COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On June 16, 2017
(Forty-Seventh Meeting of the Full Committee)

The forty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, June 16, 2017, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person or by conference telephone at the meeting, in addition to Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Federico C. Alvarez, Judge Michael H. Berger, Helen E. Berkman, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., Margaret B. Funk, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Matthew A. Samuelson, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Lisa M. Wayne, Judge John R. Webb, and Frederick R. Yarger. Excused from attendance were John M. Haried, Jacqueline C. Melmed, Boston H. Stanton, Jr., Eli Wald, and E Tuck Young. Also present was Supreme Court staff attorney Jennifer J. Wallace.

I. *Introductions; Departure.*

The Chair introduced two new members to the Committee. They are Margaret B. Funk, Chief Deputy Regulation Counsel, Colorado Supreme Court Office of Attorney Regulation Counsel; and Frederick R. Yarger, Colorado Solicitor General, Office of the Colorado Attorney General. The Chair also reported that a third new member of the Committee, Jacqueline C. Melmed, Counsel to Governor John Hickenlooper, was unavoidably unable to attend the meeting.

And the Chair announced that this meeting would be the last meeting attended by Helen E. Berkman as a member of the Committee. Helen has been a member of the Committee since its twelfth meeting, on December 9, 2005, and has been, the Chair noted, deeply involved in the Committee's consideration of an amendment of Rule 8.4(c) to accommodate "pretexting" in lawful investigative activities, to which the Committee would turn its attention later in this meeting.

II. *Meeting Materials; Approval of Minutes of Two Prior Meetings.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-fifth meeting of the Committee, held on November 4, 2016, and of its forty-sixth meeting, held on February 24, 2017. Both sets of minutes were approved as submitted.

The Chair pointed out that the secretary provides "dense" minutes and noted that the minutes detailing the Committee's consideration of the "pretexting" issue in Rule 8.4(c) showed the value of that thoroughness; she thanked the secretary for his service.

III. *Chair's Correspondence with Court and Attorney General Regarding Committee's Consideration of Disclosure of Public Entity Legal Fees.*

The Chair explained that the third item contained in the meeting materials — pages 28 through 31 of the meeting packet — was included to inform the Committee of her letters to the Court and to Attorney General Cynthia H. Coffman, advising them of the Committee's vote at its forty-sixth meeting, on February 24, 2017, against recommending to the Court a change in CRPC 1.6 that would require or permit government lawyers to disclose aggregate fee information. As proposed by the Colorado Attorney General, the following provision would have been added to the list contained in Rule 1.6(b) of disclosures that can be made notwithstanding the basic requirement of confidentiality imposed by Rule 1.6(a):

> (9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client.

The Chair added that the Court had not yet acted on the matter.

IV. *Flat Fee Agreements*.

At the Chair's request, James S. Sudler III gave a brief report on the consideration of agreements for "flat fees" for legal services by a subcommittee formed for that purpose.[1] Sudler said that the subcommittee met on June 1, 2017, and reached a consensus on principles to apply when a lawyer has failed to comply with the requirements of the Rules governing flat fee agreements. The subcommittee intends to send its proposal to lawyers in the Colorado Criminal Defense Bar Association and the Colorado Bar Association's Trusts and Estates Section for their comment.

V. *Proposal for Amendment of Rule 8.4(g) to Prohibit Harassing or Discriminatory Conduct.*

The Chair invited member Judge John W. Webb, who was attending the meeting by conference telephone, to give the members an overview of the activities of the subcommittee that was formed following the forty-sixth Committee meeting, on February 24, 2017, to consider an amendment to Colorado Rule 8.4(g)[2] based upon an amendment to Model Rule 8.4(g) that was adopted by the American Bar Association at a meeting of its House of Delegates in August 2016, amending the paragraph to read as follows:

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1. Previous consideration by the Committee of the matter of flat fees for legal services can be found in these Committee minutes, with the materials provided for these meetings containing reports from the flat-fees subcommittee:

Fortieth meeting, 6/5/2015, Item IV.
Forty-first meeting, 10/16/2015, Item IV.
Forty-second meeting, 1/29/2016, Item V.
Forty-third meeting, 4/29/2016. Item 3.
Forty-fourth meeting, 7/22/2016, Item III.
Forty-fifth meeting, 11/4/2016, Item VII.
Forty-sixth meeting, 2/24/2017, Item 5.

—*Secretary*

2. *See* materials previously provided by the Chair to the Committee with respect to this proposal, at p. 96–99 of the meeting packet for the Committee's forty-fifth meeting, on November 4, 2016, and at p. 52-85 of the meeting packet for its forty-sixth meeting, on February 24, 2017. —*Secretary*

It is professional misconduct for a lawyer to:

. . .

(g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

Correlative changes are proposed for the comments to Rule 8.4(g).

Judge Webb invited members Judge Ruthanne Polidori and Alexander R. Rothrock to join in the conversation, noting that he and they had not anticipated a substantive discussion of the subcommittee's work at this meeting. He then recounted that, as of today's meeting of this Committee, the ABA amendment has not been adopted in any jurisdiction and that there has been a great deal of commentary[3] "and more than a little controversy" about the proposal. He noted that some of the commentary has questioned the constitutionality of the broad proscription on lawyer conduct that would be imposed by the amended rule.

