COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 13, 2012
(Thirty-Second Meeting of the Full Committee)

The thirty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at about 9:00 a.m. on Friday, July 13, 2012, by Chair Marcy G. Glenn. The meeting was held in the offices of Holland & Hart LLP at 555 Seventeenth Street in Denver, Colorado

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

Also present, as guests of the Committee, were Ellen Dole, Regional Counsel for Region VIII (Denver) of the United States Department of Housing and Urban Development; Matthew T. Kirsch, of the Office of the United States Attorney for the District of Colorado; Zach Mountain, of the United States Department of Housing and Urban Development; Raymond P. Moore, Federal Public Defender for the Districts of Colorado and Wyoming,; Amanda Rocque, of the Office of the United States Attorney for the District of Colorado; Adam L. Scoville, of RE/MAX, LLC; John F. Walsh III, United States Attorney for the District of Colorado; and Jan M. Zavislan, Colorado Deputy Attorney General.

I. *Meeting Materials; Minutes of January 6, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-first meeting of the Committee, held on January 6, 2012. Those minutes were approved as submitted.

II. *Adoption of Rules Amendments.*

Justice Coats advised the Committee that the Supreme Court had adopted, effective July 11, 2012, the following changes to the Colorado Rules of Professional Conduct, changes that the Committee had previously proposed to the Court:

A. Amendment to Comment [1] to Rule 1.12, Former Judge, Arbitrator, Mediator or Other Third-Party Neutral[1]—

> [1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter

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1. *See* the minutes of the committee on January 21, 2011 (twenty-ninth meeting of the Full Committee).

pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. ***Paragraph III(b)*** ~~**Paragraphs C(2), D(2) and E(2)**~~ of the Application Section of the ~~**Model**~~ ***Colorado*** Code of Judicial Conduct ~~**provide**~~ ***provides*** that ***a*** ~~**part-time judge, judge pro tempore or retired judge recalled to active service,**~~ ***part-time judge*** "shall not act as a lawyer in ~~**any**~~ ***a*** proceeding in which ~~**he**~~ ***the judge has*** served as a judge or in any other proceeding related thereto." ~~**Canon 3(C)(1)(b)**~~ ***Rule 2.11(a)(5)(a)*** of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or ~~**a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter**~~ ***the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association.*** Although phrased differently from this Rule, those Rules correspond in meaning.

B. Amendment to Rule 3.5(b), Impartiality and Decorum of the Tribunal[2]—

A lawyer shall not:

(a) . . .

(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. Amendment to Comment [2] to Rule 3.5, Impartiality and Decorum of the Tribunal[3]—

[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**~~***, 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)(l) 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)(l). 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***

2. *See* the minutes of the Committee on January 6, 2012 (thirty-first meeting of the Full Committee).

3. *See* the minutes of the Committee on January 6, 2012 (thirty-first meeting of the Full Committee).

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)(l) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

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

The Chair then asked Thomas Downey to lead the Committee in a resumption of its discussion of "pretexting"[4] and its consideration of the supplemental report of the pretexting subcommittee, which Downey chaired, that had been provided to the members in the materials for the meeting.

Downey began by noting that, at its thirty-first meeting, on January 6, 2012, the Committee had considered an initial written report from the pretexting subcommittee about the application of the Colorado Rules of Professional Conduct, in particular Rule 8.4(c), to lawyer involvement with undercover investigations, pretexting in the course of trademark enforcement, and the like. At the January meeting, the Committee had also heard Adam L. Scoville, of RE/MAX, LLC, and Matthew T. Kirsch, of the Office of the United States Attorney for the District of Colorado, and Committee member Alexander Rothrock had provided a summary of activity in other states that have considered the issues. Downey pointed out that Attachment B to the subcommittee's supplemental report updates the state survey to which Rothrock had referred at the January 6, 2012 meeting.

Downey noted that, at the January 6, 2012 meeting, the Committee had directed the subcommittee to obtain more input into the pretexting matter from interested constituencies, such as the criminal defense bar and lawyers engaged in other affected practice areas. He reported that the subcommittee did that in the months following the January meeting and that Attachment A to the supplemental report includes all of the written comment that the subcommittee had received since the January meeting in response to its solicitation of comments. He said that the subcommittee had solicited comments from both the Colorado Trial Lawyers Association and the Colorado Defense Lawyers Association but that neither of those groups had responded. Following the January meeting, the subcommittee met nearly monthly to deal with the input it had received from others, meetings that Downey characterized as "spirited" and that led to the supplemental report that the subcommittee has now submitted to the full Committee.

Downey reported that, as the supplemental report shows, a majority of the subcommittee supports a revision of Rule 8.4(c) that is simpler than the proposal that the full Committee had considered at its January 6, 2012 meeting. The supplemental report also contains a minority proposal, which Judge Polidori would explain to the Committee following a discussion of the majority proposal. He pointed the Committee to Part III of the supplemental report for a detailed discussion of the revised proposal, made by the majority of the subcommittee, for amendment to Rule 8.4(c), which proposal reads as follows:

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4. The Committee's consideration of pretexting began at its twenty-ninth meeting, on January 21, 2011, (*see* Part V of the minutes of that meeting) and continued at both its thirtieth meeting, on May 6, 2011, (*see* Part V of the minutes of that meeting) and its thirty-first meeting, on January 6, 2012, (*see* Part IV of the minutes of that meeting).

> It is professional misconduct for a lawyer to:
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> . . .
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> (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***;

Part I of the supplemental report, he said, provides a summary of the issue and of the subcommittee's activities following the January 6, 2012 meeting, explains that there is a minority report (which is set forth in Part V), and lists the additional stakeholders from whom the subcommittee received input. Part II reviews that input, and Part IV provides the majority's conclusory remarks.

Noting that the subcommittee had labored long and hard, Downey thanked all of the subcommittee participants for their service, singling out Judge John Webb and Adam Scoville for their drafting of the supplemental report.

Downey concluded his opening remarks by noting that several avenues were open to the Committee, including (1) adoption of the proposal submitted by the majority of the subcommittee, (2) adoption of the first proposal of the minority to extend a Rule 8.4(c) exception only to lawyers representing the government, (3) embarkation on a new direction of the Committee's own selection, or (4) adoption of the alternative proposal of the minority to propose no change to Rule 8.4(c), a course the minority assures would *not* permit the drawing of any inference that the Committee would thereby have endorsed the broadest possible interpretation of the *Pautler* case.[5]

Downey then laid down what he characterized as important preliminary considerations in the development of any exception to Rule 8.4(c). First, there is the broad language of Rule 8.4(c) itself. Then, in Colorado, there is the broad *Pautler* opinion, in which the Court discussed cases arising in other jurisdictions under other circumstances but in which the focus was on direct action taken by the lawyer under scrutiny in that case, not on indirect conduct involving the giving of advice to or direction or supervision of others.

