing on that matter." In other words, she said, the frequency of these kinds of

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4. *See* n. 3 to these minutes for the text of CJC Rule 2.9 A)(1).

5. CJC Rule 2.9(A)(4) provides, "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge."

communications that had been commented on with respect to "small districts" may also be found in particular practice areas.

A member expressed his concern that the proposed comment places a terrible burden on the lawyer by requiring the lawyer to cut off a communication initiated by a "judicial officer." He wondered why he should be made responsible to monitor the judge's conduct, and he gave as an example the dilemma faced by the lawyer who is asked by the judge something relating to the substance of a case, such as, "Is your client still a party in that case?" Speaking for himself, he said that he would not dare cut off the judge who asked him such a question.

But another member suggested that an appropriate reaction might be to press the conference telephone button and get opposing counsel into the conversation with a "That's a good question, Judge; let me get the other lawyer on the line." No one noted that this precise solution would not be available in a face-to-face conversation.

A member asked how these matters are handled in practice under the existing rules. She noted that the proposal is intended to make the Rules of Professional Conduct, governing lawyers, match those of the Code of Judicial Conduct, governing judges, but CRPC Rule 3.5 currently forbids a lawyer to "communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order." How do lawyers currently handle the judge's direction to "email me to set that matter" given during an encounter at a bar association event?

A member replied that she understood the existing rule's prohibition of *ex parte* communications to cover only those communications that involve substantive issues about cases. But, she said, when the text of the rule is made more precise, distinguishing between initiation and receipt of communications, it appears to draw bright lines that do not permit that substance/non-substance distinction.

But the member who had inquired about current practices pointed out that there is no textual basis, in current CRPC Rule 3.5, for that suggested substance/non-substance distinction.

A member commented that, while it is difficult to place oneself in the mind of a judge, he would assume that the judge who said, "Email me to set that matter," actually intended that the subsequent emailed communication would be sent both to the judge and to the opposing lawyer, so that it would not be *ex parte* in fact. In other words, the judge's offhand comment might not actually be an invitation to an *ex parte* communication.

Rothrock stepped in to remind the Committee that current CRPC Rule 3.5 is an absolute prohibition against the lawyer's participation in an *ex parte* communication unless some "law or court order" authorizes the *lawyer* to do so. The lawyer has no exception for communications that a judge may engage in and has initiated; and, even with the recent amendment to CJC Rule 2.9, there is no rule permitting the judge to engage in the kinds of communications the members were now discussing. Before the amendment to CJC Rule 2.9 effective July 1, 2010, even judges were out of bounds when having *ex parte* communications even about scheduling, administrative, or emergency matters. Rothrock suggested that there had been a disconnect between the absoluteness of the rules and the actual practice of lawyers and judges, a practice that is now — at least for judges — largely accommodated by the revision to CJC Rule 2.9. Accordingly, he added, perhaps the Committee should bow to reality, which seems to be inconsistent with an insistence that the judge be the initiator of all *ex parte* communications. Do we, he asked, make the rule reflect reality, or make reality adhere to the subcommittee's idea about initiation?

A member who represents lawyers in discipline cases described one such case that he was currently involved in. A young lawyer had been party to an *ex parte* communication initiated by a judge in a major piece of litigation. It had at first been unclear to the lawyer what the scope of the communication was, but, when it became clear that the judge had gone far beyond what was permitted to him by the Code of Judicial Conduct, the lawyer felt he could not hang up on the judge. In the course of representing the lawyer, the member spoke with a number of ethics experts, researched the issue, and made his recommendation to the lawyer. But the experience has left the member with the belief that there needs to be an absolute ban on the judge communicating with the lawyer about any matter that is beyond what is permitted by CJC Rule 2.9. As the other member had said previously, it is difficult for the lawyer to adhere to the rule when it is the judge who strays. In this member's view, the prohibition should be entirely on the judge, and the lawyer should not be obligated to cut off the judge when the judge does stray. Perhaps, he suggested, there should be a tattletale proviso applicable to the lawyer, but that would be appropriate only if there were first an absolute ban on the judge's extended communication. In reply to a member's question, this member said the problem lies in the Code of Judicial Conduct, not in CRPC Rule 3.5. In answer to a question whether this member was suggesting that it would be a mistake to make CRPC Rule 3.5 match CJC Rule 2.9, as the subcommittee has suggested, this member said that any exception available to the lawyer should be made very narrow, so that the lawyer knows the precise limits of the permitted *ex parte* communications and can say, "I'm sorry, your honor, but under CRPC Rule 3.5 I cannot continue this conversation." In this member's view, the subcommittee's proposal was not narrow enough.

A member pointed out that CRPC Rule 3.5 as proposed by the subcommittee applies not only to communications regarding a particular case but to any *ex parte* communication with a judge before whom a lawyer has a pending case. Does this mean, the member asked, that the rule would prohibit the lawyer from commenting about the weather to a judge during the entire pendency of the case? His question prompted another member to recall the concern of a young associate of hers, who had been invited to the home of a judge for whom the associate had previously clerked. This member agreed that it was not clear whether the entire concept of an *ex parte* communication was to be restricted to communications that had something — substantively or procedurally — to do with a pending case or might extend to encompass entirely unrelated subjects. The member who had initiated this thought commented that he agreed with the previous suggestion that the ethics rule should not place on lawyers the burden of policing the communications of judges.

A member noted that every lawyer has an obligation, under CRPC Rule 8.3(b), to report judges' misconduct to "the appropriate authority." In her view, the Committee should not propose a rule that addresses an egregious situation but does not provide an answer to the general circumstance. As the rule now reads, it permits *ex parte* communications that are "authorized by law or court order";[6] thus, because the Code of Judicial Conduct is such a "law," CRPC Rule 3.5 as currently stated already permits to the lawyer all of the communications that CJC Rule 2.9 permits to the judge. Given that this is model language from the Model Rules of Professional Conduct, she cautioned that the Committee should not willy-nilly amend the provision.

A member underscored the comment made earlier that the ethics rules should not place on lawyers the burden of policing the communications of judges. This member's concern was that amended Comment [2], as the subcommittee proposed it, imposes precisely that policing duty. He gave as an example a judge's casual comment, "How are you getting along with So-and-So," and suggested that the Committee should not propose a rule that imposes a duty on the lawyer to cut off that judge.

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6. *See* Rule 3.5(c)(1).

Another member said he was equally uncomfortable with telling the judge to stop, But, he noted, if we don't impose that obligation on the lawyer, we are left with only the reporting duty of CRPC Rule 8.3(b). He recalled a case from years ago involving a judge who regularly gave a district attorney a ride to the courthouse and who, on one occasion, gave the district attorney advice on how to handle a case. The district attorney did report the judge under the applicable ethics rule and the particular case was assigned to a different judge. This member summarized that example as follows: Either you cut off the judge in mid-sentence, or you report him pursuant to CRPC Rule 8.3(b); cutting him off in mid-sentence is the easier thing to do, and that is what the subcommittee is proposing.

Another member agreed with that position. He suggested that most judges would appreciate being reminded of the limitations of CJC Rule 3.5; this should not be a hard thing for a lawyer to do in practice. Sometimes, he commented, lawyers have to make hard decisions. But the line should be clearly drawn, so that the lawyer is not left in doubt and left to police the judiciary without adequate guidance. He wanted more specificity than the subcommittee's proposal offers; he, too, would prefer in CRPC Rule 3.5 a precise restatement of the limits expressed in CJC Rule 2.9.

A member moved that the matter be referred back to the subcommittee with instructions to make further modifications to its proposal that reflected the gist of this meeting's comments — that the statement of *ex parte* communications that are permitted to the lawyer be made more specific than just those "the subject matter of [of which] is within the scope of the judge's authority under a rule of judicial conduct." This member also proposed that the Committee recommend to the Colorado Commission on Judicial Discipline that it amend CJC Rule 2.9 to be more specific, too.

A member noted that territorial aspects would need to be reflected in any revision to the subcommittee's proposal — in Colorado, the limitations on the lawyer would correspond directly to those imposed on judges under CJC Rule 2.9, but for *ex parte* communications governed by principles found under other jurisdictions, the lawyer would have to look to those other principles or other applicable law for guidance.

Rothrock responded to these comments by saying that the underlying problem is that the Code of Judicial Conduct does not authorize the *lawyer* to do anything; it only covers the conduct of the judge. Thus, if the ethics rule, CRPC Rule 3.5, states that the lawyer shall not engage in any *ex parte* communication except that which some provision authorizes the lawyer to engage in, we cannot say that the rule permits the lawyer to engage in *ex parte* communications regarding case scheduling — because there is no authority for the *lawyer* to engage in that kind of communication, and the lawyer cannot exercise the authority that CJC Rule 2.9 extends to the judge.

A member commented that he had participated in the drafting of the Model Code of Judicial Conduct by the American Bar Association ("ABA"). The trend, he noted, was to draft the model analog of CJC Rule 2.9 to broaden the scope of judges' permitted *ex parte* communications with lawyers; the effort was to broaden the ability of judges and lawyers to communicate. The Colorado Commission on Judicial Conduct spent two years working to adopt the ABA revisions to the Colorado code, and, in the public comment stage, testimony was received supporting a broadening of CJC Rule 2.9 for the "substantiative courts," for family courts, and so forth to contend with expanding dockets, reduce court staffing and similar impacts. He remarked that the trend in this Committee discussion was flowing in the other direction, to ask the Court to *narrow* the authority of the judge to engage in *ex parte* communications.

Another member noted that the full Committee needed to provide the subcommittee with some direction. He commented that everyone seems to accept the concept that *ex parte* communications about "procedural" matters are okay, such as the setting of dates for hearings, while all substantiative *ex parte*

communications should be proscribed. He ask why we could not simply work that procedural / substantive distinction into the words of CRPC Rule 3.5.

The member who had served in the ABA's effort to expand the analog to CJC Rule 2.9 replied that that distinction is already included in revised CJC Rule 2.9. He agreed that it should be reflected in CRPC Rule 3.5 and in its comments.

The Chair noted that there was a pending motion to return the matter to the subcommittee for further revisions to clarify what *ex parte* communications are permitted and what communications are proscribed. The motion, she said, included an instruction that the subcommittee consider whether to propose that the Committee request that the Commission on Judicial Conduct consider specific changes to CJC Rule 2.9.

A member suggested that the phrase, " and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct" be stricken so that CRPC Rule 3.5(b) would simply say, "[A lawyer shall not] (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge initiates such a communication," and the lawyer would not be at risk to make a determination whether the judge had the authority to engage in the communication.

Another member responded negatively to that suggestion by saying that it would permit a miscreant judge to engage in improper communications and green-light the lawyer to follow on. She thought the lawyer would have a duty to report the miscreant judge under CRPC Rule 8.3(b) but thought that the ethics rules should also subject the lawyer himself to discipline for letting the improper conversation proceed.

By a straw poll conducted at a member's request, it was made clear that no one favored a proposal that CJC Rule 2.9 be amended to *eliminate* the exception for judges that is contained in CJC Rule 2.9(A)(1).

But one member responded to the poll by stating his feeling that the provision should be tightened up, so that it is "very, very clear" to both the judge and the lawyer what is permitted and what is proscribed.

The member who had served in the ABA's effort to expand the analog to CJC Rule 2.9 recited the wording of CJC Rule 2.9(A)(1), and another member followed that lead by asking the member who had urged clarity whether he really thought the words could be made any tighter. That member admitted he was not sure how they could be.

A member asked whether the text of CJC Rule 2.9(A)(1) was the model language that was promulgated by the ABA. The member who had participated in that process was not sure whether it was identical; he thought that there may have been public comment in the Colorado process seeking a broadening of the judge's authority for *ex parte* communications.[7]

The Chair said she detected no sentiment among the members to ask for a revision, a clarification, of the Colorado Code of Judicial Conduct in this regard.

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7. There appears to be no change in CJC Rule 2.9(A)(1) from the Model Code of Judicial Conduct analog, as adopted in February 2007. See http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf. —Secretary

A member concurred with that observation but added that she would like to see the text of the Code rule be recited in the ethics rule in order to provide guidance to the lawyer.

A member suggested that some of the perceived need to add clarity could be satisfied if some of the specifics of CJC Rule 2.9 were put into the commentary to CRPC Rule 3.5. He suggested, in particular, that reference could be made in the comment to communications about "substantive matters" and reference could be made to the judge's CJC Rule 2.9(A)(1)(b) duty to notify absent parties about the *ex parte* communications after they occur. He added that his focusing on the actual text of CJC Rule 2.9(A)(1) in the course of this discussion had convinced him that it works pretty well.