Judge Webb pointed out that, under the current version of Rule 8.4(g) in the Colorado Rules of Professional Conduct,[4] as in the ABA's model rules prior to the 2016 amendment, discriminatory conduct is proscribed only if done "in the representation of a client." The proposal would extend the proscription to "the practice of law"; he commented that the accompanying amendments to the comments evince the intended breadth of that phrase: Proposed Comment [4] to accompany the amendment would read, in part—

Conduct related to the practice of Jaw includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing· a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. . . .

Judge Webb reported that the subcommittee's members were closely divided on the matter at its initial meeting; he added that there was low attendance at the second meeting, at which a proposal was made to amend the current Colorado provision to "play off" the current text of Rule 8.4(g) but with regard to religious discrimination.

At Judge Webb's invitation, Rothrock explained that he had, at the second meeting of the subcommittee, proposed that the issue of the ABA amendment be tabled for the time being, in part because of the nationwide controversy swirling around the ABA's adoption of the amendment and in part because no other jurisdiction has yet adopted it. At Rothrock's urging, the subcommittee now proposed

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3. Links to some commentary is found on the ABA's website at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/8_4_articles.authcheckdam.pdf. –Secretary

4. Currently, Colorado Rule 8.4(g) reads as follows:

It is professional misconduct for a lawyer to:

. . .

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;

—*Secretary*

that the Committee defer further consideration of the amendment until other jurisdictions act and, possibly, until challenges to the amendment are resolved in adopting jurisdictions. Rothrock did not believe the issue is settled nationally; he did not want to disband the subcommittee but saw no need to get out ahead for the national consideration of the amendment.

Judge Webb added that, in discussions with the Colorado Office of Attorney Regulation Counsel, it appears that existing Rule 8.4(g) is rarely at issue in disciplinary cases. As he put it, "If it ain't broke, don't fix it."

A member spoke to note that a number of jurisdictions have provisions similar to the ABA amendment to Rule 8.4(g) and to say that the issue came before the ABA because of concerns about sexism in law firm settings. She drew from this that there may be other states that do not see a need to adopt the ABA amendment because they already have similar provisions and see no need for change. The member added that the proposal that had initially emerged from the ABA's Center for Professional Responsibility had been modified before it reached the floor of House of Delegates at the ABA's August 2016 meeting, because other state standing committees had voiced concern about that proposal; she did not describe the initial text or explain the modifications that had been made, but she added that a number of female lawyers had expressed concerns about gender issues arising in their private practices.

To those comments, Rothrock noted that the Colorado case of *People v. Lowery*[5] involved sexual harassment within a law firm, and thus there is actual case law on the matter in this state; perhaps no other jurisdiction has such case law to supplant the need for an amendment to the Rules, although, he added, Indiana also has such cases.

On a member's motion, the Committee determined to "let the matter percolate."

VI. *Amendment of Rule 3.5(c) Regarding Impeachment following* Peňa-Rodrigue*z*.

The Chair turned the Committee' attention to the next item on the agenda, consideration of an amendment to Rule 3.5(c) in response to the recent five-to-four decision of the United States Supreme Court in *Peňa-Rodriguez v. Colorado*,[6] in which the Court reversed existing law and held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment of the United States Constitution requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the constitutional jury trial guarantee. The Chair noted that Committee member Frederick Yarger had argued the case for the State of Colorado before the high court. The Chair asked Judge Michael Berger to lead the Committee's discussion.

Judge Berger explained that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying about jury deliberations in a subsequent proceeding questioning the verdict. In *Peňa-Rodriguez*, the United States Supreme Court held that such a rule of evidence must give way under some

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5. People v. Lowery, 894 P.2d 758 (Colo. 1995). The Committee was aware of the *Lowery* case as it worked to modify the ABA Ethics 2000 model rules for adoption in Colorado — *see* the minutes of its eleventh meeting, on September 27, 2005. At that meeting, the Committee determined to shift the text of Comment [3] in the ABA's model Rule 8.4 into the rule itself, as a new Rule 8.4(g). —*Secretary*

6. Peňa-Rodriguez v. Colorado, 137 S.Ct. 855 (2017). —*Secretary*

circumstances in deference to the constitutional guaranty of due process.[7] Judge Berger said that he had spoken with the Colorado Supreme Court's Standing Committee on the Rules of Evidence but found that that committee has not yet determined upon responsive amendments to those rules of evidence. But, he said, it is useful to look also at the Colorado Rules of Professional Conduct, particularly at Rule 3.5(c)(4), which is a Colorado addition to the ABA's model rules of professional conduct.[8] That provision prohibits a lawyer from communicating with a juror if "the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts." Judge Berger suggested that, if a lawyer called a juror out because of a racially discriminatory remark made as a juror, the lawyer's comment could be viewed as demeaning, embarrassing, or criticizing that juror; Berger recommended the formation of a subcommittee to consider that possibility. In response to the Chair's inquiry whether such a subcommittee should coordinate with the Standing Committee on the Rules of Evidence before proposing any change to the Rules of Professional Conduct, Judge Berger thought that not to be necessary.

Judge Webb, who had authored the unpublished opinion of the Colorado Court of Appeals in the *Peňa-Rodriguez* case,[9] offered to chair such a subcommittee, and the Chair accepted that offer.