Downey added that there are times when one feels one is "slugging through at a snail's pace" and other times when one finds moments of clarity; the subcommittee, he said, has had both experiences. He pointed to the Preamble and Scope of the Rules; the Preamble, he noted, speaks about the varying roles of the lawyer. Included in those roles, in representing clients, are the roles of advisor — "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications" — and evaluator — "As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others." These observations were relevant to the subcommittee's consideration of pretexting. And the subcommittee recognized that the lawyer must always comply with the law; its proposal countenances only *lawful* investigations. Downey pointed out that the Scope identifies its mandatory rules — those expressed in words such as "shall" — as "[defining] proper conduct for purposes of professional discipline."

So, Downey summarized, the subcommittee looked at the breadth of Rule 8.4(c) and *Pautler* and perceived a need to provide additional guidance to lawyers with respect to pretexting.

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5. *See* the discussion of In re Pautler, 47 P.3d 1175 (Colo. 2002) in the minutes of the thirty-first meeting of the Committee, on January 6, 2012; *and see* n. 25 to these minutes for the minority's discussion of the implications of no action.

Downey added that lawyers are entitled to rules that provide clear guidance for their conduct. Private investigators and others engaged in investigations in the course of law enforcement and the protection of private rights under the law sometimes engage in dishonesty or deceit. Lawyers are entitled to know whether, under the Rules, they may provide advice and guidance to those persons as they engage in those activities.

Downey said that the majority of the subcommittee believes that the conduct its proposal would sanction is not really within the proscriptions of Rule 8.4(c), because the conduct does not involve the direct action by lawyers of the kinds that have been the subject of actual disciplinary cases prosecuted under the rule. The majority also believes that allowing lawyers to give advice to clients and investigators will actually lead to the lawyers being more accountable for the conduct of the investigators whose services they engage; at present, with the uncertainty surrounding the application of Rule 8.4(c) to investigations, many lawyers choose not to know what their investigators are actually doing in the field. That is not, he said, a good effect of Rule 8.4(c) as currently written.

Downey outlined the boundaries of the exception that the majority of the subcommittee has proposed: The conduct covered by the exception — advice, direction, or supervision — must be in the context of lawful investigative activities; the exception has no application in any other context. But the words "lawful investigative activities" are, he said, fairly broad, intentionally so. The lawyer's role is limited to advice, direction, or supervision of others, the exception does not permit the lawyer to participate directly in deceptive investigative activities.

Downey again alluded to the concern that, in light of Rule 8.4(c) and *Pautler*, lawyers have distanced themselves from the actual investigations others engage in in the course of their cases; that, he said, is not a good result of the present state of the rule and case law.

The boundary limiting the exception to "lawful" activities will be determined on a case-by-case basis — and the lawyer will be required to know the law applicable to that determination. Unlike the subcommittee's initial proposal, the exception does not contain concepts of "good faith" or "reasonable belief."[6]

Downey pointed the Committee to page 16 of the subcommittee's supplemental report, on which begins a section in which the majority responded to a number of comments that the subcommittee had received in the course of its work. In that section, the majority considered whether there was really a need for the exception; and Downey referred to the comments of Colorado Attorney General John Suthers, the two letters submitted by United States Attorney John Walsh, and comments from intellectual property rights lawyers that identify such a need. In that section of the supplemental report, the majority also considered the matter of a Colorado divergence from the model text of the American Bar Association's Rules of Professional Conduct. He recalled the "rebuttable presumption" of uniformity that the Standing Committee had adopted in the course of its review and modification of the model text in developing its proposal for the revised Colorado Rules of Professional Conduct that the Court adopted effective January 1, 2008, but he noted that the Committee has recommended and the Court has adopted non-uniform changes in a number of rules.

Downey noted that the proposal does not turn on the lawyer's intent. As explained on page 23 of the supplemental report, "the proposed exception, covering only the lawyer's advice, direction, or supervision of 'lawful investigative activities,' no longer hinges on the intent of the lawyer." Footnote 11 of the supplemental report on that page amplifies the point as follows:

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6. *See* Part IV, at p 5, of the minutes of the Committee's thirty-first meeting, on January 6, 2012, for the text initially proposed by the subcommittee.

> It is worth noting, however, that it would have been inaccurate to characterize even the original proposal as containing "a subjective 'good faith' standard for the lawyer's belief that his/her actions were lawful and in compliance with the exceptions noted in the amendments" . . . . The original proposal required that the lawyer "reasonably and in good faith believes" that the action was within the scope of the scope of the lawyer's law enforcement duties (government), or that the law had been violated and the activity would aid the investigation (private), requiring a belief that is at once objective and subjective. . . . To the extent that the original proposal was overly nuanced concerning intent, the current proposal in any event avoids this concern.

Downey explained that the majority's proposal extends the exception to all lawyers; it is not limited in scope to law enforcement matters and to prosecutors.

And Downey explained that, because there is no conflict between the majority's proposal and Rule 4.2 — the exception does not permit direct action by a lawyer and thus cannot lead to a lawyer's "[communication] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" as is prohibited by Rule 4.2 — there is no need to state that amended Rule 8.4(c) provides an exception to Rule 4.2.

Downey then asked Judge Polidori to explain the minority's positions.

Judge Polidori began by noting that, at the thirty-first meeting of the Committee, on January 6, 2012, she had pointed out that there was not unanimity on the proposal made by the subcommittee at that time; now, she said, the minority has provided its own report to the Committee, which is included in the subcommittee supplemental report beginning at page 31.

Characterizing herself as old-fashioned, Judge Polidori said she became a lawyer because it was an honorable profession. We should, as lawyers, be above the common man; we should not permit dishonest conduct by lawyers even if it is "lawful." Some matters can be lawful but still dishonest, as the minority stresses in its report.[7]

It is hard for her, the judge said, even to allow that a government lawyer may engage in advising, directing, or supervising deceptive conduct by others — which is the first of the two alternative proposals made by the minority — but she recognized that there is caselaw supporting that proposition and referred to Opinion 96 of the Colorado Bar Association Ethics Committee.[8] And, she added, there are constitutional guarantees of individual rights — and the exclusionary principle as a check — applicable to the activities of prosecutors and others in law enforcement, guarantees and checks that are not applicable to conduct by private lawyers.

Accordingly, the first alternative proposed by the minority to the proposal made by the majority was to amend Rule 8.4(c) to read as follows [showing the change to the majority's proposal]:

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7. "Because the legality of private conduct involving fraud, deceit, or misrepresentation could be ascertained from statutes and the common law of torts, the Rule's use of the term 'dishonesty,' which alone is neither the basis of any tort nor an element of any crime, must go further." Minority Report, p. 34 of Pretexting Subcommittee's Supplemental Report.