A member noted that the reference in CRPC Rule 4.2[8] to a lawyer's *ex parte* communications with a represented party is parallel to the principle in CRPC Rule 3.5. Under CRPC Rule 4.2, the lawyer must not engage in such a communication unless specifically permitted to do so, and the comment makes clear that the lawyer must "immediately terminate" a communication that has begun if he learns that it is proscribed under the rule. The member admitted that there might be differences between communications with someone else's client and communications with a judge, but he saw parallels as well.

Rothrock, the reporter for the subcommittee, said the subcommittee needed guidance on the question of whether a lawyer should be permitted to *initiate* a conversation with a judge that a judge could herself initiate under CJC Rule 2.9.

To Rothrock's query, a member suggested that there might be an alternative. He suggested defining "initiation" to include a "generic" invitation by a judge, to the lawyers in the "circuit" she rides, to communicate with her about scheduling matters. But it would have to be clear that the permitted scope of such generically initiated communications would be limited to procedural topics.

To that, a member wondered why such a generic concept would be required at all. Why couldn't the one lawyer contact the other lawyer to agree upon a proposed schedule that they could, together, communicate to the judge? She could not see a circumstance where a generic "invitation" to *ex parte* communications would be ever be needed.

At this point, the movant said he saw confusion in the Committee's understanding of what it would be doing by adoption of the motion, and he withdrew it.

Stepping in to fill the void, another member moved as follows: First, amend CRPC Rule 3.5(b) by deleting all after "court order," so that it reads—

> (b) [A lawyer shall not] communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order~~, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the~~

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8. Rule 4.2 reads in part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [3] provides—

> [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that person is one with whom communication is not permitted by this Rule.

> **~~communication is within the scope of the judge's authority under a rule of judicial conduct~~**;

Second, modify the comment to address two points: To clarify that "authorized to do so by law" means that, if the judge can engage in the communication, then the lawyer can do so also. And to recite the wording of CJC Rule 2.9, which, the movant suggested, is pretty clear about what can and what cannot be included in an *ex parte* communication. The movant noted that her preference usually is to include substantive text in a rule rather than just in a comment but, in this case, that has proved difficult to do. The motion was seconded.

A member responded by stating his dislike of the motion. He did not want to bury substance in the comment rather than include it in the body of the rule. Further, in his view, the present content of the comment makes a pretty good statement of a safe harbor. And, he said, the qualifier that the lawyer should reasonably believe that the subject matter of the communication is within the scope of the judge's authority is appropriate and should be retained in the body of the rule rather than be stricken as the motion would do. He did, however, agree that the comment could be expanded to include discussion of CJC Rule 2.9.

The movant responded that these comments were not friendly to her motion.

A member commented that all of the discussion has involved pros and cons. He felt that, when the subcommittee reconvened to consider its next proposal, it would identify a number of unintended consequences; accordingly, the full Committee should give the subcommittee a good deal of leeway in making that next proposal and not box it in. Judges will stray, he noted, and making this rule more strict and constraining will not eliminate that problem. In his view, CJC Rule 2.9 is an adequate statement of conduct and the rest should be left to education of judges and lawyers alike. Making either rule more strict will not help.

The Chair noted that a motion was on the table, which she construed as calling for the inclusion of the substance of CJC Rule 2.9 in the comments to CRPC Rule 3.5 — leaving to the subcommittee to determine how that is done — and explaining in a comment that "authorized by law" extends to the lawyer the authority that CJC Rule 2.9 grants to the judge.

The movant explained her intention that, if the judge can engage in an *ex parte* communication then the lawyer can initiate and engage in the same communication. To that the Chair disagreed, and the movant suggested that the language to be clarified to make the point clear.

The Chair said she understood that the movant would take the position that the rule text, as proposed to be modified, would inherently permit the lawyer to initiate an ex parte communication that the judge could initiate, while the member who had first commented on the motion would add that initiating-authority to the comment. In the Chair's opinion, neither approach made it clear that the lawyer had such authority, and she disagreed with the movant and another member who insisted that the authority would be clear under the text as modified by the motion.

The Chair also observed that another member had found the entire approach to be inappropriate because it burdened the lawyer with the duty to police the judge.

A member suggested that the text proposed by the motion be modified to include reference to substantive matters, reading as follows:

> (b) [A lawyer shall not] communicate ***about substantive matters*** ex parte with such a person during the proceeding unless authorized to do so by law or court order**~~, or unless a judge~~**

~~initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct~~

In the member's opinion, this change would make clear the distinction between procedural and substantive matters.

The movant said she liked that suggestion and noted that, if the text of CJC Rule 2.9 is included in the comment to CRPC Rule 3.5, then the distinction between procedural and substantive matters will be manifested and clarified. The member who had seconded the motion also found that suggestion to be friendly.

Rothrock said he disliked both the motion as made and as it would be modified by the last suggestion. What the Committee should be doing, he said, is make CRPC Rule 3.5 mirror CJC Rule 2.9 as much as possible. Extending the lawyer's authority to all "procedural" communications while banning "substantive" communications would omit the limitation, in CJC Rule 3.5, of the judge's *ex parte* communications to only those that are for "scheduling, administrative, or emergency purposes." "Procedural" is not a synonym for those limited purposes. Everyone, Rothrock noted, seems to be in favor of an expansion of the comment. He is opposed to an expansion of CRPC Rule 3.5 that would provide that the lawyer is authorized to initiate any communication that the judge is authorized to initiate under CJC Rule 2.9. Further, he noted, the ethics rules use, in CRPC Rule 1.6(b), in CRPC Rule 4.2, and elsewhere, the concept of a lawyer being authorized by law to engage in certain conduct; therefore, the Committee must be careful not to alter that concept of the lawyer's authority, by wording in this CRPC Rule 3.5, to include authority that is derived from authority that is in fact extended only to someone else, such as a judge. Who the law authorizes is an important factor, and we should not, by modification of CRPC Rule 3.5, dilute that concept. Rothrock directed the members to the text of CRPC Rule 4.2 — " . . . a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer . . . is authorized to do so by law . . . ." — and noted that there the concept clearly refers only to authority that is extended to the lawyer directly.

A member said he did not feel the Committee could capitulate to the expressed concern that it would unfairly burden lawyers with the need to police judges. It would be purest, he agreed, if there could be no *ex parte* communications, but that would not be a practical rule. Yet, we should not be doing anything to encourage lawyers to have *ex parte* communications with judges, and it would be wrong to imply that thy can have any *ex parte* communication so long as it is not "substantive."

To that, another member claimed that everyone agreed that lawyers can have *ex parte* communications with judges so long as they do not relate to the pending proceeding — such as comments about the weather. The existing rule, however, does not permit those obviously acceptable communications. To that, another member said everyone understands that the limitations of existing CRPC Rule 3.5 extend only to communications about a proceeding in which both the judge and the lawyer are involved.

A member said the procedural / substantive distinction is in fact inappropriate, noting that a judge might say that the case would be governed by the *substantive* law of Texas but that the *procedural* law of Colorado would be used. We should actually be talking about "administrative" communications.

The member who had seconded the pending motion said that she now withdrew her consent to the amendment that had been proposed to add the words "about substantive matters" to CRPC Rule 3.5(b).

To the comment that we should be referring to "administrative" matters rather than to "substantive" matters, the member who had suggested adding the words "about substantive matters" explained that he had use the word "substantive" only because it is used in CJC Rule 2.9. Another member, however, pointed out that it is used in CJC Rule 2.9 only for a limited purpose: to state a class of communications that is only for "scheduling, administrative, or emergency purposes, which does not address substantive matters."

The movant restated her motion: Cut off CRPC Rule 3.5(b) after the words, "or court order"; expand the comment to include the substance of CJC Rule 2.9; and let the subcommittee determine how to modify the rest of CRPC Rule 3.5 to accommodate these changes. Then, she said, the full Committee can reconsider the entire rule based on the subcommittee's resulting revised proposal.

A member forecast that, if the motion failed, he would move to accept the subcommittee's existing proposal regarding the text of CRPC Rule 3.5 but to amend its comment both to include the substance of CJC Rule 2.9 rather than rely on mere cross-reference to that rule and to include examples of circumstances when the lawyer should know that the judge has strayed from her authority.

In answer to a member's question, the Chair assured the Committee that it would not be constrained, in its subsequent consideration of CRPC Rule 3.5, by any instruction given to the subcommittee or by any proposal the subcommittee might return with.

In answer to a member's question to him, Rothrock explained that the subcommittee had not found itself in uncharted territory. He pointed to the package of materials that had been provided to the members in advance of the meeting, which, beginning at page 64, outlined the subcommittee's research into action that other jurisdictions have taken with respect to *ex parte* communications.

On a vote of the members, the pending motion was defeated.

The member who had forecast an alternative motion now moved that the subcommittee be directed to retain its currently-proposed text for CRPC Rule 3.5 and that it modify the rule's comments to—

1. "Flush out," with specificity, the exception provided to the judge by CJC Rule 2.9(A);

2. Explain the concept of the "initiation" of a communication to include a judge's standing or generic invitation to "call me to schedule all matters"; and

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.

And, the movant said, if the subcommittee finds that it cannot accomplish this, it can return to the full Committee with that conclusion.

A member asked that the subcommittee be directed to cover both the "initiation" of *ex parte* communications and the "invitation" for such communications. The movant said that is what the second part of his motion was intended to cover.

A member asked whether, if this motion is approved and the subcommittee returns with a proposal as intended, the full Committee would then be limited to a consideration only of that proposal. All agreed that it would not be so constrained.

The motion was approved.

IV. *Status Report, Rule 8.4(b) and C.R.C.P. Rule 251.5(b) Conflict.*

David Stark reported, for the subcommittee that had been tasked with resolving the conflict in language between CRPC Rule 8.4(b) and C.R.C.P. Rule 251.5(b), that the issue had been passed on to the Advisory Committee of the Office of Attorney Regulation. That committee has determined to recommend to the Court that C.R.C.P. Rule 251.5(b) be modified to match the language of CRPC Rule 8.4(b), which proscribes commitment of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Stark did not know the status of the recommendation.

V. *Rule 4.1, Rule 4.3, and "Testers."*

For the subcommittee that has been tasked with considering the request of the Intellectual Property Section of the Colorado Bar Association that the ethics rules regarding honesty be modified to accommodate "pretexting" to determine whether trademark rights were being violated, Thomas Downey reported that the subcommittee had met twice, at one of which meeting guests from the Intellectual Property Section were in attendance. The subcommittee is getting organized and getting a sense of "the lay of the land," including an understanding of the *Pautler*[9] case and the various rules — in addition to Rule 8.4(c) regarding honesty and Rule 4.2 and Rule 4.3 regarding contact with persons represented by other counsel and with unrepresented persons — that might be applicable to the issue. With regard to Rule 8.4(c) and the strong language found in *Pautler*,[10] Downey said the subcommittee was discussing what, if anything might be done to provide an exception for pretexting. He noted that the subcommittee has sought input from several Federal agencies, from the U.S. Attorney's office, and from the Colorado Attorney General's Office.

Downey said that, at the subcommittee's meeting on April 19, 2011, it reviewed correspondence from U.S. Attorney John Walsh and heard comments from representatives of the U.S. Attorney's Office and of the Colorado Attorney General; as well as from several representatives of the Colorado Bar Association Intellectual Property Section. Walsh had looked at the matter from a law enforcer's perspective and had suggested that the Committee consider amendments that would sanction law enforcement undercover work. The representative from the Attorney General's Office was in accord with Walsh and noted the Department of Law has a large section devoted to consumer protection and to criminal law, which would be accommodated by an expansion of the rules to permit pretexting.

The subcommittee was inclined to propose amendments to Rule 8.4 and perhaps one other rule. It was looking, too, at addressing the situation in which a lawyer, whether enforcing civil or criminal laws, might not be engaged directly in covert conduct but might be directing agents who were "legitimately" engaged in undercover work.

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9. In re Pautler, 47 P.3d 1175 (Colo. 2002).

10. *E.g.*, "We ruled [in *People v. Reichman*, 819 P.2d 1035 (Colo.1991)] that even a noble motive does not warrant departure from the Rules of Professional Conduct." *Id.* 47 P.3d at 1180. —Secretary

Downey summarized by saying the subcommittee had heard enough already to believe that it had to make some proposals. Its next task is to draft some specific language, a task that he characterized as very complex and that might lead to alternative proposals. It was, he said, a very good subcommittee, very enthusiastic, but its work was cut out for it.

A member of the subcommittee added that it is not starting from scratch. The United States Attorney, John Walsh, had given it some good information from other jurisdictions; and it appears that some states specifically permit law enforcement officers to supervise undercover agents, while others permit "any lawyer" to do so. He pointed out that it would take a rule that extended permission for undercover work beyond law enforcement to satisfy the concerns of the Intellectual Property Section.

Downey outlined the areas to be covered as, first, that of law enforcement; second, government lawyers in the enforcement of civil laws; and third, any lawyer in specified circumstances.