The packet of materials that the Chair had provided to the Committee in advance of this meeting contains, on pages 59 and 60, an extract from the Committee's Report and Recommendations [to the Colorado Supreme Court] Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct, dated December 30, 2005, in which the Committee explained the addition of Clause (4) to Rule 3.5(c). In the extracted text, the Committee explained that it was of the view that additional restrictions upon juror contacts by lawyers were necessary, as would be imposed by the addition of Clause (4), but it declined to add a Clause (5) to prohibit juror communications to solicit impeaching statements other than as permitted by existing Rule 303(b) of the Rules of Evidence.

The Chair concluded the discussion by noting that other states may be considering amendments to their own correlative provisions in light of the United States Supreme Court's invitation to the states to do something about the matter.[10]

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7. As the case headnote expresses it, the United States Supreme Court "held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."

Id. —*Secretary*

8. Colorado Rule 3.5(c)(4) is an addition to the ABA model rule 3.5(c); the paragraphs (c) are otherwise identical. –*Secretary*

9. Peňa-Rodriguez v. Colorado 2012 WL 54573622012 (Colo.App. 2012). —*Secretary*

10. The United States Supreme Court's majority opinion concluded with this:

> The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion . . . .

—*Secretary*

VII. *Rule 8.4(c) and "Testers."*

The Chair turned the Committee's attention to the topic she predicted would take up most of the rest of this meeting, that of a proposal to amend Rule 8.4(c) to permit what prior minutes have referred to as "testers" and is also known as "pretexting" or "covert activities."

The Chair invited member Tom Downey, who chaired the subcommittee that labored on this matter in 2011 and 2012, to lead the discussion now — but the Chair suggested that Downey take advantage of the fact that many of the members present had been participants in the earlier effort; she noted that the packet of materials provided for the meeting referenced minutes of the forty-fifth meeting, on November 4, 2016, for an earlier discussion of the topic[11] and added that any member may submit individual comments to the Court as it now considers the matter. The question she asked the Committee to determine this day was whether it wished again to speak to the Court as a body about the matter. She noted that Justice Márquez had affirmed to her that the Court is familiar with the Committee's prior deliberations on the matter.[12] She summed up the pending question as follows: Does the Committee want now to submit a short paragraph to the Court summarizing its earlier considerations, or, if its views have changed, what should it say now?

Downey then provided the Committee with a refresher course on the history of the Committee's consideration of pretexting, explaining that the subcommittee was formed in January 2011 and worked long and hard for about a year and a half before issuing an interim report to the Committee for its thirtieth meeting, on May 6, 2011, and a "final" report for its thirty-first meeting, on January 6, 2012, to be followed by a "supplemental" report that was considered at the Committee's thirty-second meeting, on July 13, 2012. Downey characterized the discussion of the matter at that thirty-second meeting as like watching a tennis match, with a back-and-forth leading to a Committee decision to do nothing more. Downey said the discussion was well-captured in the minutes for that meeting.

Downey recounted that, at the Committee's thirty-second meeting, on July 13, 2012, a motion to adopt the subcommittee's majority report — which would have amended Rule 8.4(c) by adding a clause reading, "except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities" — failed on a close vote, as did a motion to adopt the first of two proposals put forth in the "minority report," a proposal to limit the exception to government lawyers who were involved in law enforcement. The

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11. *See* prior discussion of Rule 8.4(c) and the "testers" or "pre-texting" matter in these minutes:

Part V, minutes of thirtieth meeting, on May 6, 2011
Part IV, minutes of thirty-first meeting, on January 6, 2012
Part III, minutes of thirty-second meeting, on July 13, 2012
Part II, minutes of thirty-third meeting, on November 16, 2012
Part III, minutes of thirty-fourth meeting, on February 1, 2013
Part 8, minutes of forty-sixth meeting, on February 24, 2017

Some of those minutes are found in the meeting packet that the Chair provided to the members for this meeting.

And see relevant materials provided to the Committee in these meeting packets:

Pages 3 through 106 of the packet for the thirty-second meeting, on July 13, 2012
Pages 24 through 27 of the packet for the thirty-third meeting, on November 16, 2012
Pages 1 through 4 of the packet for the thirty-fourth meeting, on February 1, 2013
Pages 91 through 156 of the packet for the forty-fifth meeting, on November 14, 2016
Pages 86 through 156 of the packet for the forty-sixth meeting, on February 24, 2017
Pages 61 through 183 of the packet for the current, forty-seventh meeting, this June 16, 2016 —*Secretary*

12. *See* the Chair's November 9, 2012 letter to Justices Coats and Márquez advising them of the Committee's consideration and rejection of an amendment to Rule 8.4(c) to facilitate pretexting.

Committee then approved a motion to take no action to amend Rule 8.4(c) with regard to pretexting — but, he noted, the minutes then show that the discussion continued as if nothing had been decided. A motion was adopted to add a comment to the existing rule, but, again, the discussion continued. Eventually, a motion was again made to adopt the majority report and again failed, twice. There was no further attempt to advance the idea of a comment, and the Committee finally determined to table the matter. The Chair forwarded all of the Committee's materials to the Court with her letter of November 9, 2012, advising it that the Committee had worked hard on the question and had those materials to offer to the Court for its own consideration of pretexting.