8. *See* CBA Ethics Committee Ethics Opinion 96, Ex Parte Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, 07/15/94. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/1817/CETH/Ethics-Opinion-96:-Ex-Parte-Communications-with-Represented-Persons-During-Criminal-and-Civil-Regula/.

> It is professional misconduct for a lawyer to:
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> . . .
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> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer ***representing the government*** may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

There is, said Judge Polidori, no caselaw supporting the proposition that private lawyers may engage in "lawful deceit." She sympathized with the stakeholders who lobbied this Committee for exceptions to Rule 8.4(c) — the intellectual property rights lawyers and other business lawyers who are stymied in how to represent their clients. But the majority's proposal would extend the exception to all lawyers, and the judge said she could not imagine what deceits and dishonesties some practitioners might be able to think up in the course of representing their clients. She said she did not intend to imply that lawyers engaged in intellectual property rights practices were of a better caliber than other lawyers practicing in other areas, but she said that so much of what occurs in some other practice areas are "in horrible situations."

Judge Polidori pointed out that the minority's second alternative to the majority's proposal is the proposal that the Committee take no action, make no proposal to the Court to change Rule 8.4(c) or add any comment. She had no preference between the minority's two alternatives.

The judge pointed out that the minority's government-lawyer-only proposal refers to "a lawyer representing the government" rather than to a "governmental lawyer," which was the phrase used in the subcommittee's initial report, considered at the Committee's thirty-first meeting, on January 6, 2012.[9]

Judge Polidori concluded her remarks by saying it is just not appropriate to change a rule for the benefit of a few when the likelihood of abuse of the rule, as changed, is so apparent.

Downey responded to Judge Polidori's comments by saying that the majority, too, recognized that lawyers may engage in misconduct in their various practices. The majority's proposal, he argued, does not permit misconduct; and, he added, similar to the constitutional principles and exclusionary rules applicable to government lawyers, there is a significant check on the conduct of a private practitioner, that check being a nasty letter from the Office of Attorney Regulation Counsel. There are also actual cases in which opposing counsel have obtained court sanctions as a result of investigative misconduct in civil cases.

Downey noted, again, that the Preamble to the Rules of Professional Conduct highlights the lawyer's role as an advisor to his client. Why, he asked, cannot a lawyer advise a client about lawful conduct that the client may engage in, and give that advice without fear of a disciplinary proceeding?

As to the distinction that Judge Polidori noted between a "lawyer representing the government" and a "government lawyer," Downey noted that the majority's proposal applies equally to all lawyers, whether in government service or in private practice. The proposal guides all lawyers; and there is a need, he argued, for such guidance in Rule 8.4(c), guidance as to what a lawyer may do in the role of advisor.

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9. "The phrase 'a lawyer representing the government' avoids potential uncertainty in the phrase 'government lawyer,' which could be interpreted as applying to lawyers who are paid by, but do not represent, the government, such as public defenders, alternative defense counsel, and legal services lawyers." Minority Report, p. 31 of Pretexting Subcommittee's Supplemental Report.

The Chair thanked Downey and Judge Polidori for their presentations and opened the matter for discussion.

Following up on Downey's last comment, a member noted that, while Downey had focused on the lawyer's role as an advisor, the majority's proposal went further and countenanced direction and supervision of investigators as well. Downey agreed with that observation and confirmed the member's subsequent observation that the majority proposal includes only amendment of the text of Rule 8.4(c) without the addition of any comment.

A member asked that the Chair invite the attending guests to speak, and the Chair did so.

Guest Ellen Dole, Regional Counsel for Region VIII of the Department of Housing and Urban Development, spoke first, thanking the Committee for the opportunity to present HUD's views. A major responsibility of her department is to enforce the Federal Fair Housing Act. The Department supports the majority proposal from the subcommittee, which will help in the enforcement of the FHA. The Department's duties include preventing housing discrimination based on race, color, religion, sex, familial status, or national origin. "Testing" is often used by the Department in the course of its enforcement activities; for example, she said that cooperative witnesses, government employees, and contractors are used to test whether they, of a protected class, can obtain rentals on the same terms as those who are not within that protected class. Dole said that, of course, the Department is active nationally, and the testing activity is essential to the enforcement of the law's anti-discrimination provisions. The Tenth Circuit Court of Appeals, she said, has noted the importance of using testers in such enforcement. The majority's proposal for an exception to Rule 8.4(c) will permit the Department's lawyers to supervise investigations without concern about attorney discipline. She noted that a job title for Department lawyers is "attorney advisor," and she appreciated Downey's singling out of the lawyer's role as an advisor that is identified in the Preamble to the Rules of Professional Conduct; if the lawyers within the Department could not freely give advice, they would be hampered in their enforcement efforts. Absent a modification of the rule such as the majority of the subcommittee has proposed, HUD lawyers have to distance themselves from enforcement investigations, so the change would be useful.

Further, Dole said, the Department supports the majority's proposal to extend the exception in Rule 8.4(c) to all lawyers, including those in private practice. Limitation of the exception only to lawyers representing the government would be harmful to the Department, for it often employs lawyers in non-representative roles, such as "grantees of testing." Those persons may not be "lawyers representing the government," but they remain subject to the Rules of Professional Conduct and would not be protected under the minority's proposal that the exception extend only to lawyers representing the government. Second, she said, the Department relies on private fair housing organizations to support its enforcement work; those organizations may employ lawyers who would not be protected by the limited exception proposed by the minority; accordingly, under the minority proposal, the Department would lose their assistance.

A member of the Committee pointed out that what Dole described as enforcement activity at the Department of Housing and Urban Development is also done in other areas of the law, including other areas of civil rights enforcement. So, this member said, the beneficial impact of the proposal would be much broader than just at HUD.

Guest John Walsh, United States Attorney for the District of Colorado, spoke next and began by thanking the Committee, and especially the pretexting subcommittee, for undertaking the pretexting issue; he noted that it is a difficult issue to sort through. But he affirmed Downey's view and said that his office would benefit from very clear guidance in its engagement of investigators for its law enforcement activities. His office has become engaged in this Committee's consideration of the

pretexting issue because of its desire to clarify the application of the Rules of Professional Conduct to conduct that is very lawful and, indeed, is sometimes mandated by guidelines of the Department of Justice that require lawyer review of law enforcement activity that may involve deception. His office supports the majority report, and he seconded the comments of Ellen Dole.