A member commented that the *Pautler* case will be a significant restriction, but other members noted that the impact of that decision can be changed by the Court itself by adoption of a rule. Downey said the subcommittee accepts that the Court may reject any proposal for change and confirm the constrictions of *Pautler*.

A member commented that Rule 8.4(c) extends all of the ethics rules' proscriptions to a lawyer's use of an agent.[11] But, he said, in practice lawyers have for many years use private investigators "in circumstances that the Rules don't really allow."

In answer to the Chair's question, Downey said the subcommittee had not yet researched the action, if any, of the ABA in this area. He noted that no consideration had been given to these issues in the course of reviewing the Ethics 2000 Rules for adoption in Colorado.

Downey concluded his report by noting that the *Pautler* expression of resolute discipline in the matter of dishonesty was very strong. But, he noted, the representatives from law enforcement told the subcommittee that at least the last four Colorado Attorneys General have been concerned about the implications of that position for their enforcement activities. He said the subcommittee is well underway but has much work to do before it will be able to make any proposals to the Committee.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:30 a.m. The next scheduled meeting of the Committee will be on Friday, September 23, 2011, beginning at 9:00 a.m. It will be held in the conference room of the Office of Attorney Regulation Counsel, 1560 Broadway, 19th Floor, Denver, Colorado.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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11. Comment [1] to Rule 8.4 confirms that "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." —Secretary

RULE CHANGE 2011(10)

COLORADO RULES OF CIVIL PROCEDURE

Rule 201.3(3) Classification of Applicants
Rule 224. Provision of Legal Services Following Determination of a Major Disaster (new)
Rule 226.5. Legal Aid Dispensaries and Law Student Externs (new)
Rule 251.5. Grounds for Discipline
Rule 254. Colorado Lawyer Assistance Program (new)

Rule 251.5. Grounds for Discipline

Misconduct by an attorney, individually or in concert with others, including the following acts or omissions, shall constitute grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship:

(a) Any act or omission which violates the provisions of the Code of Professional Responsibility or the Colorado Rules of Professional Conduct;

(b) Any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects~~act or omission which violates the criminal laws of this state or any other state, or of the United States~~; provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action;

(c) Any act or omission which violates these Rules or which violates an order of discipline or disability; or

(d) Failure to respond without good cause shown to a request by the committee, the Regulation Counsel, or the Board of Trustees of the Colorado Attorneys' Fund for Client Protection or obstruction of the committee, the Regulation Counsel, or the Board or any part thereof in the performance of their duties. Good cause includes, but is not limited to, an assertion that a response would violate the respondent's constitutional privilege against self-incrimination.

This enumeration of acts and omissions constituting grounds for discipline is not exclusive, and other acts or omissions amounting to unprofessional conduct may constitute grounds for discipline.

Burns
Figa
Will P.C.

MEMORANDUM

TO: Marcy Glenn, Chair
Colorado Supreme Court Standing Committee
on the Rules of Professional Conduct

FROM: Alec Rothrock, Member
Judicial Code Subcommittee

DATE: December 22, 2011

SUBJECT: Report on Proposed Changes to Colo. RPC 3.5(b) and Comment [2]

At the Committee's May 6, 2011 meeting, the Judicial Code Subcommittee presented a draft of proposed revisions to the text of Colo. RPC 3.5(b) and Comment [2]. The overall purpose of the revisions was to permit lawyers to engage in a very narrow class of ex parte communications with judges that the 2010 version of the Code of Judicial Conduct permits judges to engage in with lawyers.

After much discussion, the Committee voted in favor of a motion by Michael Berger regarding the Subcommittee's draft. The accompanying draft of Colo. RPC 3.5(b) and Comment [2] is intended to reflect the substance of Mike Berger's motion.

With respect to Colo. RPC 3.5(b), Mike Berger's motion accepted the revisions proposed in the draft presented at the May 6 meeting. In other words, insofar as the rule itself is concerned, there is no difference between the draft presented at the May 6 meeting and the accompanying draft. The italicized language in the rule in the accompanying draft reflects the difference between the current rule and the proposed revision to the rule that the Committee approved at the May 6 meeting.

Relative to Comment [2], there is a significant difference between the May 6 draft and the accompanying draft. The italicized language reflects these changes. These changes were extensive, so I have reprinted on the following page an email summary by Mike Berger of his motion, as well as Secretary Tony van Westrum's notes regarding Mike's motion.

Michael Berger's summary:

My motion had three or maybe four components:

1. To add the language in the text of the rule that was proposed by the subcommittee.

2. To flush out the comment as completely as possible so that the comment stands by itself, without the necessity of the reader to consult another set of rules that do not even govern lawyers.

3. To address in the comment that the concept of initiation may be slightly broader than one might think—if a judge's practice in a particular district is that lawyers must contact the judge directly for a setting, that would be contact initiated by the judge.

4. To provide whatever guidance that reasonably can be provided to signal to the lawyer when the judge has exceeded the judge's authority and the lawyer must discontinue the communication, irrespective of whether the judge is upset with the lawyer—the distinction between administrative matters such as settings for hearing, etc, and the substance of the case. I think we got off track at the meeting (mainly my fault) when we were distinguishing between substantive and procedural matters.

5. Matters that are procedural under traditional usage (e.g. diversity jurisdiction) can be substantive in this regard, so the traditional distinction between substantive and procedural matters is neither useful nor relevant here.

Tony van Westrum's Notes:

The member who had forecast an alternative motion now moved that the subcommittee be directed to retain its currently-proposed text for CRPC Rule 3.5 and that it modify the rule's comments to:

1. "Flush out," with specificity, the exception provided to the judge by CJC Rule 2.9(A);

2. Explain the concept of the "initiation" of a communication to include a judge's standing or generic invitation to "call me to schedule all matters"; and

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.

PROPOSED CHANGES TO COMMENT [2] OF RULE 3.5 CONSISTENT WITH MICHAEL BERGER'S MOTION AT MAY 6, 2011 MEETING

(No change to text authorized in motion)

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, *or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct.*

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

. . .

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, *subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication*

is within the scope of the judge's authority to engage in the communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. See also Cmt. [5], Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(1) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if "circumstances require it," "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication," and "the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." Code of Jud. Conduct, Rule 2.9(A)(1). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(b)("A judge may . . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication[.]"). The second exception does not authorize the lawyer to initiate such a communication. A judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(A)(1) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

FINAL REPORT OF PRETEXTING SUBCOMMITTEE

The pretexting subcommittee[1] respectfully submits the following report.

I. Summary

In seeking to obtain information through covert activities ("pretexting"), attorneys -- particularly criminal prosecutors and other government attorneys involved in law enforcement -- will often be in a position to advise clients, investigators, or non-lawyer assistants concerning conduct involving misrepresentation and nondisclosure, which is both inherent in many investigations and intended to mislead the targets. The subcommittee recommends that the Rules of Professional Conduct should be revised to address when such advice may be given, while continuing to prohibit direct lawyer participation in any deception or subterfuge. Specifically, the subcommittee proposes language that would create a limited exception to R.P.C. 8.4(c) and clarifying comments.

[1] Tom Downey chaired the subcommittee. Members included: J. Haried; A. Scoville: A. Rothrock; D. Stark; H. Berkman; J. Sudler; J. Posthumous; M. Berger; R. Polidori; M. Dulin; J. Zavislan; M. Kirsch; A. Rocque and J. Webb.

II. Background

The subcommittee was formed in response to an inquiry from the Colorado Bar Association Intellectual Property Section as to how rules such as R.P.C. 4.1, 4.2, 4.3, 5.3, and 8.4(c) might limit certain efforts to gather evidence before commencing a civil action, and thereby assure compliance with C.R.C.P. 11. For example, counsel representing a trademark holder might arrange to purchase an unlicensed product that infringed on the trademark using a person who misrepresented matters such as his or her identity, purpose for purchasing, desire to become a distributor of such products, and lack of affiliation with counsel. *See, Apple Corps Limited v. International Collectors Society,* 15 F.Supp. 2d 456, 475 (D.N.J. 1998) (describing such investigative techniques, and concluding, "If plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of plaintiffs, such an inquiry would have been useless to determine [defendant's] day-to-day practices."); *Accord Gidatex v. Campaniello Imports, Ltd.*, 82 F.Supp. 2d 119 (S.D.N.Y. 1999); *but see, Hill v. Shell Oil Co.*, 209 F.Supp. 2d 876, 879-880 (N.D. Ill. 2002). (concluding, "Lawyers (and investigators) cannot trick protected employees into doing things or saying things

they otherwise would not do or say. ... They probably can employ persons to play the role of customers seeking services on the same basis as the general public"); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp. 2d 1147, 1155-60 (D.S.D. 2001) (finding violations of South Dakota analogs to rules 4.2, 4.3, 5.3, and 8.4); *In re Curry*, 880 N.E.2d 388, 404-05 (Mass. 2008) (disbarring attorney because, unlike "investigators who pose as members of the public in order to reproduce pre-existing patterns of conduct, [the attorney] built an elaborate fraudulent scheme whose purpose was to elicit or potentially threaten the [subject] into making statements that he otherwise would not have made"). *See generally*, "Cheat the Beatles: Ethics in Investigations," Alec Rothrock, Essay D3, Essays on Legal Ethics and Professional Conduct in Colorado, First ed. (CLE in Colo., Inc. Supp. 2008). Particular concern was expressed within the subcommittee because of our supreme court's statement, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002)(deputy district attorney sanctioned for misrepresenting that

he was a public defender to barricaded and armed murder suspect in the context of surrender negotiations).

Initially, the subcommittee considered whether to elicit input from stakeholders in other practice areas who might have similar concerns. Although one member urged staying within the initial inquiry, a majority of the subcommittee concluded otherwise. Consequently, members contacted the United States Equal Employment Opportunity Commission (EEOC), the United States Department of Housing and Urban Development (HUD), and the Office of the Colorado Attorney General.

The EEOC's Denver Regional Office responded that it did not use testers, and had not for some time. The United States Attorney for the District of Colorado responded for HUD and on his own behalf with a lengthy letter, which urged that the Rules be changed to permit attorney involvement in pretext investigations. (*See* Attachment 1.) His representatives attended the subcommittee's later meetings.

A representative of the Colorado Attorney General attended several subcommittee meetings, acknowledged that the propriety of attorney involvement in pretext investigations has been a long-

standing concern, and verbally endorsed the U.S. Attorney's position. He did not submit anything in writing, but described pretext investigations in areas of consumer fraud and securities fraud. For example, in one investigation a staff member presented herself as the relative of a senior citizen to induce the target of the investigation to make a sales presentation that was being examined as a possible fraud on seniors.

The subcommittee determined that a handful of states have addressed this issue through rule provisions allowing attorney involvement in "lawful investigative activities," investigations "authorized by law," and "lawful intelligence-gathering activity," or merely providing that rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law." Most of these states allow attorneys to act as advisors but not as direct participants. Likewise, most such states, namely Michigan, North Dakota, Oregon, Virginia, and Wisconsin, permit such conduct by all attorneys, while in two (Alabama[2] and

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[2] In Alabama, notwithstanding that the exception that applies only to prosecutors, an ethics opinion suggests that any lawyer may employ private investigators to pose as customers under the pretext of seeking services on the same basis or in the same manner as a

Florida), protection is limited to government attorneys. (*See* table, Attachment 2.)

In all, at least ten states have either a rule, comment, or ethical opinion suggesting that all attorneys may at least supervise pretext investigations, and another five have a rule, comment, or ethical opinion reaching the same conclusion with respect to government attorneys. In several other states, there may have been less reason to address the issue through a rule change because cases held, usually in the course of evidentiary motions, that advising, retaining, or instructing investigators who pose as members of the public to reproduce pre-existing patterns of unlawful conduct does not violate the state ethical rules.[3]

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member of the general public. *Compare* Alabama R.P.C. 3.8(2)(a) *with* Alabama Op. RO-2007-05 (Sept. 12, 2007).

[3] *See, e.g., Apple Corps Ltd.,* 15 F.Supp. 2d at 474-76 (New Jersey); *Gidatex,* 82 F.Supp. 2d 119 (New York); *Hill,* 209 F.Supp. 2d at 879-880 (Illinois); *cf. In re Curry,* 880 N.E.2d at 404-05 (disbarring attorney but distinguishing the "elaborate fraudulent scheme" present there from the situations approved of in *Gidatex, Apple Corps* and *Havens Realty Corp v. Coleman,* 455 U.S. 363, 373-75 (1982)). In other cases, courts in other states decided that the rules were violated, or decided to exclude evidence on the basis of conduct they saw as violating the rules. *See e.g., Midwest Motor Sports, Inc.,* 144 F.Supp. 2d at 1155-60 (South Dakota).

The subcommittee's proposals in section V below draw on these rules.