Downey noted that interest in pretexting comes from other lawyers in addition to those engaged in law enforcement, including lawyers in the patent-and-trademark bar. Attention has also focused on the *Pautler* decision.[13] Eight to ten other states have considered the matter, he said, as is reflected in the materials that have been provided to the Committee.

Now Downey turned to why the matter was again before the Committee. As reflected in the minutes of the Committee's forty-sixth meeting, on February 24, 2017, a news story had incorrectly stated that a complaint had been made to this Committee and had led to the shutting down of a child-sex offender Internet investigation unit within the office of the Jefferson County District Attorney, to which story the Chair had responded to obtain a correction. The materials provided to the Committee for this meeting contain further details regarding that matter, including the original proceeding petition filed in the Colorado Supreme Court by Colorado Attorney General Cynthia Coffman, in which she recounted that the determination of the Office of Attorney Regulation Counsel to investigate the Internet investigation unit — upon the allegation of a criminal defense lawyer that the undercover conduct of the unit violated Rule 8.4(c) — and the OARC's determination to dismiss its investigation of the matter only if the Internet investigation unit were itself disbanded within the District Attorney's office, had in fact led to that disbanding. The Supreme Court denied Attorney General Coffman's petition but has proposed its own rule on the matter and has invited public comment on the proposal. The Court's proposal draws on the prior work of this Committee that Downey has recounted and would add an exception to Rule 8.4(c) reading as follows: "except that a lawyer may advise, direct, or supervise others, including client, law enforcement officers, or investigators, who participate in lawful investigative activities." A member noted that this is the text of the exception proposed by the subcommittee's majority in 2012. The Court has scheduled a hearing on its proposal for September 14, 2017.[14]

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13. In In re Pautler, 47 P.3d 1175 (Colo. 2002), as the case headnote explains,

> The Supreme Court, Kourlis, J., held that: (1) no imminent public harm exception existed to the ethical principle that a lawyer may not engage in deceptive conduct; (2) attorney violated the professional conduct rule that provided that, in dealing on behalf of a client with a person not represented by counsel, the attorney was required to state he was representing a client and could not state or imply that the attorney was disinterested; and (3) suspension for three months, which was stayed during twelve months of probation during which the attorney was to take ethics courses and retake the professional responsibility examination, was reasonable.

—*Secretary*

14. Following that hearing, the Court did amend Rule 8.4(c) by adding the proposed exception, so that the provision reads as follows:

> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation***, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities***;

—*Secretary*

Downey concluded his presentation by saying that the Committee could choose to do something or nothing in response to the Court's own proposed amendment to Rule 8.4(c). The Committee's goal, he noted, had always been to develop rules of professional conduct that provide clear guidance to the organized bar. In his view, if the Committee was concerned about these matters after the *Pautler* case, it should be even more concerned now following the commencement of an OARC investigation that led to the disbanding of the Jefferson County District Attorney's child-sex offender Internet investigation unit.

The Chair asked if someone would care to summarize the arguments for and against modification of Rule 8.4(c) to deal with pretexting. Downey did so, as follows:

1. As set forth in the supplemental report provided to the Committee for its thirty-second meeting, on July 13, 2012, the subcommittee first developed "very cumbersome" text that tried to limit the exceptions to Rule 8.4(c) to "investigatory activities," avoiding listing specific permitted actions — such as "advise," "direct," or "supervise" — while recognizing that even under the Supreme Court's view, as enunciated in *Pautler*, a lawyer cannot directly participate in pretexting conduct. And that iteration of the subcommittee's proposed text required that the conduct otherwise be "lawful." But, as that effort proceeded, the subcommittee recognized that the addition of detail caused more problems than it could solve. Ultimately, a majority of the subcommittee sought simpler language that would permit a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."

2. The subcommittee's minority advocated two alternatives. The first would limit the exception to government lawyers in law enforcement activities. The second would make no change to the current rule.

3. Downey noted that some of the government lawyers who participated in the subcommittee's deliberations were not opposed to text that would permit pretexting by non-governmental lawyers in other than law enforcement contexts. The government lawyers were more interested in "the whys and wherefores" than in constricting the exception to their arenas.

4. Remarking that he could not effectively summarize eighteen months of work on the matter, Downey said the subcommittee had striven to provide guidance, recognizing that guidance is needed. He added that many members of the Committee have colleagues who have engaged the services of private investigators, often not knowing what the investigators were doing in the course of their engagement. The lawyer is principally interested in results, not methods. The subcommittee thought that an amendment to Rule 8.4(c) permitting pretexting conduct under the lawyer's "advice, direction, or supervision" would assure that the lawyer could oversee the investigator's conduct without violating the rules of professional conduct.

A member directed the Committee' attention to Rule 5.3, which establishes a lawyer's supervisory obligations with respect to "nonlawyers employed or retained by or associated with" the lawyer. Under that rule, the lawyer must make "reasonable efforts . . . [to have] in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." Thus, the member thought, the pretexting issue also implicates Rule 5.3, which requires the conduct to be "compatible" with the lawyer's own professional obligations. When pressed by another member, the

member who referred to Rule 5.3 said he was merely noting its relevance to pretexting by persons engaged by lawyers, and he declined to analyze its implications.