A member asked Walsh whether lawyers in his office have actually faced disciplinary charges or court scrutiny because of their participation in investigations. Walsh responded that he was not aware of any disciplinary action but noted that James Coyle, a Committee member in attendance at the meeting who is Chief Deputy Regulation Counsel, and guest Matthew Kirsch, of Walsh's office, might be able to provide further response to the question. Walsh noted that there is a civil case pending in which a party is seeking dismissal of a Federal Trade Commission action based on this ethical issue.[10] And he stressed that, even though the office has not encountered an actual disciplinary proceeding in this area, the ethical implications of participation in investigatory activity is a common topic of discussion among its lawyers and its ethical counselors frequently receive inquiries about lawyers' conduct in connection with undercover investigations. In the last two years, the Department of Justice has placed a particular emphasis on lawyer review of investigatory activities to assure that the investigations are lawful.

Guest Jan M. Zavislan then introduced himself, stating he was attending on behalf of Colorado Attorney General John Suthers and the entire Colorado Department of Law. He would echo the comments of Ellen Dole and John Walsh; Attorney General Suthers is completely in accord with their position. As Walsh had done, Zavislan noted the pendency of the Federal Trade Commission case[11] and pointed out that the Department's Consumer Protection Section is a co-plaintiff with the FTC in that case. The pertinent allegation in that case is that FTC representatives acted as consumers and, in the course of their activities, made recordings to obtain evidence; defense counsel has sought to exclude the recordings from evidence on the grounds that Rule 8.4(c) was violated. To Zavislan, the perception that everything is actually okay in practice under the current text of Rule 8.4(c) and its application in practice is false: There is a specific challenge, based on Rule 8.4(c), to appropriate undercover activity. The idea that lawyers use evidence obtained by undercover means regularly and without impediment by the rule is just not true; it is not true that lawyers in the Department of Law can engage in this proper conduct without challenge. Proper undercover investigation is, he stressed, not the kind of conduct that Rule 8.4(c) was drafted to prohibit; yet the rule is being used in efforts to exclude evidence that has been properly gathered.

A member stated that he wanted our government vigorously to investigate bad people; but that, he felt, was not the issue that is before the Committee. He commented that he had served six years each on the Committee on Conduct of the United States District Court for the District of Colorado and on the Colorado Supreme Court Grievance Committee and that he had never seen Rule 8.4(c) or its predecessor raised in any of the cases that those panels considered during his tenure. In this member's view, carving out a Rule 8.4(c) exception for special lawyers would be inappropriate, and he felt Judge Polidori had stated the matter well: Lawyers must adhere to the highest standards of conduct; there must be no "wink-wink" to the application of the prohibition against dishonest conduct, no question about where the line might be drawn. This member offered kudos to the subcommittee, which, he noted, has done such a good job serving so many masters. He had, himself, started out thinking that a change or two to Rule 8.4(c) might be helpful, but he now felt that would not be possible and thought, instead, that proposing no change to the rule was the best course for the Committee to take. If the Feds want to pass laws permitting certain conduct, so be it. But he did not want them to come to this Committee and to the Colorado Supreme Court for approval of deceitful conduct, even in the course of lawful investigations.

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10. *See* Federal Trade Commission v. Dalbey, Case № 1:11-CV-01396 RBJ-KLM (D. Colo.).

11. *See* n. 10.

He characterized himself as "old school," noting that he had also opposed collaborative law. He recalled that he had been defeated in his effort to preclude the confidentiality requirements of Rule 1.6 from being preempted by the duty of candor to the court under Rule 3.3, but he admitted he could live with the outcome of that debate.[12] But, he said, he would have a hard time living with the majority's proposal: The exception that the majority proposed to add to Rule 8.4(c) would swallow the prohibitions of Rule 8.4(c). He commented that, as Judge Polidori was concerned about the conduct of lawyers in some practice areas, he, as a mediator and arbitrator, had seen scary conduct by lawyers in the furtherance of their clients' interests.

Another member expressed her complete accord with the comments just made by the other member. It is not, she said, that lawyers in particular practice areas are all "bad"; it is that, if an exception to the proscriptions of Rule 8.4(c) is created, every lawyer will conclude that his or her contemplated conduct falls within the exception. She said that, in her practice, she sees misconduct by opposing counsel but, when she complains to the court about the conduct, she is told that it is not the court's duty to enforce the disciplinary rules and that she must take the matter up with the Office of Attorney Regulation Counsel. Accordingly, the concerns expressed by guest Zavislan were not persuasive to this member.

The member also referred to the comments of guests Zavislan and Walsh to the effect that they have regular conversations within their offices regarding the implications of Rule 8.4(c) on the investigations in which their offices become involved. She understood that the purpose of the rules of professional conduct are to provide guidance. There is no black and white understanding of every possible scenario out there and whether it's within the rules. Therefore, she said, if Rule 8.4(c) is prompting dialogue and critical analysis prior to action, then it is working as it should.

But this member had a particular objection to the minority position that any exception should be extended only to lawyers representing the government: That, she felt, was troublesome; the addition of exceptions to Rule 8.4(c) for only government lawyers would have an adverse impact on young lawyers, the lawyers in the "X and Y" generations in particular. There is, she said, so much distrust of government, institutions, and the "establishment" in those generations. If we, as a profession, put in writing that no lawyer can be dishonest, except those representing the government and law enforcement, it would only contribute to what she saw as an already extreme sense of disenfranchisement among younger lawyers. Creating an exception that allowed government lawyers "to be dishonest" would lack the transparency that is demanded of every level of governmental agencies. It would seem to give additional power and protection to the establishment, those who already have all the power and hold all the cards. The potential for abuse would also be compounded.

Guest Raymond Moore, Federal Public Defender for the Districts of Colorado and Wyoming, then spoke, saying that his comments would be tiered. He spoke, he said, not just from the perspective of a defender of the accused but also from his experience in the criminal law arena over a number of years; he did not come before the Committee with a "get-the-bad-guys" perspective. He commented that he appreciated the consideration the subcommittee had given to a number of the comments that he had submitted to it; he saw the impact of his comments in the current majority proposal, and he felt that the proposal was much better than the one that had been considered by the Committee at the thirty-first meeting on January 6, 2012.

But, Moore said, we should hold ourselves to a higher standard than what is set by the majority proposal; we are better than that. Further, he was still of the view that there was no compelling need to

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12. The member's reference was to Colorado Bar Association Opinion 123, Candor to the Tribunal and Remedial Measures in Civil Proceedings, available at http://www.cobar.org/index.cfm/ID/386/subID/27384/CETH//.

add an exception to Rule 8.4(c), despite what others have said about that. He understood that the Committee's consideration of an exception to Rule 8.4(c) was instigated by an inquiry from the intellectual property rights bar; the government was not, at first, concerned that there was a problem, but it then joined in the debate as a "me, too." Moore did not know of a single instance of law enforcement curtailing an investigation because of the rule. It is not a matter, he said, of being more clear or less clear. It is not a case of someone saying there is some conduct we need to engage in but we cannot now engage in it because of this rule. There is no universe in which the bad guys are getting away with conduct that we cannot now prevent. There is no record of a problem with the rule.