III. Preliminary Considerations

The subcommittee first considered factors that weigh against making changes to any rule or comment, primarily the strength of some language in *Pautler*, the absence of any similar protective provisions in the ABA Model Rules, and the number of states enacting protective provisions, which remains a small minority.

However, one member pointed out that in *Pautler*, 47 P.3d at 1179 fn. 4, the supreme court recognized, "Utah and Oregon have construed or changed their ethics rules to permit government attorney involvement in undercover investigative operations that involve misrepresentation and deceit." Rather than disapproving of such actions, the court described these exceptions as "limited [] to circumstances inapposite here." *Id.* Likewise, a majority of the subcommittee concluded that its charter and the related concerns of stakeholders were far removed from the facts of *Pautler* in at least two ways. First, the attorney in *Pautler* was sanctioned for directly participating in the misrepresentation. Second, the purpose of the

misrepresentation was not investigating to obtain further information.

Further, a majority of the subcommittee felt that Colorado attorneys are entitled to clarification where tension exists between the plain language of any rule and the unique challenges of particular practice areas. The subcommittee also agreed that the objective of paralleling the ABA Model Rules (uniformity) was not a major concern. The proposed changes would lessen rather than increase the risk of lawyer discipline, and pretext investigations seem unlikely to implicate interstate practice.

The subcommittee also discussed whether its focus should be on "limit[ing] the attorney's role to 'supervising' or 'advising,' [but] not permitting direct participation by attorneys." *Id.*, citing Or. DR 1-102(d). Of the states that have taken action, most adopted this approach. *See* attachment 2. However, because under R.P.C. 8.4(a) and R.P.C. 5.3(c) an attorney cannot perform through an agent an action that would violate any Rule if done by that attorney directly, several members questioned whether this was a principled distinction.

Nevertheless, the majority concluded that any exception limited to supervising or advising was defensible on three grounds. First, continuing the prohibition against direct misrepresentations by attorneys would bolster public confidence in the profession. Second, this limitation would avoid problems attendant to an attorney becoming a witness. *See* R.P.C. 3.7. Third, a benefit of allowing lawyer supervision and advice may be keeping pretext investigations within other legal boundaries, such as avoiding entrapment.

The subcommittee also considered whether any exception should appear in the text of a rule, in a comment, or both. One member observed that a comment creating an exception to the plain language of a rule would be at odds with Preamble and Scope [21] ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.") In the majority's view, any exception should appear in the rule, as illustrated in Section V below, coupled with explanatory comments and a definition.[4]

[4] One stakeholder expressed concern that the representative of O.A.R.C., who could not attend the subcommittee's final meeting, had never addressed the force of a definition contained only in a comment.

IV. Possible Changes to Rules Other Than R.P.C. 8.4(c)

The subcommittee noted that stakeholder input focused on R.P.C. 8.4(c), consistent with the actions of most states as discussed above. The *Pautler* decision upheld discipline under this Rule. Hence, the subcommittee considered, but ultimately rejected, changes to R.P.C. 3.8, Special Responsibilities of a Prosecutor; R.P.C. 4.1, Truthfulness in Statements to Others; R.P.C. 4.2, Communications with Persons Represented by Counsel; R.P.C. 4.3, Dealing with Unrepresented Persons; and R.P.C. 5.3, Responsibilities Regarding Nonlawyer Assistants. A brief discussion of the subcommittee's consideration of each of these rules follows.

Given the focus on government attorneys in some states that have changed their rules, the subcommittee considered changing R.P.C. 3.8. For the reasons discussed below, the subcommittee decided that the specific language of R.P.C. 8.4(c) needed to be addressed. However, an exception to that language clearly applicable to criminal prosecutors might warrant a cross-referencing comment in R.P.C. 3.8.

R.P.C. 4.1 deals with "a false statement of material fact." Because the operative terms in R.P.C. 8.4(c), "dishonesty, fraud, deceit, or misrepresentation," are broader, the subcommittee concluded that changing R.P.C. 4.1 would not remove uncertainty concerning the application of Rule 8.4(c). Further, the subcommittee rejected redefining or limiting "material," as used in R.P.C. 4.1(a), to exclude conduct inherent in pretext investigations. Although the court did so in *Apple Corp Limited,* 15 F.Supp. 2d at 476, this approach would be difficult to reconcile with *In re Fischer,* 202 P.3d 1186, 1201 (Colo. 2009)("A statement is material if it could have influenced the listener.") If changes to R.P.C. 8.4(c) are approved, however, a cross referencing comment in R.P.C. 4.1 might also be appropriate, such as, "The prohibition in this Rule is subject to the exception in R.P.C. 8.4(c) for 'lawful covert activity.'"

With respect to Rule 4.2, some stakeholders told the subcommittee that pretext investigations would not be directed at a potential criminal defendant whom the supervising lawyer knows to be represented by counsel in the matter that is the subject of the investigation. However, other stakeholders expressed concern over how representation "in the matter," (which is not defined in the

comments to Rule 4.2), would be determined where the target of the investigation retains counsel but a proceeding has not yet begun. And one member pointed out the anomaly that investigating compliance with a court order by a represented party already adjudged to have violated the law would be more difficult, *cf. Apple Corps Ltd.*, 15 F.Supp. 2d at 474-76, than investigating a not-yet-represented party merely suspected to have done so.

On balance, the subcommittee favored the interests advanced in R.P.C. 4.2 over any investigative needs that might arise after the target of the investigation had obtained counsel in the particular matter that is the subject of the investigation. However, the subcommittee chose not to address when counsel has been retained in the particular matter that is the subject of the investigation.[5]

Because the proposed changes to R.P.C. 8.4(c) discussed below do not permit direct lawyer participation in pretext

[5] *Compare* Comment [4] to R.P.C. 4.2 ("the existence of a controversy between a government agency and a private party [] does not prohibit a lawyer from communicating with nonlawyer representatives of the other regarding a separate matter") *with* Comment [5] to R.P.C. 4.2 ("communications authorized by law" may include actions of investigative agents, acting on behalf of a lawyer representing governmental entities, "*prior to* the commencement of criminal or civil enforcement proceedings." (emphasis added))

investigations, but expressly contemplate the involvement of non-lawyer assistants, the subcommittee concluded that R.P.C. 4.3 probably would not be implicated. Also, insofar as pretext investigations conceal lawyer involvement, the target of the investigation would not be likely to be aware of, much less misunderstand, that lawyer's role.

Finally, because the subcommittee determined that the proposed exception to R.P.C. 8.4(c) would allow lawyers to direct, advise, or supervise *others*, whose conduct might place the lawyer in violation of R.P.C. 5.3, but not directly participate in, lawful covert activity, the subcommittee determined that the exception must also apply to R.P.C. 8.4(a)(violation of a rule by knowingly assisting or inducing another to do so). Under the subcommittee's proposal, because the lawyer could advise others to engage in certain types of misrepresentation or deceit, the lawyer would not violate the general rule of R.P.C. 5.3(a lawyer is responsible for conduct of a non-lawyer assistant) if the person acted consistently with the lawyer's advice.

However, one member expressed concern that exempting lawyer conduct in this area from R.P.C. 8.4(a) could dilute the

lawyer's responsibilities under R.P.C. 5.3. For example, a lawyer might have instructed an investigator to act consistently with the exception, but later learn that the investigator had engaged in conduct beyond that allowed by the exception. The subcommittee concluded that the lawyer's instructions would satisfy the "reasonable efforts" standard of R.P.C. 5.3(b). But if the lawyer failed to take reasonable remedial action, notwithstanding such knowledge of the investigator's actual conduct, the lawyer could be subject to discipline under R.P.C. 5.3(c)(1)("the lawyer ... with knowledge of the specific conduct, ratifies the conduct involved.") For the same reason, the lawyer might be subject to discipline if the lawyer only learned of the investigator's actions after the investigation had ended, but the lawyer nevertheless used the fruits of the investigation.

V. Possible Changes to R.P.C. 8.4(c)

Due to the subcommittee's relatively small size and the diversity of viewpoints within it, the subcommittee seriously considered presenting alternatives, rather than a single recommendation, to the committee of the whole. Ultimately, the subcommittee aligned itself behind the following proposal.

Nevertheless, the subcommittee wishes to preface that proposal with a review of various concerns.

The subcommittee considered the view that "the literal application of the prohibition of R.P.C. 8.4(c) to any 'misrepresentation' by a lawyer, regardless of its materiality, is not a supportable construction of the rule," particularly in light of R.P.C. 4.1(a)'s prohibition on "false statement[s] of *material* fact or law," (emphasis added), which would otherwise be rendered inoperative if *any* misrepresentation were a violation. *Apple Corps*, 15 F.Supp.2d at 475-76. The court in *Apple Corps* seemed to accept that "RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes," *id.* at 475, "especially where it would be difficult to discover the violations by other means." *Id. See also Gidatex*, 82 F.Supp. 2d at 125-26.

However, the subcommittee rejected an "the end justifies the means" approach to misrepresentations inherent in pretext investigations as irreconcilable with *Pautler*. The subcommittee was also troubled that merely raising the materiality threshold to protect pretexting would not provide adequate guidance and could not be reconciled with *Fisher*. Instead, the proposal limits private

attorneys to misrepresentations about "matters of background, identification, purpose, or similar information," and it applies other limiting principles to all lawyers.

As indicated, the exceptions adopted in several states are limited to "lawful investigations." The subcommittee saw value in this limitation because, at least in the criminal context, it provides a frame of reference to determine proper lawyer action. For example, the substantive law of entrapment restricts action of a government agent that would induce a suspect to commit a crime.

However, the subcommittee also recognized that a lawyer who had directed a pretext investigation should not be exposed to discipline solely because a court made a post hoc determination that the investigation had not complied with such a substantive legal principle. Hence, the subcommittee opted for a reasonable, good faith belief qualification on "lawful" for purposes of discipline. The citations in the comment to *Davis* and *Leon* raise the legal principle that while a search warrant may suffer from a fatal flaw, the underlying search may still be lawful based on the good faith belief of the officer who executes the warrant.

The subcommittee had the greatest difficulty drawing meaningful distinctions among the different societal interests furthered by investigations involving deception or subterfuge. For example:

- Although criminal prosecutors most often enforce laws that protect public safety, they also deal with violations of criminal laws, such as securities fraud, having primarily economic consequences.
- Other government lawyers enforce civil laws that usually have only economic consequences. However, some civil law violations, such as consumer fraud involving prescription drugs could have adverse public health or safety consequences beyond having paid for a worthless product.
- Some private attorneys bring statutory claims that equally further the strong public interest in areas such as employment discrimination, housing discrimination, securities fraud, and antitrust, or that are rooted in the prevention of consumer fraud that may arise from trademark infringement.

The subcommittee reconciled these difficulties with a proposal that is more permissive as to government attorneys and more

restrictive as to non-government attorneys, in lieu of alternative proposals or a minority report. However, the subcommittee includes two strongly held minority views: first, any exception should be limited to government attorneys; or, second, it should be limited to government attorneys involved in criminal prosecutions that implicate public safety. With these caveats, the subcommittee proposes the following "exception" language and explanatory comments:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:

(1) (A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (B) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or

(2) (A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.

[TO FOLLOW EXISTING COMMENT 2]

[2A] "Covert activity" means an effort to obtain information through the use of misrepresentations or other subterfuge. Whether covert activity is "lawful" will be determined with reference to substantive law, such as search and seizure. However, a lawyer will not be subject to discipline if the lawyer provided direction, advice, or supervision as to the covert activity based on the lawyer's objectively reasonable, good faith belief that the activity was lawful, even if the covert activity is later determined to have been unlawful. The objective reasonableness and good faith of the lawyer's conduct is also determined with reference to substantive law. *See, e.g., Davis v. United States,* __ U.S. __, 131 S. Ct. 2419, 2429 (2011); *United States v. Leon,* 468 U.S. 897, 918-22 (1984).

[2B] A lawyer may not participate directly in covert activity. However, Rule 8.4(c) does not limit the application of Rule 1.2(d) (allowing a lawyer to discuss the legal consequences of any proposed criminal or fraudulent conduct with a client or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law).

[2C] A lawyer whose conduct falls within the exception to Rule 8.4(c) does not violate Rule 8.4(a)(knowingly assist or induce another to violate these rules). In all other respects, the lawyer's conduct must comply with these rules. For example, a lawyer who directs, advises, or supervises others in covert activity directed at a person or organization the lawyer knows to be represented in the matter that is the subject of the covert activity may violate Rule 4.2. Further, if a lawyer who has directed, advised, or supervised a person engaging in covert activity learns that such person's conduct has exceeded the limitation in Rule 8.4(c)(1)(A), the lawyer may violate Rule 5.3 by failing to take reasonable remedial action.