A member noted that the lawyer in *Pautler* had himself engaged directly in the conduct at issue; he had not been supervising another person in that person's own conduct. The member noted that the distinction between actors is important to the distinctions being created by the exception that would be added to Rule 8.4(c); and she asked Coyle whether, under the current version of the provision, containing no exception, a client — as distinguished from the client's lawyer — could engage an investigator to do pretexting to investigate suspected trademark infringement. Coyle replied that, under the current text, his office does make that distinction. The office does not offer opinions on what scope there is for such an engagement, but it carefully parses the words of the provision when considering actual cases before it.

A member asked Coyle whether Rule 5.3 would need to be amended if Rule 8.4(c) were amended to add an exception as the Committee was discussing. Coyle replied that an alternative to amendment of Rule 8.4(c) might be amendment of Rule 5.3. He noted that the latter rule establishes three categories of lawyers vis-à-vis "nonlawyers employed or retained or associated with a lawyer": first, each lawyer having "managerial authority" comparable to a partner in a law firm; second, the lawyer having "direct supervisory authority" over the nonlawyer actor; and third, any lawyer who is "responsible" for the conduct of the nonlawyer actor whose conduct "would be a violation of the Rules of Professional Conduct if engaged in by a lawyer" under either of the circumstances detailed in subparagraphs 5.3(c)(1) or 5.3(c)(2). For each category, the focus is essentially on conduct that could not be engaged in directly by a lawyer but is conduct by nonlawyer actors who are in some manner under the control of the lawyer. If the person engaging the nonlawyer actor is himself or herself not a lawyer, Rule 5.3 is not implicated.

To that point, another member asked whether a law enforcement officer — such as an agent of the Federal Bureau of Investigation — who is a lawyer can engage in pretexting conduct in the same circumstances as a compatriot who is not a lawyer is engaged in that conduct. Downey replied that, in such a case, the lawyer-agent would be personally taking direct action and is precluded, by current Rule 8.4(c), from doing so because of the mere status of being a lawyer. Another member put it this way: the lawyer-agent could take the same action as the compatriot — but at risk to his or her law license. The member who had asked the original question then asked whether the rule that leads to those answers makes sense.

Another member responded that there should be a difference when the lawyer-agent is acting "like an FBI agent" and is only incidentally a lawyer. She said the distinction has come up often in the wake of *Pautler* and is difficult to address.

A member asked whether members of the Attorney General's staff are classified as "law enforcement officers" and was told by another member that they are so classified.

Member Frederick Yarger, who is the Colorado Solicitor General, explained the concerns of the Office of the Attorney General as follows: A lot of what lawyers within that office do is "partner" with Federal and local law enforcement officers, and those relationships could be considered to be supervision of those officers within the meaning of the proscriptions of the current rules. Even if there were recognized divisions between lawyers as lawyers and lawyers and others who are law enforcement officers, there would still be that overlap of conduct and supervision. Government lawyers must work closely with undercover agents, and that relationship was part of what motivated the Attorney General to commence her original proceeding in the Supreme Court following the commencement of the OARC investigation of the Jefferson County District Attorney's Internet investigation unit — although, he added, there was also concern about investigative activities carried on under the auspices of members

of the Attorney General's own staff. While Yarger thought that amendment of Rule 5.3 might provide some relief, there would still be concern about the proscription of Rule 8.4(c). He added that other states have taken action on these matters in the five years that have elapsed since the pretexting subcommittee concluded its work.

A member expressed her view that, if a change were to be made, it should be made to Rule 8.4(c), for she was of the belief that lawyers must be able to direct the lawful conduct of others. With permission within Rule 8.4(c) for a lawyer to direct the lawful conduct of others, benefits would ensue from the fact of that direction and the resulting lawyer oversight of the conduct. She referred to Colorado's legalization of marijuana usage that remains unlawful under Federal law, and suggested that a distinction between direct lawyer conduct and conduct by the lawyer's client can be found in the addition of Comment [14] to Rule 1.2 to provide that a lawyer may counsel and may even "assist" a client "in conduct that the lawyer reasonably believes is permitted by" Colorado law with respect to cannabis. Again, she stated, lawyers should be able to supervise the lawful activity of others, and, if that principle is to be contained in the Rules, it should be by amendment of Rule 8.4(c).

Another member said she had been on the side of the minority when this matter was last considered by the Committee in 2012 but now felt that was wrong. She agreed that guidance needs to be given to lawyers as to pretexting. She had previously been worried about "slippery slopes" but now thought the Committee needed to tackle the problem. Further, the contemplated permission in Rule 8.4(c) for pretexting should be extended to private lawyers in addition to government lawyers. Perhaps there should be a correlative amendment to Rule 5.3, but, if so, that should be done with care.