Moore said he would rank the Committee's alternatives this way: First, do nothing; propose no change to Rule 8.4(c). He did not like the minority's first alternative, which it has characterized as limiting the exception only to lawyers who are involved in law enforcement; as proposed, he said, the minority's language — "lawyers representing the government" — was actually broader than just government lawyers engaged in law enforcement. There are many lawyers who represent the government but are not involved in law enforcement, and he cited as an example lawyers employed by the Bureau of Indian Affairs. The minority's exception, he noted, would not extend to him personally, as the Federal Public Defender does not represent the government.

As to the majority's proposal, Moore objected to the exception permitting covered lawyers to *direct* others in investigations. He said there was no actual effort, by the Office of Attorney Regulation Counsel or otherwise, to preclude lawyers from *advising* other persons on what is lawful or unlawful conduct by those persons. But the word "direct" envisions too much involvement by the lawyer — for example, directing the undercover officer as he pretexts a pornographic conversation on the Internet.[13] What the difference is, between typing the text oneself and directing another to do so, escaped him, Moore said.

A member said that it was patently unreasonable for the Rules, as presently constituted, to give government lawyers none of the guidance that they need to have. It goes without saying, he added, that this Committee should propose such guidance to the Court for its adoption to guide those lawyers in lawful activity, activity which the United States Supreme Court has held is lawful. If Attorney Regulation Counsel were to contest that activity by Federal lawyers, he would lose because of the Supremacy Clause. The harder question for this member was the extension of an exception to other lawyers. He agreed with Judge Polidori that there should be no such extension; the risks in doing so are too great. There are no limitations, such as a § 1983[14] challenge, on abuse by private lawyers. He would approve of an exception to Rule 8.4(c) that covered government lawyers — but not private lawyers —

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13. *See* p. 12 of the Subcommittee's Supplemental Report:

> However, stakeholders who opposed the overall proposal took the view that forbidding the lawyer from participating directly does not render the proposal acceptable. As one commentator put it, allowing the lawyer to advise, direct, or supervise pretext investigations is "wordsmithing which will only prove to create a distinction without a difference." FedDefender Comment at 2 (posing the example of a law enforcement officer engaging in an online child pornography sting with a lawyer looking over his shoulder, advising what to type).

14. 42 U.S.C.A. § 1983 provides—

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

and he would, perhaps, tighten the coverage to just government lawyers who are engaged in law enforcement.

A member noted anecdotal references to cases that have been dismissed on the grounds of lawyer misconduct under Rule 8.4(c). Guest Adam Scoville responded that the issue of a violation of Rule 8.4(c) has come up in several cases. The majority of the cases, he reported, have not involved dismissal or exclusion of evidence because of such violations, and there are civil cases holding that a lawyer's participation in lawful pretexting is acceptable; he referenced trademark cases and cases against major oil companies asserting the violation of civil rights against discrimination in the practice of requiring persons of minority status to pay for gasoline before pumping it. Pretexting was approved in the *Arctic Cat*[15] case from South Dakota, to which he had referred in his remarks to the Committee at its thirty-first meeting, on January 6, 2012, a case that involved a trademark infringement investigation of a snowmobile dealer whose distributorship had been terminated. The cases look at a line that condones limited deceitful conduct but does not permit schemes designed to elicit testimony from higher-level executives; they do not permit elaborate ruses to elicit admissions but permit engagement with defendant's staff in ways that an ordinary consumer might do, activity which, if the investigator engaged in openly — "Hi, I am here to investigate possible trademark infringement," as Scoville put it — would not give the investigator the same response as he or she would receive if the investigator had pretended to be an ordinary customer. Scoville pointed out that the trademark laws provide consumer protections; in that respect, they are akin to the laws that are the subjects of law enforcement activities, and private investigations in connection with the protection of trademark rights are akin to the involvement of private persons in the enforcement of the Fair Housing Act in assistance to the Department of Housing and Urban Development. Fake drugs sold as legitimate pharmaceuticals and knockoff ball bearings sold as qualified for service in aircraft engines are examples of the public harm that can be caused by trademark violations. If consumers were not deceived by the trademark infringement — and that is the test, he said — then the owners of the trademarks would not succeed in their enforcement actions. Accordingly, even private lawyers often act for the protection of the public as consumers.

Scoville cited, as an example of a case in which Rule 8.4(c) is preventing legitimate action, "phishing" attacks using email. A website may use what appears to be a logo or trademark of a large real estate agency, and it may appear to be a website maintained by that agency; visitors to the website will be drawn to the website — "Check out these new listings" — and will be asked to "log in" using their email account addresses and secret passwords, thereby giving the criminal website operator access to their private information, including security codes. The bona fide real estate agency will eventually hear from the injured customers, and it will often try to prevent further harm by reporting the abuse to Internet service providers in order to get the website "taken down"; but often its remediation efforts will not be effective until after thousands of users have uploaded their security information. Another real estate scam, he said, is to use a knockoff website to obtain online payments of "the first and last months' rent." The legitimate trademark owner will be reluctant to get involved in stopping these activities, because involvement may incur risks. Scoville said he does not want an employee of his company, an employee that he supervises, to put phony information into such websites in an effort to learn about the scam, even to learn just the Internet Protocol address of the phisher, although that is the kind of information he would need if he were to try to get law enforcement authorities to get involved. Certainly he would not advise an investigator to use the investigator's actual personal information in the course of the phishing investigation, but Rule 8.4(c) constrains him from advising that the investigator use false information in the investigation. Accordingly, legitimate real estate agencies and other such enterprises face a "whack-a-mole" problem; since they cannot conduct an investigation sufficient to expose the schemers behind

15. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F.Supp.2d 1147 (D.S.D. 2001).

the phony websites, all they can accomplish is the shutdown of a particular website while another springs up in its place.

As to the distinction between the lawyer "advising" the investigator and the lawyer "directing" the investigator, Scoville noted that the law permits him to hire an investigative agent; but, if he has to engage an agent in, say, Thailand and set him up to make an effective investigation with a view toward introduction of the evidence in an American court, he will necessarily have "directed" that investigator. His concern is, in fact, the opposite of Moore's concern. (To that comment, Moore agreed but added that "direct" is a fuzzy term.)