While the subcommittee hopes that the compromises inherent in this language are apparent and reasonably self-explanatory, the

phrase "lawful intelligence gathering" may be neither. It reflects strong input from stakeholders in the law enforcement community. While those stakeholders acknowledged that this activity may usually involve national security considerations, they opposed any such limiting language in the rule based on examples such as:

1. Health-care investigations of patterns of overdose deaths and doctor "pill mills" where an undercover agent will pose as a patient seeking excessive quantities of narcotic medications to learn whether any doctors are over-prescribing. *See United States v. Jahani & Peper,* District of Colorado case number 11-cr-00302-CMA.
2. IRS investigations where statistical data shows that an unusually high percentage of a return preparer's returns have refunds, so an undercover agent poses as a tax payer to learn whether fraudulent returns are being created.
3. Hazardous waste investigations where an undercover agent poses as a foreign national to learn whether anyone in the domestic waste industry is willing to illegally ship hazardous waste overseas.

4. Fencing investigations where an undercover agent opens a pawn shop and holds himself out as a fence to learn whether burglars are fencing stolen property.

Respectfully Submitted,

Thomas E. Downey, Jr.

December 19, 2011

ATTACHMENT 1

U.S. DEPARTMENT OF JUSTICE

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April 18, 2011

Via Electronic Mail and U.S. Mail

The Honorable John Webb
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101 West Colfax Avenue
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Dear Judge Webb:

Thank you for the opportunity to comment on the Colorado Supreme Court's Standing Committee on the Rules of Professional Conduct's ("Committee") proposal to revise Colorado Rule of Professional Responsibility ("Colorado Rule") 8.4(c) as well as potentially other Colorado Rules.

We understand the initial inquiry came to the Committee from a group of civil practitioners who expressed concern over application of language from In re Pautler, 47 P.3d 1175 (Colo. 2002). Although we respect Pautler's holding, we share the concern of these practitioners about Pautler's potential scope.

We request that the Committee review Colorado Rule 8.4(c) as well as Colorado Rule 4.1(a) from the standpoint of all practitioners: both government and private attorneys, and both civil and criminal attorneys. We believe that the participation of government attorneys in investigations of violations of law provides significant benefits to society by increasing the likelihood that the legal rights of investigative targets will be protected and by maximizing the ability to obtain relevant, admissible evidence in meritorious cases. While we understand the Committee is considering revision of the Colorado Rules to address civil attorneys' supervision of stings or similar transactions and the use of testers by federal agencies, we are concerned about the potential limitations that these rules could impose on all attorneys engaged in the investigation of violations of civil and criminal law, and we believe that clarification of the scope of these rules is warranted. Specifically, we believe the Committee should consider all

the civil and criminal areas in which government attorneys practice in weighing any changes and where such attorneys, in furtherance of government investigations, direct, supervise, or advise others who engage in deceit as an investigative tool.

United States Department of Justice ("DOJ") prosecutors, civil DOJ attorneys, and other federal government attorneys[1] use a variety of law enforcement investigatory techniques — such as undercover operations, use of confidential informants and other covert techniques — that may be regarded as deceitful and can involve the use of false statements of material fact or law, but that are lawful in nature and well-established in practice. In considering this issue, various jurisdictions have adopted, through their rules, comments, case law, or ethics opinions, an exception when applying their Rules 8.4(c) and 4.1(a) to permit government attorneys to direct, supervise, and advise agents who engage in deceitful conduct during the course of lawful investigations. We recommend the Colorado Rules be amended to specifically address this work done by government attorneys.

The higher standard of conduct applied to government attorneys makes the risk of violating Rules 8.4(c) or 4.1(a) particularly acute. Colorado courts and the existing Colorado Rules hold government attorneys to a higher standard than non-government attorneys.[2] But in their current form, neither Colorado Rules 8.4(c) and 4.1(a), nor their respective Comments, create an explicit exception for government attorneys who are authorized to direct, supervise, and advise investigative agents to use law enforcement investigative techniques that may be regarded as deceitful, including the use of false statements of material fact or law.

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[1] Although this letter primarily addresses the impact of these Colorado Rules on United States Department of Justice attorneys, the Colorado Rules also impact other federal government attorneys who engage in similar techniques in the course of performing their official duties. For example, as discussed below, attorneys within the Department of Housing and Urban Development may use testing evidence to investigate and/or establish claims arising under the Fair Housing Act. And as also discussed below, we are similarly concerned about the impact of the Colorado Rules on attorneys for recipients of federal funding that typically employ testing when investigating and enforcing civil right laws.

[2] The Court in Pautler stated, "District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices." Pautler, 47 P.3d at 1180. Similarly, Comment [5] to Rule 8.4 states in pertinent part, "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

Colorado Rule 8.4(c) states:

> It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

Comment [2] to Rule 8.4 states:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Colorado Rule 4.1(a) states:

> In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person[.]

As the Rules are currently written, however, there is a risk that Colorado Rules 8.4(c) and 4.1(a) may be construed to prohibit a federal government attorney's direction of, supervision of, or advice regarding lawful investigative activity.

Courts long have recognized the ability of law enforcement agents or cooperating informants to engage in subterfuge and misrepresentation in a criminal investigation as

critical to the government's ability to uphold the public's interest in law enforcement.[3] Overwhelming precedent reflects the fact that such activities are necessary to detect illegal activity that frequently is not provable without the use of guile, deception, and misrepresentation. See, e.g., Hampton v. United States, 425 U.S. 484, 495 (1976) (Powell, J., concurring) (contraband crimes are "difficult to detect in the absence of undercover Government involvement"); United States v. Russell, 411 U.S. 423, 432 (1973) (infiltration of drug rings is the only practicable means of detecting unlawful conduct, and as such is a recognized and permissible means of investigation). A DOJ attorney's direction, advice, or supervision of deceit and misrepresentation in a criminal investigation, however, could be misconstrued as running afoul of the Colorado Rules.

Because such covert investigative activities often raise difficult and sensitive legal or policy issues, it is vital for government agents to consult DOJ attorneys in conducting these investigative operations. The interests of justice are not served when government attorneys cannot direct, supervise, or provide advice regarding covert law enforcement investigations. See, e.g., United States v. Salemme, 91 F. Supp. 2d 141, 188-97 (D. Mass. 1999) (discussing the importance of oversight by the Attorney General of FBI activities, and noting that the FBI is formally subject to the oversight and direction of the Attorney General, 28 U.S.C. §§ 503, 531-33), rev'd in part on other grounds, 225 F.3d 78 (1st Cir. 2000). Attorney involvement in investigations is usually required by federal law or DOJ policy and is often critical to a proper and effective investigation and prosecution. Government attorney involvement is equally important in ensuring that constitutional and other legal rights of investigative targets are protected. Attorneys, even more than investigators, are aware that violations of targets' rights often have a variety of negative consequences, from suppression of evidence to dismissal of charges, even in otherwise meritorious cases.

These investigative techniques, while deceitful, are lawful and certainly do not involve moral turpitude on the part of a federal government attorney. For example, the DOJ is charged with protecting the government against the submission to federal agencies of false claims for payment. See False Claims Act, 31 U.S.C. §§ 3729 et seq. A DOJ attorney, civil or criminal, may direct or supervise agency agents or cooperating witnesses

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[3] See, e.g., Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (Court recognized the "necessity of undercover work" and its value "to effective law enforcement"); Andrews v. United States, 162 U.S. 420, 423 (1896) (government agent could properly obtain evidence for prosecution through use of fictitious name); Sorrells v. United States, 287 U.S. 435, 441-42 (1932) ("Artifice and stratagem may be employed" for law enforcement purposes).

in a civil health care fraud investigation that may require the agents to pretend to be patients or vendors in order to uncover efforts to defraud the Medicare program. The witness' or agent's pretense necessarily would involve misrepresentation as to his or her identity or the purpose of his or her contact with the health care provider. Under the Colorado Rules as written, the DOJ attorney's direction of, supervision of, or advice regarding the investigation might be misconstrued as running afoul of Colorado Rules 8.4(c) and 4.1(a).

Likewise, both the DOJ and the Department of Housing and Urban Development ("HUD") are responsible for ensuring that persons are afforded equal opportunity in housing and are not discriminated against based upon their race, color, religion, gender, national origin, familial status, or handicap. See Fair Housing Act, 42 U.S.C. §§ 3601 et seq. Any person or entity found to have engaged in discrimination may be liable for civil penalties and/or a payment of damages to victims of the discrimination. In order to determine whether discrimination is occurring, the DOJ and HUD may engage in "testing" of a housing provider, i.e., sending in cooperative witnesses or government employees to pose as home seekers to discover whether the "testers" are provided the same information and given the same opportunity to purchase or rent regardless of their membership in a protected class. HUD also provides funding through the Fair Housing Initiative Program ("FHIP") to fair housing organizations that employ similar tactics to help identify and investigate housing providers suspected of housing discrimination. These investigative techniques are essential to enforcing anti-discrimination law. See Hamilton v. Miller, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("it would be difficult indeed to prove discrimination in housing without [using a tester] for gathering evidence"). However, absent additional clarification, attorneys supervising such "testing" — whether a government attorney from the DOJ or HUD, or a private attorney from a FHIP organization — could be misconstrued as running afoul of the Colorado Rules.

It is therefore important to eliminate any argument that a government attorney violates Colorado Rules 8.4(c) or 4.1(a) by directing, supervising or providing advice regarding such an investigation. This could be done by amending the Colorado Rules to bring Colorado in line with several other states' Rules 8.4[4] and 4.1[5] and make it clear that

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[4] Iowa Rule 8.4 expressly permits attorneys to "advise clients or others about or to supervise . . . lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity." IOWA RULES OF PROF'L CONDUCT R. 8.4, Comment [6] (2010). Tennessee excludes from Rule 8.4(c)'s prohibitions investigative techniques that "prosecutors are authorized by law to use, or to direct investigative agents to use . . . that might be regarded as deceitful," and states that lawful secret or surreptitious recordings for the purpose of evidence gathering or

government attorneys engaged in otherwise legitimate law enforcement investigations are not prohibited from directing or supervising agents in an investigation or giving them advice, even when dishonesty, fraud, deceit, or misrepresentation are used as investigative tactics.

Specifically, we recommend that Colorado Rule 8.4(c) be amended[6] to read as follows:

> It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal or civil law enforcement agency or regulatory agency to advise others about or to direct or supervise another in an undercover

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preservation do not violate Rule 8.4. TENN. RULES OF PROF'L CONDUCT R. 8.4 cmts. 4, 5 (2011). OHIO RULE OF PROFESSIONAL CONDUCT 8.4, Comment [2A] (2007) provides, "Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Florida Rule 8.4 permits lawyers employed by a law enforcement or regulatory agency to advise or supervise investigators involved in misrepresentation. FLA. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2010). Alabama, North Carolina, South Carolina, Oregon and Wisconsin also have rules or comments that permit Government lawyers to supervise law enforcement investigations that involve some elements of misrepresentation or deceit.

[5] Wisconsin Rule 4.1(b) provides, "Notwithstanding [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities." WIS. RULES OF PROF'L CONDUCT R. 20:4.1 (2007). The Committee Comment to Wisconsin Rule 4.1 explains, "[W]here the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor . . . ." WIS. RULES OF PROF'L CONDUCT R. 20:4.1, Wisconsin Committee Comment. Comment 2 to South Carolina Rule 4.1 also provides that a government lawyer involved in a law enforcement investigation does not violate the Rule 4.1 prohibition against making false statements of material fact through "use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation." S.C. RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2005).

[6] In the alternative, we would suggest that the Committee consider inserting the requested language into the Comment to Rule 8.4(c).

> investigation. A government lawyer who directs, supervises, or provides advice regarding a lawful covert operation that involves misrepresentation or deceit for the purpose of gathering relevant information, such as a law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule. In addition, a lawyer who provides supervision or advice to an organization that is responsible for assisting a government agency with the law enforcement investigation of suspected unlawful activity does not, without more, violate this rule.

We recommend the addition of the following language as Comment [4] to Rule 4.1:

> A government lawyer directing, supervising or providing advice regarding a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or other non-lawyers, of false identifications, backgrounds and other information for purposes of the investigation or operation.

The proposed additions to the Colorado Rule 8.4(c) and the Comment to Colorado Rules 4.1 would make it clear that attorneys engaged in otherwise legitimate law enforcement investigations, regardless of whether the investigations are criminal or civil, are not prohibited from directing or supervising agents in covert investigations or giving them legal advice even when deceit—including false statements of material fact or law—is one of the tools used in the investigation.

The proposed additions also are consistent with the Colorado Comments to Colorado Rule 4.2. Rule 4.2 prohibits contact with a person represented by counsel about the subject matter of the representation unless the representing counsel consents or it is otherwise authorized by law or a court order. Comment [5] to the Rule clarifies that "[c]ommunications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." Thus, the Colorado Supreme Court recognizes that government attorneys engaged in legitimate law enforcement investigations may be involved in actions that otherwise may arguably violate Rule 4.2.