A member pointed out that Rule 5.3 is not limited to government lawyers, and that the rule covers not only employment and retainer relationships between lawyers and nonlawyers but also lawyers' "associations" with nonlawyers. Accordingly, that rule does not distinguish between in-house and other relationships; it does not apply just to a nonlawyer working within a law office. And, he added, under Rule 8.4(c), the lawyer cannot do indirectly what is not permitted as direct action. In short, a change in one or both of the rules is needed "to accommodate reality." The member recalled that former Denver District Attorney Dale Tooley had conducted an investigation of people bilking senior citizens regarding repair of their furnaces. Tooley engaged people to act as if they owned a house, to sign up for furnace inspections, and to arrest those "inspectors" who tried to bilk them. The member recalled other such undercover investigations over the years, both civil and criminal, and gave as another example the sale of football jerseys in violation of a team's property rights in its team name. He concluded that, in reality, these kinds of investigations are necessary and are in fact conducted; the Rules need to be changed to reflect that reality. Without a proposal for amendment, the Committee seems to be is saying it is not in favor of any deception, even when appropriate; he concluded his remarks by saying, "See *Pautler.*"

A member expressed thanks for the coverage in the Committee's minutes of the prior discussions about pretexting, as they would make the comments he was about to make "more palatable." He said he "wanted to get all the bad people out of there . . .," and when he reads novels he wanted the hero to beat the [dickens] out of the bad guys. But he worried that lawyers would misuse an exception that permitted pretexting. What does the proposed phrase "lawful activities" mean? The current Federal administration would apparently countenance torture to extract confessions. Is this good? A lot of the people advocating that approach may themselves be lawyers; would they be exempted from the general proscriptions of Rule 8.4 by such an exception as was being discussed? If the text permits a lawyer to supervise nonlawyers in "lawful activities," what is the scope of that exception? Referring to *Pautler*, he wondered where the line would be drawn.

He understood the position of the member who had referred to the Tooley investigations but asked for a single example of a lawyer who has been prosecuted for the conduct the Committee was now

considering to permit. He did not know of any. If the proscription of the Rule were opened up, where would the line be drawn? He noted that he had, himself, defended lawyers who "have had a lot of trouble with Rule 8.4" in the disciplinary process. From that perspective of defense counsel, of course, he would welcome the proposed amendment to Rule 8.4(c). But he worried about the scope of "lawful activities." He characterized himself as of the old school: "You are either honest or you are not." He could not conclude that the proposal was for the public good.

Another member joined in opposition to the proposal. There is, it appears, no limit on the extent of the exception. The existence of the exception would make other rules harder to enforce. In his experience, he frequently saw lawyers misrepresent things to judges, saying such things as "We need a witness who cannot be present today, and therefore we need a delay." If the Rules were amended in any regard to give allowance to misrepresentation or to permit lawyers to be associated with unlawful activities, the Rules would be compromised. It was already his impression that the regulatory process is having a hard time keeping the lid on these kinds of conduct.

A member said he had two observations to make. First, it was his recollection that the phrase "lawful investigative activities" was offered as an attempt to incorporate criminal law principles as a limiting factor. Even undercover investigators are prohibited by the criminal law from entrapment. His personal view would be to align with the previous observations that, since lawyers may not engage in dishonest conduct, they should be precluded from directing others to do dishonest things.

A member asked where the Committee was headed. Bad facts make bad law. In *Pautler*, the member noted, the responding lawyer was, at the time he deceived a murder suspect in order to encourage his surrender, Chief Deputy District Attorney in the same office in which Tooley had once been the District Attorney, and there are some who still see Pautler as a martyr in the disciplinary action against him. The member could envision a lawyer inappropriately instructing a client to get, on a tape recorder, his wife denying a fact, but the member would have difficulty if the exception were only extended to government lawyers. What, she asked the Chair, was the Committee being asked to do this day?

To that, the Chair said she wanted to ascertain whether the Committee's views had changed since its last deliberations in 2012.

In response to the Chair's question, a member replied that, if an exception were added to Rule 8.4(c), a good deal of work would need to be done to develop a comment to explain the purpose and scope of the exception.

The Chair added that, if the Committee had a real turnaround of view, it would be helpful to the Court to hear that; she knew that the Court listens to the Committee's views about the Rules. So, again she said, the point of raising this matter again was to ascertain whether there had been a change in the Committee's view from the earlier one that it would make no recommendation to the Court for any change regarding pretexting.

A member noted that the subcommittee had ascertained, in 2012, that Oregon had revised Rule 8.4 but used different language[15] — referring to covert investigations. That led the member to suggest

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15. The equivalent to Rule 8.4(c) in the Oregon Rules of Professional Conduct reads as follows:

> (a) It is professional misconduct for a lawyer to: . . .
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

that the Committee might aid the Court by looking to see what other jurisdictions might have done in this regard since the Committee's 2012 considerations.

The Chair agreed with that suggestion, saying she had herself been thinking about updating the Committee's summary of what the law was. Rothrock, who had provided the subcommittee and full Committee with a chart outlining relevant authority in other jurisdictions, offered to update that chart for the Supreme Court's benefit. Yarger noted that the Attorney General's Office also intended to provide the Court with information regarding other jurisdictions' approaches to lawyer involvement in pretexting.

Following a twenty minute break, the Chair asked whether the members thought there should be another Committee meeting in August to give further consideration to the matter before the Court's hearing in September.

To that question, a member responded that there had been a great deal of Committee time expended on the matter five years ago; she would not want to now tell the Court simply that the Committee's views had not changed since then. But, to say more than that would take a good deal of additional Committee time, not now available before the Court's September hearing. Accordingly, this member would encourage individual Committee members to make their views known to the Court directly, but she did not think the Committee itself should expend further effort.

The Chair responded by noting that the subcommittee had previously done a great deal of work — such as looking at the question a member had raised earlier about the meaning of the phrase "lawful activity" — but, as the process developed, the subcommittee's specific work was not carried forward and presented to the Court in the Committee's report to the Court. She did not know how that material could be provided to the Court in the time remaining before the September hearing.