Scoville said that the Federal Trade Commission case to which others had referred[16] may turn on the fact that the conduct under scrutiny there was conduct occurring under the supervision of a lawyer. He noted that the current version of Rule 8.4(c) induces lawyers to stay aloof from the investigatory conduct in order to shield themselves from disciplinary proceedings. Instead, he said, the Rules should permit the oversight of lawful investigations that Rule 8.4(c) currently precludes. He emphasized that the majority's proposal would extend the exception regarding deceit and misrepresentation only to lawful investigatory activities.

A member who had not spoken before said that we need law enforcement to do its job, and it needs to be able to investigate. But she was concerned about the "slippery slope" that would be created if the exception were extended to "ordinary" lawyers directing private investigations. Such a change might, she feared, take the profession back to the days of "zealous" representation.[17] It is, she agreed, a slippery slope.

Guest Moore interjected that he commented as the single representative of a certain side of the issue. There seemed to be a thread to the discussion, he feared, that implied that private lawyers have no ethics, while government lawyers are of the highest level. But in fact, he said, government lawyers can do the wrong thing, too; the notion that because they work for the government they are more moral than private practitioners is wrong.

Guest Kirsch pointed out that none of the guests representing government lawyers was advocating that the Committee select the alternative that extended the exception only to government lawyers. He agreed with the point a member had made about the inappropriateness of carving out an exception applicable only to special lawyers and noted that all the government lawyers who were involved in the subcommittee's and the Committee's deliberations supported the broader exception that the majority had proposed. He added that no subcommittee member felt that government lawyers should not themselves be held to the highest ethical standards. But it is not, he said, possible to keep lawyers away from these activities. Investigations will continue in both civil and criminal cases and will be seen in the courts. The majority seeks to minimize Rule 8.4(c)'s current disincentive, which restrains lawyers from giving advice, direction, or supervision to clients and investigators to assist them in complying with applicable law. The proposal does not just permit *advice* but also permits *direction* and *supervision*, because the majority wanted more lawyer involvement in difficult questions of what may be

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16. *See* n. 10

17. *See* the minutes of these prior meetings of the Committee for its consideration of the matter of "zealousness" in the representation of clients:

- Fifth meeting, on October 1, 2004, Item IV.B;
- Tenth meeting, on July 19, 2005, Item II; and
- Eleventh meeting, on September 27, 2005, Item III.A.

constitutional and lawful, to assure more protection of the rights of defendants. He knew that lawyers would continue to get some of the questions wrong; but, society as a whole will be better off by having lawyers in the game rather than sitting on the investigatory sidelines. He said that there are, in fact, discussions in his office about what is permitted and what is constrained by Rule 8.4(c); the best answer the ethics counselors in the office often can give is "we are not sure." So there is a real effect from the broad wording of the current rule; it may not be an effect felt through disciplinary action by Attorney Regulation Counsel or though dismissal of cases by the courts, but the effect is that investigators are not getting as much guidance as they need. Kirsch concluded by saying he disagreed with the member who had suggested that the addition of an exception to Rule 8.4(c) would swallow the prohibitions of Rule 8.4(c), leading to unlawful investigative activities.

A member who had not previously spoken said there were good arguments on both sides of the question that was before the Committee. He, too, was concerned about the slippery slope — "carve out an exception and you'll drive a truck through it." But, at the same time, it seems inappropriate that lawyers cannot safely advise clients about activities that are intended to enforce state and Federal laws. All of the discussion has been about that category of activity. He proposed, instead of the addition of an exception to the text of Rule 8.4(c) itself, that a comment be added that said, if the lawyer is doing something lawful in furtherance of the client's effort to find out if there has been a violation of law, the lawyer does not thereby violate Rule 8.4(c). He suggested that such a comment would prove to be more manageable than the proposals to amend the text of the rule itself.

A member noted that the Committee had been discussing government lawyers and pointed to the comment that the government lawyers had joined the discussion only after the intellectual property rights bar had made its inquiry. But, he said, the Colorado Bar Association has already issued an extensive ethics opinion on conduct by government lawyers.[18] Difficult questions under the Rules are the name of the game, he argued; he pointed to the conflicts rules[19] as examples of rules that present difficulties in application. So, he concluded, it is not really a question of providing guidance to government lawyers; that is not in fact a problem. And, he said, the issue is not just one of the wording of an ethics rule but also involves the substantive laws that regulate the conduct of government lawyers. The concern is untethered private lawyers.

The member continued: If the concern is that the lawyer cannot ordinarily dissemble, then we have lost the moorings of the word "lawful." The reasoning underlying government deception in law enforcement is that there are statutes that authorize investigatory activities and there are guidelines for the conduct of those activities. That is the basis for the cases that have permitted lawyer involvement in deceptive investigative activities. But there are no such statutes to govern the conduct of private lawyers; the idea that we can have a rule that countenances some dishonesty is crossways. The intellectual property rights bar has a real concern. But what is "lawful" will become "what is not prohibited," and the exception will allow not only pretexting but also secret tape recording by lawyers — conduct that is lawful under many statutes but as to which the Colorado Bar Association Ethics Committee has opined, "[b]ecause surreptitious recording of conversations or statements by an attorney may involve 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."[20] The proposed exception might

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18. *See* n. 8 for information on Colorado bar Association Ethics Committee Opinion 96.

19. *See* C.R.P.C. 1.7 through C.R.P.C. 1.10.

20. *See* Colorado Bar Association Ethics Opinion 112, Surreptitious Recording of Conversations or Statements, 07/19/03. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/3809/CETH/Ethics-Opinion-112:-Surreptitious-Recording-of-Conversations-or-Statements,-07/19/03/.

permit pretexting for the purpose of accessing social media. It might permit a lawyer representing a defendant in a personal injury case to go to the door of the plaintiff's residence, with a secret camera, and pretend to ask for help to deal with a flat tire. Is that the direction this Committee wants to go, he asked. No, he answered. There is a limit. This is not a matter of sanctimony. How far can one go in protecting intellectual property rights?

But, this member said, he would not be a spoiler. Instead, he supported the prior speaker's proposal to deal with the matter by a comment that noted that the lawyer may advise a client about lawful activity in which the client may engage. There is, this member said, no need for an exception in Rule 8.4(c); such a comment would protect the intellectual property rights lawyer in advising about lawful pretexting. But the comment would not countenance lawyer involvement to the level of direction or supervision of deceitful conduct. Most states that have made changes in this area, the member noted, have only gone so far as to permit advice, not direction or supervision.

To that member, guest Zavislan asked why direction and supervision should be omitted, when the investigators whom a department like his deals with are employees of the department, not clients. How would the member have government lawyers deal with government employees, whom the government lawyer often has a duty to direct and supervise?