Similarly, the proposed amendment also would be in accord with the Colorado Bar Association's Ethics Committee's Opinion 112. That opinion found that, because

surreptitious recording of conversations or statements by an attorney typically involves an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law. In discussing Colorado Rules 8.4(c) and 4.1 (as well as Colorado Rule 4.4), however, the Committee found a criminal law exception, as surreptitious recordings are an appropriate, effective means of gathering evidence in the criminal arena and it is beneficial to have attorney oversight of such activities.

The proposed additions would also reflect that misrepresentations about identity or purpose that are made only for the purposes of investigating the facts are different from other misrepresentations. The proposed additions thus would be consistent with the court's analysis in Apple Corps. Ltd. v. International Collector's Society, 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998). In that copyright case, the plaintiffs suspected the defendants were violating a consent order by continuing to sell unlicensed Beatles paraphernalia. The plaintiffs' counsel and other agents, posing as consumers, contacted the defendants and successfully purchased the unlicensed materials in direct contravention of the consent order. The court rejected the defendants' objection that the conduct of the plaintiffs' counsel was deceitful in violation of New Jersey's Rule 8.4(c). The court, instead, determined that Rule 8.4(c) does not apply to misrepresentations about identity or purpose that are made only for the purposes of gathering evidence. The court stated:

> Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Id. at 475.[7]

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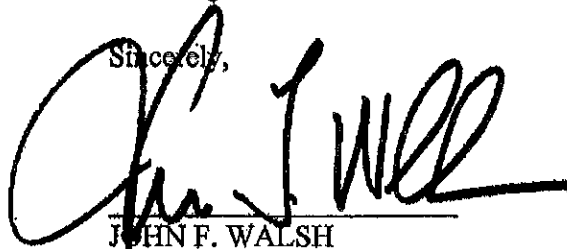
[7] The case is referenced in Utah State Bar Ethics Advisory Op. 02-05 (2002), which considered the same issue that is now before the Committee. A federal government lawyer who participated in criminal and anti-terrorism covert investigations

Accordingly, for all of the above-stated reasons, we urge the Committee to amend Colorado Rules 8.4 and 4.1 so that the rules and comments accurately reflect that while a prosecutor or civil government lawyer (or an attorney for an organization responsible for assisting with law enforcement, like a FHIP grantee) may not himself or herself engage in deceit, the lawyer may direct, supervise, or advise others who engage in deceit in the course of legitimate law enforcement investigations.

Thank you again for this opportunity to comment. We greatly appreciate the opportunity. If an addition to the rules or comments is proposed, we respectfully request an additional opportunity to provide our views at that stage.

Sincerely,



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asked the Utah State Bar for an opinion about whether his conduct violated Utah's Rule 8.4 (which is similar to the Colorado Rule). The Utah Bar opined that the Rule did not prohibit state or federal prosecutors or other government attorneys from participating in or supervising otherwise legitimate covert law enforcement investigations. The Utah Bar acknowledged that even Congress has recognized "in this era of increasingly powerful and sophisticated [wrongdoers], some of the undercover technique is indispensable to the achievement of effective law enforcement" and that it would not serve the purposes of the Rule to prohibit prosecutors or other government lawyers from engaging in or supervising otherwise legitimate covert law enforcement activities. Id. at 2. "Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful undercover investigations." Id. at 4.

ATTACHMENT 2

"PRETEXTING" RULES AND COMMENTS IN OTHER JURISDICTIONS THAT DEVIATE FROM ABA MODEL RULES OF PROFESSIONAL CONDUCT, PLUS ETHICS OPINIONS THAT INTERPRET THOSE RULES OR RULES IDENTICAL TO ABA MODEL RULES

Alec Rothrock
March 10, 2011

State	Rule	Comment	Ethics Op.
Alabama	3.4 (1994) A lawyer shall not: . . . (d) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless: . . . (3) the information pertains to **covert** law enforcement investigations in process, such as the use of undercover law enforcement agents. 3.8 (1994) . . . (2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except: (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and (b) to the extent an action of the government is not	3.4 (1994) Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2. 3.8 (1994) Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are	Op. RO-2007-05 (Sept. 12, 2007): During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public. Following rationale of *Apple Corps Limited, MPL v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998) (Alabama Rule 4.2 applicable only to contact with represented parties)

	prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.	limited so as to preserve the integrity of the profession of law. Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.	
Alaska		8.4 (2009) . . . [4] This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.	
D.C.			D.C. Op. 323 (March 29, 2004) Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties. ("The prohibition against engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" applies, in our view, only to conduct that calls into question a

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			lawyer's suitability to practice law.")

Florida	**8.4** (Jan. 1, 2006) . . . **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;	**8.4** (Jan. 1, 2006) Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.	
Iowa		**8.4** (July 1, 2005) . . . [6] It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.	

Michigan	8.4 (2005) It is professional misconduct for a lawyer to: . . . (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;		
New York			New York County Op. 737 (May 23, 2007): [I]t is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.

			("dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance")
North Carolina		**8.4** (Feb. 7, 2003) [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.	
North Dakota	**8.4** (Aug. 1, 2006) It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;		
Ohio		**8.4** (Feb. 1, 2007) [2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.	
Oregon	**8.4** (Dec. 1, 2006) (a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on		Oregon Op. 2005-173 (Aug. 2005) (interpreting Rule 8.4(a)(3) and (b))

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	the lawyer's fitness to practice law; ... (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.		
South Carolina		4.1 (Oct. 1, 2005) [2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.	
Tennessee		8.4 (September 29, 2010) [5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.	

Utah			Utah State Bar Ethics Advisory Opinion No. 02-05 (March 18, 2002): A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.
Virginia	**8.4** (March 25, 2003) It is professional misconduct for a lawyer to: . . . **(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law		Virginia Op. 1845 (June 16, 2009) (interpreting Rule 8.4(c) in UPL investigations by bar) Virginia Op. 1765 (June 13, 2003) (interpreting Rule 8.4(c) in context of attorney working undercover for federal intelligence agency)
Wisconsin	**4.1** (July 1, 2007) (a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [Rule 1.6]. (b) Notwithstanding par. (a), [Rule 5.3 (c)(1)], and [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities.	**4.1** (July 1, 2007) Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See [Rule 1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See [Rule 8.4(c)]. Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is	WISCONSIN COMMITTEE COMMENT Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See SCR 20:1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See SCR 8.4(c). Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a

		taking place or will take place in the foreseeable future.	lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

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Formal Opinion No. 123: Candor to the Tribunal and Remedial Measures in Civil Proceedings

Adopted June 18, 2011

Introduction and Scope

The Colorado Rules of Professional Conduct (Colo. RPC or Rules) establish a lawyer's duties of candor to tribunals. This opinion addresses the lawyer's duties of candor only in civil matters. In criminal litigation, the accused has constitutional rights to testify and to the assistance of counsel, which may require a different analysis.

Following an analysis of the lawyer's duties in civil matters, the Colorado Bar Association Ethics Committee (Committee) provides four illustrations designed to provide practical guidance to lawyers facing these situations.

Syllabus

Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. If a lawyer knows that a client or a witness called by the lawyer has offered material evidence that is false, the lawyer has a duty to take reasonable remedial measures. This duty may override a lawyer's duty under Colo. RPC 1.6(a) not to disclose information relating to the representation of the client.

If the false evidence was presented by a client (for example by testimony at a trial or hearing), the lawyer must remonstrate confidentially with the client. If the client refuses to rectify or permit the lawyer to rectify the situation, then the lawyer must take further remedial action. In most cases, withdrawal of the false evidence, with the consent of the tribunal, will constitute an adequate remedial measure. In some cases, the conflicts created will require the lawyer to withdraw from the representation. Depending on the circumstances, withdrawal from the representation alone may or may not be an adequate remedial measure, and in some cases, the tribunal may not permit the lawyer's withdrawal. When the tribunal does not permit withdrawal from the representation or when withdrawal from the representation alone is insufficient to undo the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is necessary to undo the effect of the false evidence.

The content of the disclosure that may be required by Colo. RPC 3.3 necessarily depends on the facts and circumstances. Nevertheless, certain general principles offer guidance. In most situations, Colo. RPC 3.3 will not require the disclosure of information protected by the attorney–client privilege; and in all situations, the lawyer should make every reasonable effort to avoid the disclosure of privileged information. However, in some circumstances, only the disclosure of information that may be protected by the attorney–client privilege will be sufficient to meet the lawyer's obligations under Colo. RPC 3.3. In those limited circumstances, the plain language of Colo. RPC 3.3 does not create an exception for information that may be protected by the attorney–client privilege. Such disclosures must be limited to those that are reasonably necessary to undo the effects of the false evidence and must be made in a manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3. The lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction into evidence of privileged information, including the information previously disclosed by the lawyer under Colo. RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of communications that are protected by the attorney–client privilege.

Finally, under Colo. RPC 3.3(a)(1), a lawyer has a duty to remedy a false statement of material fact or law made by the lawyer, and in this regard, reasonable remedial measures may require the lawyer to disclose the false statement to the tribunal. In this case, too, the disclosure to remedy such a false statement must be limited to the extent reasonably necessary to achieve such ends and must be made in the manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3.

Analysis

I. Candor to the Tribunal: Colo. RPC 3.3

Colo. RPC 3.3 provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the

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tribunal to make an informed decision, whether or not the facts are adverse.

Colo. RPC 1.0(m) defines a "tribunal" as

> a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Thus, under Colo. RPC 3.3, the lawyer has several separate duties of candor to a tribunal. Each of these duties presents the lawyer with separate but related problems. *See* 2 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, § 29.8, at 29-9 to 29-10 (Supp. 2007) (Hazard & Hodes). This opinion addresses only the prohibitions against offering false evidence, the duty to take remedial measures regarding false evidence, and the duty to correct false statements by the lawyer.[1]

A. Materiality

Certain of the duties imposed by Colo. RPC 3.3 turn on whether statements made to the tribunal or evidence offered in the proceeding are "material." The Colorado Rules do not define "material," and different jurisdictions have derived different definitions of materiality in the context of their counterparts to Colo. RPC 3.3. The Colorado Supreme Court interpreted "materiality" under Colo. RPC 3.3(a)(1) in *In re Fisher*.[2] There, the Supreme Court held that

> the concept of materiality encompassed in Colo. RPC 3.3(a)(1) is not directed by the outcome of a particular matter, but rather whether there is potential that the information could influence a determination as to that matter.[3]

B. Confidential Remonstration with the Client

The concept of confidential remonstration with the client is a fundamental part of the reasonable remedial measures mandated by Colo. RPC 3.3. Comment [6] to Colo. RPC 3.3 describes the process as follows:

> If a lawyer learns that the client or a witness that the lawyer plans to call intends to offer false evidence, the first challenge for the lawyer is to remonstrate with the client to attempt to persuade the client or witness that the false evidence should not be offered. It is at this initial stage that the problem of false evidence is best and most frequently resolved.

The *Restatement (Third) of the Law Governing Lawyers* (*Restatement*) further explains this process as follows:

> *Remonstrating with a client or witness.* Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is [*sic*] a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment *h*).

Restatement, § 120, cmt. [g] (2000) (emphasis added).

In his treatise on modern legal ethics, Professor Charles W. Wolfram details the process of remonstrating with a client or witness:

> *Remonstration* is clearly required: a lawyer must attempt to persuade a client not to present or, if it is presented, to correct, false testimony. Remonstration in most cases should cover the fact that perjury is a criminal offense, the risks of its deception, and the importance of truthful testimony, the attorney's duty to withdraw, and the extent of the lawyer's duty to disclose perjury.

Charles W. Wolfram, *Modern Legal Ethics*, § 12.5.3, at 656 (1986) (footnotes omitted). *See also* Colo. RPC 3.3, cmts. [6], [10].

Thus, when material evidence has been presented to the tribunal and the lawyer subsequently discovers that the evidence is false, the lawyer must first remonstrate with the client confidentially. In this discussion, it is appropriate for the lawyer to inform the client that the client's failure to correct the false evidence may require the lawyer to seek withdrawal from the representation[4] and that the lawyer may have to disclose the false evidence to the tribunal with or without the client's consent, with the potential for dramatic adverse effect on the client, both as to the outcome of the pending matter and in terms of potential perjury charges. If the lawyer lacks competence in criminal law practice, the lawyer also may wish to advise the client to seek independent criminal defense counsel.

II. A Lawyer May Not Knowingly Offer False Evidence

Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. Colo. RPC 1.0(f) provides that "knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. If the lawyer knows before the evidence is presented that it is false, then the lawyer may not offer it. Colo. RPC 3.3(a)(3).[5] A lawyer also may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, if the lawyer reasonably believes it is false. Colo. RPC 3.3(a)(3).