A member spoke to agree with the proposal that members make their own individual comments to the Court if they cared to do so. But the Committee had not previously been able to reach a consensus about proper rule text regarding pretexting, and he thought it was wishful thinking to think it would be different by September. But many members had thought carefully about this and should express their views to the Court directly.

Downey, the subcommittee's chair, said he agreed with the views previous expressed that individual members should speak directly to the Court if they cared to do so. The Committee could spend more time revisiting the matter, but it was unlikely to find consensus. The Committee could advise the Court that it gave the matter further thought after a five-year hiatus and still could not reach a consensus — that this meeting revealed continued fractiousness that will not be resolved.

Downey added that reference has been made to a "good faith" standard, but he felt that lawyers should know what is "lawful activity" and should not be able to rely on a "good faith" hedge. Yes, it would be difficult to give "lawful activity" precise content; the effort to do so could go on for a long time. Noting that Iowa has used the phrase "lawful covert activity," Downey said the Committee could ask the Court itself to address the meaning of such a term if it chose to use it. But these are very difficult issues, especially when the discussion gets into the weeds of FBI agents who are themselves lawyers — it is difficult to accommodate the principle that lawyers are always lawyers even when they are acting in other roles in parallel with nonlawyer colleagues.

—Secretary

Downey summarized his view by noting that the Committee is full of talented lawyers. If the subcommittee were to meet again, it would be a step back to 2011.

Another member spoke to agree with the idea of members giving their individual comments to the Court; but she said that, if the Court were to adopt an amendment to Rule 8.4(c), the Committee should be prepared to then offer additional commentary, such as to clarify that lawyers cannot directly participate in pretexting. She added that the meaning of "lawful activity" might change over time — and she added that she did not think a comma should follow the word "investigators" in the text that we have been considering.

A member noted the inappropriateness of a rule the effect of which would be to deny a police officer legal guidance to ensure that his undercover activities were lawful. At a minimum, the officer is entitled to a lawyer's advice — that's a "no-brainer." This member said he might write a comment to the Court that dealt with the meanings of the words "advise," "direct," and"supervise." In his view, the latter two words overwhelm the more limited term "advise."

Another member agreed with that observation and added that he was concerned about the vagueness in the phrase "who participate in law enforcement activities." Those words will concern lawyers who try to ascertain their application to civil pretexting. He would prefer something like "who participate in the investigation of potentially unlawful activities." At another member's question about whether the provision should be limited to government lawyers, he said no, that he was thinking of the application of the provision to a civilian lawyer dealing with fair housing issues. The alternative he offered would more clearly permit that kind of involvement between lawyer and nonlawyer investigator. Yet another member asked about the example of an investigation into trademark infringement; he replied that his alternative would encompass and permit that.

To that conversation, another member asked about the application of the exception to divorces. The member replied that a limitation of the exception to investigation of "unlawful activities" would work to provide a proper barrier against inappropriate extension of the exception.

The Chair asked, accepting that this Committee could not come to a consensus on this matter, was there any appetite for a comment to the Court such as Downey had suggested — asking the Court itself to address the meaning of the phrase "lawful activities" if it chose to use it — but with the additional message that, if the Court chose to add an exception to Rule 8.4(c), the Committee would welcome the opportunity to develop an appropriate comment about the exception. Some nodded their heads in concurrence; a member suggested there was no need to make such an offer, as the liaison justices who were present at this meeting — Justice Coats and Justice Márquez — had heard the discussion and were well aware that the Court might request the Committee to work on a comment to go with any exception the Court might choose to add to the rule. To that, another member pointed out that there remained the question of whether the Committee itself thought any exception should be accompanied by an explanatory comment.

To that discussion, Downey expressed his concern that development of a comment could lead the Committee to make radical changes to text the subcommittee had carefully considered earlier. He felt that the Committee remained a long way away from consensus and said it would be strange for the Committee to tell the Court it would be glad to help with a comment when it in fact remained deeply divided even over the text.

A member commented that the Jefferson County District Attorney's office, as well as Attorney General Coffman's Department of Law, had changed the way they operate as a result of the Court's dismissal of Coffman's original proceeding. A big change had occurred in Colorado law enforcement

as a result of the OARC action that had led to Coffman's original proceeding petition. This member understood why the Court was moving quickly to deal with the questions that had been raised.

A member said that, in her view, if the exception were added without appropriate comment, it would be too broad; it would, thus, be useful for the Committee to consider, on its own initiative, what the text of such a comment should be after the exception were added without a comment.

A member formally moved that the Committee advise the Court that it had carefully considered the pretexting issue in 2011 and 2012 and had previously provided to the Court the analysis that was developed at that time; that the Committee again considered the matter at its June 16, 2017 meeting and found that it could not provide additional substantive value to the Court's consideration of the matter; and that, if the Court were to adopt an amendment to add an exception to Rule 8.4(c), the Committee would then deliberate on whether it should propose to the Court a comment to give lawyers guidance about the application of the exception added by the Court's amendment to the rule text.

To that motion, a member asked whether it would be appropriate to add the possibility that the Committee would also consider "reconciliation" of the exception, as added to Rule 8.4(c), with other rules. The movant agreed to that addition.