The member responded to Zavislan by saying the statutes that are the subject of the law enforcement activities will give the government lawyers the needed authority. Zavislan replied that this member, and guest Moore, have argued that permitting the lawyer to give direction and supervision goes too far; but, while he does not *direct* the FBI agent, he *directs* his own investigators.

A member said that she was concerned that the proposed exception would conflict with Rule 1.2(d), at least in application to a lawyer dealing with a client. The lawyer cannot, under Rule 1.2(d), counsel or assist a client in fraudulent conduct.[21] In dealing with an investigation of counterfeit products, the necessary pretexting will be fraudulent.

To this, guest Zavislan responded that pretexting is not fraudulent and pretexting is not deceitful conduct such as Rule 8.4(c) was originally intended to proscribe. He too believed, he said, that lawyers are held to a high standard; but Rule 8.4(c) refers to actionable fraud, not to merely advising an investigator, in a lawful investigation, that he need not reveal his true identity. No one is proposing to permit actionable fraud, he added.

A member of the Committee who also served on the subcommittee noted that he had moved from the majority's to the minority's view. In doing so, he had asked his staff to look for cases examining what is lawful and what is unlawful conduct by investigators. As another member had stated, he found that there was very little said in the cases about what is lawful, and he feared that what is "lawful" will become that which is not prohibited. As in the various invasions that are made on the right of privacy, the exception will become the rule. He pointed out that Rule 8.4(c) uses both words, "fraud" and "deceit," so there must be some difference intended between the two kinds of conduct; deceit must mean something more than fraud. Pretending to be someone other than who you are is deceitful. Lawyers, this member said, are held to a higher standard.

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21. C.R.P.C. 1.2(d) reads—

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This member added that, while the subcommittees had sought input from a number of practice areas among the private bar, only the intellectual property rights lawyers have supported the proposed exception. In particular, the Domestic Relations Section of the Colorado Bar Association opposed the proposal to add an exception to Rule 8.4(c).[22] We know, he said, that in the personal injury arena there are surreptitious investigations of claimed injuries, but no lawyer from that practice has spoken about the proposal.

To the suggestion that the Committee provide a comment to the effect that the current text of Rule 8.4(c) permits deceit in a lawful investigation of an expected violation of law, guest Scoville noted that the subcommittee's proposal that had been considered at the Committee's thirty-first meeting, on January 6, 2012, would have permitted involvement by a private lawyer in an investigation when "the lawyer reasonably and in good faith believes that . . . .a violation of civil or constitutional law has taken place or is likely to take place in the immediate future." That limitation on the circumstances in which the private lawyer might advise, direct, or supervise others would have worked, Scoville thought, for the private lawyer. But, he said, the subcommittee determined to drop the complexity of that proposal because the analogous provision for the law enforcement side of the exception — that the government lawyer "reasonably and in good faith believes that . . . the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law" — presented too many questions of degree in the area of law enforcement relative to the existence of a violation. That structure of the exception also touched on the concern of the Federal Public Defender, Moore, about the nature of the belief required for application of the exception. The subcommittee always intended that the standards would be objective, although containing a requirement of good faith. But, if the exception applied only when the lawyer was investigating a violation of law, that would raise problems for the lawyer representing a criminal defendant, so there would be uneven application of the exception. The majority of the subcommittee, Scoville said, believes the exception it has proposed permits involvement only with investigative activities that are not tortious.

Guest Kirsch said that, with respect to the matter of guidance, the majority has proposed an exception to the rule rather than the addition of a comment because of the priority that the text of a rule takes over any comment made with respect to that text. That is, the statement of an exception in Rule 8.4(c) would be more certain than a statement of what the unamended rule means. But, Kirsch said, the prosecutors will take any guidance they can get. He noted, however, that the prior reference to Colorado Bar Association Ethics Committee Opinion 96[23] was incorrect; that opinion deals only with a prosecutor's contact with represented parties, not with the role a prosecutor may take in an investigation. As to the example of a lawyer using a secret camera to expose a plaintiff in a personal injury case, Rule 4.2 would be effective to preclude the contact with that plaintiff in the first place. Kirsch emphasized that the majority proposal would not permit otherwise impermissible conduct.

A member who had not previously spoken referred to the previous comment of another member that there must be no "wink-wink" in the application of the prohibition against dishonest conduct; he suggested that, in fact, there has been a good deal of winking going on for a long time. The current text of Rule 8.4(c) seems to preclude a good deal of what lawyers engaged in law enforcement and other practices that entail investigations using deception have been doing for a long time — and yet we have in fact permitted that activity to go on without challenge. Contrary to the view of the member who had pointed to the complexities of the conflicts rules, this member saw that lawyers don't wink at the conflicts rules but rather take them very seriously and try to comply with their constraints. On the other hand, we have allowed what appear to be violations of Rule 8.4(c) and have led lawyers to believe that those

22. *See* p. 35 of the Subcommittee's Supplemental Report.

23. *See* n. 8.

violations will be tolerated. But, as a lawyer who advises other lawyers, this member worried about the advice he can give them in this area. The majority's proposal establishes standards for conduct in connection with investigations that use deception. It is a tool for guidance of lawyers. The Rules of Professional Conduct are, he noted, rules establishing minimum standards of conduct; they do not preclude lawyers from adhering to higher standards.

A member who had not previously spoken said that he supported the majority's proposal. He noted that the legal profession should be prepared and permitted to advise clients — and those who assist lawyers in their representation of clients — about their conduct, to assist them in conducting themselves in compliance with the law but also to assist them, to the fullest extent of the law, in securing and protecting the clients' rights. The profession should not, out of a sanctimonious view that the lawyers themselves are "above that," impede its ability to provide to clients the legal services to which they are entitled.

Another member added his concurrence to the views of the two previous speakers.

The member who had earlier said that it was patently unreasonable for the Rules not to give guidance to government lawyers now said that he supported the first proposal made by the minority. He formally moved that the minority's proposal be adopted, but with a modification so that clause (c) of Rule 8.4 would read as follows [showing his modification of the minority's proposal]:

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer representing the government may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities ***in the enforcement of federal, state, or local criminal or civil regulatory law***;

The member said he saw no reason to extend the exceptions to government lawyers when they are acting in *defense* of challenged government conduct; it should apply only when they are acting in the enforcement of the law.

To that suggestion, a participant asked whether the list could be expanded to include constitutional principles; the movant declined to do so.

The motion was seconded.

As a matter of procedure, Downey asked that the Committee first address the majority's proposal, and he asked the movant to withdraw the motion. With the concurrence of the seconding member, the movant did so.

Downey then moved the adoption of the proposal made by the majority of the subcommittee in its supplemental report; the motion was seconded. The motion failed on a vote of seven members in favor, ten opposed.