> If a lawyer reasonably believes that evidence is false, but does not "know," Rule 3.3(a)(3) provides that the attorney *may* refuse to offer the evidence. This provision leaves up to the discretion of the lawyer whether to seek admission of questionable evidence. Some lawyers may err on the side of inclusion and risk the need to correct the submission at a later time. Other lawyers may prefer to be cautious and demand additional proof of its authenticity. This Rule permits a lawyer's decision to override client choice on whether to admit the evidence.

Ronald Rotunda and John Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, 741 (2009–10).

In any event, a lawyer is prohibited from assisting a client in conduct the lawyer knows is criminal or fraudulent. Colo. RPC 1.2(d). Knowingly assisting a person to testify falsely is criminal conduct.[6]

If the lawyer's efforts at persuasion are not effective, the lawyer's duties may vary, depending on whether the witness is the client. If a witness (including a client) whom the lawyer intends to call in a civil case insists on giving false evidence despite the lawyer's efforts at persuasion, then the lawyer must not call the witness. If only a portion of the witness's testimony would be false, the lawyer may call the witness but "may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false."[7] Colo. RPC 3.3, cmt. [6]. If the witness nevertheless gives evidence the lawyer knows to be false, then, as explained below, the lawyer must take remedial measures.

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III. A Lawyer Must Correct False Evidence Already Presented—Remedial Measures

If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take "reasonable remedial measures." Colo. RPC 3.3(a)(3). The "reasonable remedial measures" that are required are not specifically listed in the Rules. Colo. RPC 3.3(c) explains that "[t]he duties . . . continue to the conclusion of the proceeding,[8] and apply even if the compliance requires disclosure of information otherwise protected by Rule 1.6." The measures taken should be the least damaging to the client consistent with the lawyer's duties to the tribunal as established in Colo. RPC 3.3 and consistent with the purpose of remedial measures to undo the taint of the false evidence. *See, e.g., Restatement*, § 120, cmt. [h] (2000); State Bar of Ariz. Ethics Op. 05-05 (2005).[9]

Comment 10 of Colo. RPC 3.3 provides guidance in this regard. It states:

> Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the attorney to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

One remedial measure available to the lawyer, under some circumstances, is withdrawal of the false evidence. If the tribunal permits the withdrawal of the evidence, in most cases the lawyer will have fully satisfied his or her responsibility under Colo. RPC 3.3. Although rare, circumstances may arise where withdrawal of the evidence, even if permitted by the tribunal, will not undo the effect of the false evidence and thus will not constitute an adequate remedial measure. Because the duty of candor under Colo. RPC 3.3 continues until the conclusion of the proceeding and because the lawyer might come to know at various times in the process that false evidence was presented, the form, nature, and effectiveness of the attorney's disclosure necessarily varies. For example, if the lawyer learns during a hearing or trial that false evidence was presented, then withdrawal of the false evidence would constitute an adequate remedial measure. *Restatement*, § 120, cmt. [h]. Specifically, if the lawyer learns that a witness testified falsely after the witness has left the stand but still during trial, the lawyer could recall the witness and thus withdraw the false evidence. Again, such a withdrawal of the evidence would constitute an adequate remedial measure. *Id.*[10] In contrast, if the lawyer learns during an appeal that false evidence was presented, then withdrawal of the false evidence (even if feasible and permitted by the tribunal) likely would not be sufficient to undo the effect of the false evidence and thus would not, by itself, constitute an adequate remedial measure. Just as in the situation before false evidence is offered, obtaining the client's consent to correct false evidence already presented is critical not only to fulfilling the lawyer's duty of candor to the tribunal but also to maintaining the client's trust in the lawyer's loyalty and diligence.

Withdrawal from the representation also may constitute, under appropriate circumstances, an adequate remedial measure either by itself, or in combination with other remedial measures, and, in any event, may be required when conflicts of interest under Colo. RPC 1.7(a) arise and cannot be resolved. When the client permits the lawyer to withdraw the false evidence and the tribunal permits the withdrawal of the evidence, the lawyer's withdrawal from the representation ordinarily will not be required. However, when the lawyer makes disclosure to the tribunal regarding the false evidence without the client's consent, and particularly when the client specifically directs the lawyer not to make the disclosure, withdrawal from the representation may be required or permitted under Colo. RPC 1.16. *See* Colo. RPC 1.7, 1.16(a)(1), (b)(1)(B)–(D), 3.3, cmt. [10]. *See also Restatement*, 120, cmt. [h]. Moreover, the client's actions may be grounds for permissive withdrawal under Colo. RPC 1.16.

Depending on the circumstances, however, withdrawal from the representation alone may not constitute an adequate remedial measure. And, in some cases, the tribunal may not permit withdrawal from the representation. If withdrawal from the representation alone is not sufficient to undo the effects of the false evidence, or if the tribunal does not permit withdrawal from the representation, the lawyer must make such disclosure to the tribunal as is reasonably necessary to undo the effect of the false evidence. Colo. RPC 3.3, cmt. [10]. The Committee believes that in most, if not all, cases where the false evidence has already been presented to the tribunal, withdrawal from the representation alone will not constitute an adequate remedial measure. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 98-412 (1998) (lawyer must correct his or her own false representations to the tribunal).[11]

IV. Distinctions Between Confidentiality and the Attorney–Client Privilege

The ethical duty of confidentiality is set forth in Colo. RPC 1.6. The scope of the duty of confidentiality is extremely broad, encompassing "information relating to the representation of a client. . . ." Colo. RPC 1.6(a). Included within this broad scope of confidentiality under Colo. RPC 1.6 is information that is subject to the attorney–client privilege. *See* Colo. RPC 1.6, cmt. [3]. The attorney–client privilege is a matter of the substantive law of evidence, not legal ethics. In Colorado, the attorney–client privilege is codified by statute.[12] Under federal law, the attorney–client privilege is governed by federal common law when the underlying dispute involves federal law and is governed by state law if jurisdiction is based on diversity of citizenship.[13]

Comment [3] to Colo. RPC 1.6 explains this distinction as follows:

> The principle of client–lawyer confidentiality is given effect by related bodies of law: the attorney–client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney–client privilege and work-

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product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client–lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* Scope.

Colo. RPC 1.6, cmt. [3].

The duty of disclosure under Colo. RPC 3.3 is, on its face, unqualified. In particular, Colo. RPC 3.3 does not by its own terms exclude from the lawyer's duty of disclosure information that is or may be protected by the attorney–client privilege. Rather a lawyer's disclosure to the tribunal under Colo. RPC 3.3 is a matter separate and apart from any determination about whether and how that information might be used as evidence in a proceeding. Comment [10] to Colo. RPC 3.3 states, in relevant part, that where the lawyer knows that evidence already offered or admitted is false and remonstration with the client to correct the false evidence has failed,

the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosures to the tribunal as is [*sic*] reasonably necessary to remedy this situation even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. *It is for the tribunal to then determine what should be done*—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Colo. RPC 3.3, cmt. [10] (emphasis added). Because information protected by Colo. RPC 1.6 includes privileged information, a lawyer's duty to disclose under Colo. RPC 3.3 includes the duty, in some cases, to disclose privileged information.

The Colorado Supreme Court has not expressly addressed whether the duty of disclosure under Colo. RPC 3.3(a)(3) includes information that may be subject to the attorney–client privilege or whether that information is somehow exempt from disclosure. However, in *In re Petition for Disciplinary Action Against John E. Mack*,[14] the respondent lawyer was disciplined for violating Minnesota version of Colo. RPC 3.3 by failing to take reasonable remedial measures after the introduction of evidence he knew to be false. Mack defended the disciplinary charge on the ground that he could not make the disclosure contemplated under Minnesota Rule 3.3 because the information was privileged. The Minnesota Supreme Court rejected this defense without distinguishing between privileged and other information relating to the representation that is protected under Minnesota Rule 1.6.[15]

The Colorado Supreme Court's decision in *People v. Casey*[16] supports the conclusion that the disclosure duty under Colo. RPC 3.3 extends to privileged information, even though *Casey* did not address this precise issue. In *Casey*, a disciplinary case, the Supreme Court addressed the interplay between a lawyer's duty to be truthful to the court and the lawyer's duty to competently represent the

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client. Casey represented a defendant in a criminal case who was an imposter; the actual defendant was another individual. Nevertheless, Casey appeared before the court and expressly and implicitly represented to the court that his client was the defendant when Casey knew that was not the case. According to the Court, Casey "portray[ed] his situation as involving a close question between the loyalty he owed his client and his duty to the court."[17] The Court emphatically rejected Casey's argument:

> Colo. RPC 3.3 (b) clearly resolves the respondent's claimed dilemma in that it provides that the duty to be truthful to the court applies even if to do so requires disclosure of [otherwise confidential information]. It is not "arguable" that the respondent's duty to his client prevented him from fulfilling his duty to be truthful to the court.[18]

While the Supreme Court did not specifically refer to the attorney–client privilege in *Casey*, the case is noteworthy in that, like *Mack*, it placed no limit on the type of confidential information that must be disclosed to discharge the attorney's obligations under Colo. RPC 3.3. Similarly, in *In re Hill*,[19] a federal bankruptcy court stated:

> Firm attorneys who had knowledge, in light of privileged e-mails of which they were aware, of misleading nature of testimony of member of firm in proceedings in bankruptcy court had duty to take some remedial action, even though it could potentially require divulging attorney–client privileged material.[20]

Outside of Colorado, several authorities have attempted to reconcile the duty of disclosure under other states' version of Colo. RPC 3.3(a)(3) with the attorney–client privilege, by distinguishing between non-evidentiary disclosures on the one hand and evidentiary submissions on the other hand.

This reconciliation finds support in a recent Ethics Opinion of the New York State Bar Association.[21] The New York Committee determined that while New York's statutory attorney–client privilege limited the available remedial measures under New York's version of Colo. RPC 3.3, that limitation applied only to the *introduction* of protected information *into evidence* and did not prohibit non-evidentiary disclosures in compliance with New York Rule 3.3. Moreover, at least one commentator supports this approach:

> When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney–client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary form, namely sharing the information with the appropriate person or authority. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[22]

Two state appellate court decisions also support this approach they address permissive disclosures under those states' versions of Colo. RPC 1.6(b), rather than mandatory disclosures under their versions of Colo. RPC 3.3. In *Purcell v. District Attorney*,[23] Purcell's client had received a court order requiring his eviction from his apartment, which was located in the same building where the client had recently been discharged as a maintenance man. The client made statements to Purcell that Purcell believed constituted threats of criminal activity by the client. Purcell deemed the threats to be serious and, acting in reliance on Massachusetts's version of Colo. RPC 1.6(b), exercised his professional discretion to make disclosure to law enforcement authorities. Acting on that disclosure, constables (accompanied by the police) went to the apartment to evict the client, found incendiary devices, and arrested the client for attempted arson. At the client's trial, the district attorney subpoenaed Purcell to testify against his former client regarding the statements made by the client to Purcell. The trial court rejected the client's assertion of the attorney–client privilege and ordered Purcell to testify against his former client. The Massachusetts Supreme Judicial Court reversed, holding that "the fact that the disciplinary code permitted Purcell to make the disclosure tells us nothing about the admissibility of the information that Purcell disclosed. . . ."[24]

A similar result was reached in *Kleinfeld v. State*[25] where the defendant in a murder case made inculpatory statements to his lawyer in connection with a separate civil case. At the murder trial, the statements were admitted over objection, and the client was convicted of murder. The Florida appellate court held that because the requirements of the attorney–client privilege had been met, it was error to admit the lawyer's testimony. The court went on to note that the existence of an ethical rule that permits a lawyer to reveal a confidence under certain circumstances does not modify the evidence code, which governs the admissibility of evidence at trial.[26]

For all of these reasons, the Committee concludes that, if reasonable remedial measures necessitate disclosure, Colo. RPC 3.3 requires a lawyer to make disclosure to the tribunal, even if such disclosure includes information that is or may be protected by the attorney-client privilege and even if the client does not consent to the disclosure. However, the Committee again emphasizes that disclosure of privileged information always must be limited to that information which is reasonably necessary to apprise the tribunal of the problem.[27] There are few, if any, circumstances in which the lawyer properly would be required or permitted to expressly disclose the source of the privileged information or any other details of the privileged communication. Once the required disclosure is made to the tribunal, the lawyer should take appropriate efforts to resist further efforts by the tribunal to compel additional disclosures. In addition, the lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction or disclosure of privileged information, including information previously disclosed pursuant to Colo. RPC 3.3. It is then the responsibility

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of the tribunal to address the evidentiary use of privileged communications.[28]

V. Correction of Misstatements Made by the Lawyer to the Tribunal

A lawyer must not knowingly make false statements of material fact or law to a tribunal. Colo. RPC 3.3(a)(1). If the lawyer makes a material factual statement believing it to be true, and later discovers that the representation was false, reasonable remedial measures may include correction of the lawyer's own misstatement. The same issues and potential conflicts of interest under Colo. RPC 1.7 that can arise when the client or other witness called by the lawyer testifies falsely, discussed in detail above, can arise when the lawyer made the false statement.