A member stated his agreement with the movant's position that it was not necessary to add to the motion the instruction that a specific statement be made to the Court of the Committee's continuing division.

The members discussed further the prospect of a comment to accompany an addition of a pretexting exception to the rule's text. The movant was of the opinion that the Court would, on its own volition, provide a comment as it amended the text; in his view, there would be sufficient ambiguity in the amended rule text to justify a comment, as well as coordination of the added exception with other rules. Another member observed that the subcommittee must have considered commentary during its 2011—2012 deliberations; he was not presently in a position to say whether a comment was needed or not or should be recommended to the Court or not. Yet another member asked why the pending motion even needed to refer to a comment; in his view, the writ of the Committee would permit it to propose a comment later, after the Court acted to amend the rule text, if the Court did not itself provide a comment and the Committee then felt a comment would be useful.

A member pointed out that the subcommittee had proposed commentary regarding the "covert activity" about which its rule text would have permitted a lawyer to give advice, direction, or supervision; the subcommittee's proposal for commentary could be found beginning at page 113 of the packet of materials provided to the Committee for its forty-sixth meeting, on February 24, 2017. But, the member noted, the Committee had spent no time parsing that proposed commentary.

A member observed that, back in 2012 but on its own, the Committee had not been able to come to decisions. Now, the Court has itself proposed a rule, and the Committee could deal with that and propose commentary to accompany it.

The secretary was asked to read the motion and did so, as follows:

> The Chair is directed to advise the Court that the Committee had, in 2011 and 2012, carefully considered the addition of an exception to Rule 8.4(c) to permit lawyers to advise, direct, or supervise nonlawyers in their lawful but covert activities; and that it had previously provided the Court with documentation reflecting the Committee's analyses from that time. The Chair shall advise the Court that, at the Committee's forty-seventh meeting, on June 16, 2017, it had discussed the proposal that the Court has now made in this regard but does not

> believe that it can add more to the Court's deliberation than what it had previously provided. And the Chair should suggest to the Court that, if it does amend the rule to provide an exception, it should consider the addition of commentary to Rule 8.4 to give guidance to lawyers in the application of the exception.

The motion was adopted.

VIII. *Postponement of Consideration of Housekeeping Amendments to Rule 5.4(d) and (e).*

Given that there were but twenty minutes left in the meeting, the Chair announced that she would postpone consideration of the housekeeping amendments proposed by Rothrock to be made to paragraphs (d) and (e) of Rule 5.4, which were set forth beginning at page 186 of the packet of materials she had provided for the meeting.

IX. *Other Agenda Items.*

The meeting agenda had listed as new business the consideration of amendments to the Rules to require lawyers to have engagement agreements, expanding the simple requirement now found in Rule 1.5(b) that, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." Member Anthony van Westrum reported that he and member David Little, who have undertaken this matter, were not prepared to report to the Committee about it at this meeting.

The Chair said she would also postpone consideration of Item 6.e on the meeting agenda, regarding a reallocation of responsibility for the contingent fee rules — Chapter 23.3, C.R.C.P. — from the Court's Civil Rules Committee to this Committee on the Rules of Professional Conduct.

Item 6.f of the agenda called for consideration of an amendment to the rules governing the advertising of personal-injury legal services that has been put before the American Bar Association Professional Responsibility Committee by Virginia Congressman Robert Goodlatte.[16] James Coyle reported to the Committee that the consensus among state bar counsel was that the matter should first be left to the American Bar Association for development of a national response before individual states considered changes to their rules of professional conduct. On a member's motion, the Committee agreed to delay any consideration of the matter by the Committee until the ABA had responded.

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16. The news service Reuters reported on the proposal on March 19, 2017, at http://www.reuters.com/article/us-otc-masstorts/house-judiciary-committee-targets-lawyer-ads-mass-torts-marketing-idUSKBN16K2JM, as follows:

> In the midst of a week in which the House of Representatives passed a series of bills to curtail class actions and mass torts litigation, Rep. Goodlatte issued a press release signaling his next target: lawyer advertising and marketing for personal injury clients. The Judiciary chairman sent letters to the American Bar Association and the bar associations of all 50 states and the District of Columbia, urging them to require all legal advertisements to include a disclaimer advising patients to consult a doctor before discontinuing their use of supposedly dangerous medication. Goodlatte cited a resolution adopted last June by the American Medical Association, which said patient care is jeopardized by ads from personal injury lawyers prowling for clients. "The legal profession, which prides itself on the ability to self-regulate, should consider immediately adopting common sense reforms," the Goodlatte letter said.

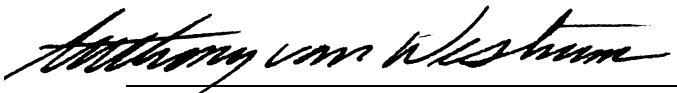
—Secretary

X. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 a.m., without a date for the next meeting. The Chair advised that she would schedule a meeting to follow the expected action by the Court on the proposed Rule 8.4(c) amendment following its hearing on September 14, 2017, but she would poll the members to determine availability for such a meeting.

[After the meeting's adjournment, the Chair scheduled the next, forty-eighth meeting, of the Committee for Friday, October 27, 2017, beginning at 9:00 a.m., in the Supreme Court Conference Room.]

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its forty-eighth meeting, on October 27, 2017.]