Illustrations[29]

Illustration 1. In a proceeding regarding title to property, Client delivers to Lawyer a deed that is material to the dispute. A variety of circumstances cause Lawyer to question the authenticity of the deed. Lawyer requests and Client gives permission to have the deed examined by a document examiner. The document examiner concludes that the document is a forgery because the ink and paper used did not exist on the date borne by the deed. Lawyer approaches Client with this information and Client confesses that the deed is false but insists that Lawyer nevertheless use the evidence. Under these facts, Lawyer "knows" that the evidence is false—not only did the document examiner unequivocally determine it was not genuine, but Client admitted the document was false. Lawyer may not offer the evidence and if Lawyer discovers its falsity after it is offered, Lawyer must take reasonable remedial measures.

Suppose instead that the document examiner determines that the deed probably is not genuine but cannot rule out the possibility that the deed is, in fact, genuine. When Lawyer confronts Client with this information, Client absolutely maintains that the deed is genuine. Under these circumstances, Lawyer does not "know" that the deed is false and reasonable remedial measures are neither required nor permitted. However, under Colo. RPC 3.3(a)(3), if Lawyer reasonably believes (but does not know) that the deed is false, Lawyer may refuse to offer the evidence.[30]

Illustration 2. Lawyer represents Client in a dissolution of marriage proceeding. Under the applicable procedural rules, each party must make comprehensive disclosure, under oath, of their financial assets. Lawyer files with the court the client's financial affidavit without knowledge that any of the information contained in the affidavit is false. After submission of Client's affidavit, Client advises Lawyer that the values ascribed to certain assets are incorrect. Assume that the value of the asset as originally disclosed was $10,000 and Client now tells the lawyer that the real value is $15,000. Assume further that the marital estate is $5 million. The $5,000 differential in the value of the piece of property probably is not material in relation to the controversy. Suppose, however, that the total marital estate is $20,000. In that context, a $5,000 differential probably is material and would require Lawyer to take reasonable remedial measures under Colo. RPC 3.3.

Illustration 3. Lawyer represents Client in a civil litigation or arbitration proceeding. During the course of preparing Client's anticipated testimony, Lawyer learns from Client that material testimony that Client intends to give is false. Given that source, Lawyer "knows" that the testimony will be false, within the meaning of Colo. RPC 1.0(f). Lawyer must confidentially remonstrate with Client and attempt to convince Client not to testify falsely. If Client insists on presenting the false evidence, Lawyer must, before the false testimony is given, move to withdraw from the representation pursuant to Colo. RPC 1.16(a)(1), and in compliance with the rules of the tribunal. If the tribunal permits Lawyer's withdrawal prior to the presentation of the false testimony, Lawyer has fully satisfied his or her ethical responsibilities under Colo. RPC 3.3. In the event that the tribunal either denies the motion to withdraw or does not rule on the motion prior to the admission of the false testimony, Lawyer is prohibited from participating, in any manner, in the admission of the evidence. (Lawyer is not prohibited from participating in the admission of other evidence or testimony that the lawyer does not know is false.) If the evidence is, in fact, admitted before the tribunal, despite all of the efforts by Lawyer to prevent its admission, Lawyer has the duties described in Illustration 4, below.

Illustration 4. Lawyer represents Client in a civil litigation or arbitration proceeding. Lawyer calls Client to testify. After the completion of Client's testimony, but before the conclusion of the proceeding (*see* Colo. RPC 3.3(c) and cmt. [13]), Client tells Lawyer that he testified falsely on matters that were material to the proceeding. What are Lawyer's responsibilities in these circumstances? First, Lawyer must remonstrate with Client, attempting to persuade Client that the best course of action is for Client to authorize Lawyer to withdraw the evidence or otherwise disclose sufficient information to the tribunal to undo the effect of the false prior testimony. Lawyer must make clear to Client that Lawyer has an ethical duty to make disclosure to the tribunal even if Client refuses consent. If Client refuses to give such consent and even if Client purports to prohibit Lawyer from making disclosure to the tribunal, Lawyer must move to withdraw from the representation pursuant to Colo. RPC 1.16(a)(1), because of the conflicts created between Lawyer and Client.

But in the circumstances where material testimony that Lawyer knows is false has already been presented to the tribunal, withdrawal from the representation is not sufficient because it does not undo the effect of the false evidence. Accordingly, Lawyer must either withdraw the evidence with the consent of the tribunal or make sufficient disclosure to the tribunal to undo the effect of the false evidence. A statement made by Lawyer to the tribunal to the effect that specific evidence is false or unreliable should be sufficient to meet Lawyer's ethical obligations in this regard. Indeed, Lawyer should not disclose any information beyond that which is necessary to apprise the tribunal of the false evidence. The tribunal will likely want more information from Lawyer, specifically, the basis for Lawyer's disclosure to the tribunal. The tribunal also may demand that Lawyer disclose the true facts. In response to such inquiries and to the extent that the information necessary to respond to the tribunal's questions is subject to the attorney–client privilege (or any other privilege recognized by the applicable law), Lawyer should respectfully decline to provide additional information to the tribunal, on authority of the attorney–client (or other) privilege. In this situation, of course, the tribunal may directly examine Client, subject to Client's rights against self-incrimination.

If the tribunal persists and orders Lawyer to disclose additional information, Lawyer must consider whether seeking a stay of such

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order to permit a judicial challenge to the tribunal's order would be appropriate. If the tribunal refuses to grant a stay and orders immediate disclosure, and the tribunal has contempt power, Lawyer may comply with the tribunal's order even if Lawyer believes the order is erroneous.[31] If Lawyer believes in good faith that the tribunal's order is erroneous or improper, Lawyer may ethically, respectfully and openly decline to obey the order solely for the purpose of seeking prompt review by a higher tribunal. However, Lawyer must be prepared to suffer the consequences of a finding of contempt.[32]

Notes

1. This opinion does not address other duties of candor that apply in civil proceedings, including the duty to disclose legal authority in the controlling jurisdiction that is directly adverse to the client's position, the duty to take reasonable remedial measures to address criminal or fraudulent conduct by persons related to the proceeding, and the duty in an *ex parte* proceeding to disclose all material facts to the court. *See* Colo. RPC 3.3(a)(2), (b), and (d).

2. *In re Fisher*, 202 P.3d 1186, 1202 (Colo. 2009).

3. *Id.* (emphasis in original).

4. Colo. RPC 1.16 provides that grounds for withdrawal include circumstances where "the representation will result in violation of the Rules of Professional Conduct."

5. The Committee understands the term "false" as used in Colo. RPC 3.3 to mean objective falsity. For example, if the lawyer knows, within the meaning of Colo. RPC 1.0(f), that the traffic light was red at the time of the collision, and if the fact at issue is whether the light was red or green (not the subjective state of mind of the witness), the fact that the client's testimony that it was green was given honestly and in good faith is irrelevant to the lawyer's duty of candor under Colo. RPC 3.3. Of course, if the client honestly believes and testifies that the traffic light was green, that information may well prevent the lawyer from having "knowledge" that it was red, but if the Colo. RPC 1.0(f) threshold is passed and the lawyer, through other evidence, "knows" that the light was red, the lawyer's duty of candor is not suspended because of the client's good faith beliefs. *See Liggett v. People*, 135 P.3d 725 (Colo. 2006) (discussing numerous alternative explanations for evidentiary discrepancies and conflicts in testimony that do not involve "lying": differences in opinion, lapses or inaccuracies in memory, differences in perception, a misunderstanding, or any other number of wholly innocent explanations for discrepancies between two witnesses' testimony).

6. *See* CRS § 18-8-502 (Colorado's criminal perjury statute).

7. It is readily apparent what is meant when the lawyer may not elicit the testimony, but the phrase "or otherwise permit the witness to present the testimony" is less clear. The phrase appears in Comment [6] to Colo. RPC 3.3, but no further guidance is provided in either the Colorado Rule or in American Bar Association (ABA) Model Rule 3.3. Under a reasonable interpretation of this phrase, if the lawyer is examining the witness in a way to avoid eliciting any testimony that the lawyer knows to be false, but the witness blurts out known false testimony, the lawyer should attempt to stop the witness from giving the false testimony. On the other hand, if the adverse lawyer is examining the witness and the witness offers testimony that the lawyer knows to be false, it might not be possible for the lawyer to prevent the witness from presenting the false testimony. In this latter situation, if the lawyer cannot "prevent" the witness from presenting false evidence in response to cross-examination by the adverse lawyer, the lawyer must take remedial measures to correct the false evidence then presented. Colo. RPC 3.3, cmt. [10]. *See* "Correcting False Evidence Already Presented—Remedial Measures," below.

8. Generally, the conclusion of the proceeding has occurred when a final judgment has been affirmed on appeal or the time for appeal has expired. *See* Colo. RPC 3.3, cmt. [13].

9. The Arizona opinion states: "The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and not broader than necessary to undo the effect of the tainted evidence." State Bar of Ariz. Ethics Op. 05-505. *See also* Colo. RPC 3.3, cmt. [10] (the purpose of remedial measures is to "undo the effect of the false evidence").

10. Perjury in the first degree by a witness can be cured if the false testimony is retracted in the course of the same proceeding in which it was made. CRS § 18-8-508.

11. Whether a "noisy" withdrawal, in which the motion to withdraw from the representation contains information to apprise the tribunal of the problem, may be sufficient to discharge a lawyer's obligations to take reasonable remedial measures is beyond the scope of this Opinion. For a comprehensive discussion of the noisy withdrawal concept, *see* Hazard and Hodes, *The Law of Lawyering*, § 9.31, 9-132 to 9-136 (Aspen Publishers).

12. CRS § 13-90-107(1)(b) (2010).

13. Fed. R. Evid. 501.

14. *In re Petition for Disciplinary Action Against John E. Mack*, 519 N.W.2d 900 (Minn. 1994).

15. *Id.* at 902.

16. *People v. Casey*, 948 P.2d 1014 (Colo. 1997).

17. *Id.* at 1016.

18. *Id.*

19. *In re Hill*, 437 B.R. 503 (Bankr.W.D.Pa. 2010).

20. *Id.* at 545.

21. N.Y. State Bar Ass'n Committee on Professional Ethics Op. 837 (March 16, 2010).

22. Sisk, "Rule 3.3 Candor Toward the Tribunal," 16 *Iowa Prac., Lawyer and Judicial Ethics* § 5.6(d)(4)(c) (2009 ed.).

23. *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997).

24. *Id.* Although *Purcell* involved the permissive disclosure of information under Massachusetts Rule 1.6, as opposed to the mandatory disclosure under Massachusetts Rule 3.3, the court's discussion of the differences between the Rules of Professional Conduct and the attorney–client privilege is instructive.

25. *Kleinfeld v. State*, 568 So.2d 937, 939-40 (Fla.App. 1990).

26. *Id.* at 939-40.

27. *See* Arizona Ethics Op. 05-05, *supra* note 9.

28. *See* Colo. RPC 3.3, cmt. [10].

29. These illustrations address the mandatory disclosures required by Colo. RPC 3.3, not the permissive disclosures authorized (but not required) by Colo. RPC 1.6(b).

30. If lawyer takes this position, contrary to client's demand, a concurrent conflict of interest under Colo. RPC 1.7(a) will result. Unless the conflict can be and is resolved satisfactorily in accordance with Colo. RPC 1.7(b), the lawyer must move to withdraw. *See* Colo. RPC 1.16(a)(1).

31. The *Restatement* takes the position that in circumstances where the only available avenue of appeal or review of an order to disclose requires a finding of contempt against the lawyer, the lawyer "may be warranted in incurring risk of contempt." § 105, cmt. [e]. *See also Maness v. Meyers*, 419 U.S. 449 (1975); *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *State v. Schmidt*, 474 So.2d 899 (Fla.App. 1985). A lawyer is not required to run the risk of a contempt order. If a tribunal possessing contempt powers orders disclosure, a lawyer will not violate the confidentiality rules (or the rules requiring competent representation) by complying with such an order no matter how ill-advised or wrong such an order may be. *Restatement* §§ 63, cmt. b, 105, cmt. [e]; D.C. Bar Op. 288 (1999). Where the disclosure order entered is by a tribunal that does not have contempt power, the law is less settled. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has opined that a lawyer is not ethically obligated to disobey an arbitration panel's order to disclose ostensibly confidential information, but that a lawyer who is the subject of such an order must promptly advise any clients whose confidences may be required to be disclosed, so that the potentially affected clients may, if they choose to do so, independently pursue any remedies, judicial or otherwise, which may be available to them. Pa. Eth. Op. 2002 106, 2003 WL 23358338 (Pa. Bar Assoc. Ethics Comm.).

32. *See* Colo. RPC 1.2(d), cmt. [12]. ■

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