The member who had made the prior, withdrawn motion then renewed it, and that motion was seconded. When the seconding member asked that the motion be amended to strike the words "direct and supervise," leaving only "advise," the movant declined the request.

A member who serves as a government lawyer in law enforcement spoke to reinforce a comment that guest Zavislan had made as to the different relationships that a government lawyer may have between personnel at represented agencies and employees under the lawyer's command. Such a lawyer may have investigators on staff, which the lawyer will direct and supervise and for the conduct of which

the lawyer will be responsible. It is difficult, as to those investigators, to distinguish between advice and supervision; the two cannot be separated in practice. Creating a meaningful distinction, by adopting a rule that only countenanced advice and did not permit direction or supervision would cause mischief. But, as another member clarified, the motion that was on the table would include all three verbs: *advise*, *direct*, and *supervise*.

In answer to a member's question of why the exception should be limited to law enforcement activities, the movant said that, as stated, the exception would permit lawyers engaged in law enforcement to do what they already can otherwise do under substantive law, and to do so without fear of violating the rules of professional conduct.

Another member noted that the adoption of the motion would cast a significant negative implication about the application of the prohibitions of Rule 8.4(c) to the pretexting activities of the intellectual property rights bar. By expressly recognizing a narrow exception for lawyers representing the government in law enforcement, the rule would support a negative inference that there was no exception for private lawyers participating in any fashion in deceptive investigations in the course of trademark enforcement activities on behalf of their private clients. They would arguably be in violation of Rule 8.4(c)'s basic prohibition against fraud, deceit, and misrepresentation. This member said that he opposed the motion and supported, instead, the idea of adding an appropriate comment to the rule.

To that comment, the movant said he was not in favor, when the Committee is presented with a difficult issue, of burying the idea in a comment to a rule. The principles that the Committee has been dealing with should be covered by some provision in some rule, not in a comment. In this case, lawyers engaged in law enforcement need to be permitted to do what they do without fear of a violation of the ethics rules.

But another member stressed that the negative implication, for private lawyers, that would result from amendment of Rule 8.4(c) as the motion provided, would be stark and severe; the Committee would have answered the inquiry of the intellectual property rights bar with a change that would leave them in a more precarious position than they are in under the present rule.

A member who had been among the minority on the subcommittee asked whether the dilemma could be solved with a combination of rule change and comment addition. But, she said, that approach would have to be limited to private lawyers pursuing the enforcement of their clients' legal rights.

To that suggestion, the movant said that he would not oppose a comment but would oppose a comment that said other than what the amended rule said.

A member asked about the application of the rule as the motion would amend it. If he were a lawyer from the Internal Revenue Service and, in the course of investigating the activities of a fraudulent tax accountant, got another accountant to accept employment in the suspect's office, in order to act at all times lawfully but to report back on what he witnessed, would that investigation entail any illegal activity? To that scenario, guest Kirsch said he could not say whether the investigation would be illegal, but he was sure the scenario would never occur in reality.

But the inquiry prompted other participants to refer to their use of confidential investigators and to note the implication of Fourth Amendment principles in those investigations.

Noting that the proposals before the Committee, including the one contained in the pending motion, were complex and could not easily be drafted, without unforeseen consequences, by the whole

Committee, a member moved that the entire discussion be tabled and remanded to the subcommittee. The motion was seconded but failed.

The Chair then proceeded to a vote on the pending motion to adopt the minority's first alternative, as the movant had proposed it to be amended and without the addition of any comment. The motion failed, seven members voting in favor and nine in opposition.

A member then moved to adopt the second alternative of the subcommittee, which was to make no proposal for any change to the Court. The motion was seconded.

A member spoke to the motion, saying it ignored what lawyers are doing today, activity that has been permitted in practice and that has never been found to violate the current text of Rule 8.4(c). Leaving the matter as it currently stands is not right; admittedly, this is a hard issue, but the Committee has heard that there is a problem, and it should respond with a solution.

Another member concurred with those comments. The Committee should not leave the law between the current state of wink-wink at what we all know goes on, on the one hand, and a slippery slope on the other hand.

A participant asked whether the pending motion would preclude the consideration of a comment that addressed the issue.

In response to that question, a member suggested that the pending motion be amended to include the adoption of a comment to the effect that government lawyers are, despite the apparent strictures of Rule 8.4(c), permitted to do what substantive law permits them to do, even if that would be deceitful. The comment would also clarify that private lawyers can advise their clients about what is lawful conduct by the clients in their enforcement of their legal rights, but it would keep the private lawyer out of direction and supervision of deceitful activities.

The movant agreed that an amendment of her motion to include such a comment would be acceptable, but she said she envisioned a comment that cited pertinent cases.

The member who had earlier sought, by his motion to table the discussion in order to avoid drafting-by-committee, noted that the comment that the movant and others envisioned could not safely be drafted at this meeting and by the whole Committee.

Another member urged that the Committee not get hung up on the words of a comment; it should simply allow government lawyers to engage in activity in which substantive law permits them to engage.

A member asked that the motion be amended to permit the subcommittee to draft the text of a comment.

The movant rejected all amendments to her motion and restated it as a motion to adopt the second alternative of the subcommittee, which was to make no proposal for any change to the Court.

The restated motion was adopted, nine members voting in favor, eight voting opposed. But the entire Committee proceeded to discuss the matter further, as if the motion had failed.

A member moved to add a comment that would permit government lawyers to do what they are permitted to do under substantive law and to permit private lawyers to advise their clients about what the clients can do in securing their private rights.

The Chair commented that, clearly, the Committee could not effectively vote on actual language for any comment in the time remaining for the meeting. But, she said, the subcommittee needed to know the parameters of the proposed comment — would it include, with respect to government lawyers, direction and supervision or just advice? Would the advice that private lawyers would be permitted to dispense be limited to just investigations for the protection of intellectual property rights or could it cover any matter?

The movant noted that the subcommittee had labored for a long time, and he did not wish to set aside all of its work. Lawyers need guidance. Private lawyers may advise their clients about their conduct but may not direct or supervise them or any other persons in deceptive activities. Government lawyers can do what they do. Those were the things he had in mind.

A member objected that the proposed comment would constitute an effort to amend the rule by way of comment; there was no other way to put it. The rule would say that there can be no fraud or deceit . . . but, see the comment. Yet rule amendment by comment cannot work; the rules prevail.

Another member concurred with those comments: If any change were to be made, it must be made in the rule. He noted that most of the states that have considered the issue have included direction and supervision as well as advice; and he noted that, while most of the Colorado rules refer to *supervision*, he understands why government lawyers want *direction* to be included as well. He stressed that the Committee's proposal needs to provide effective guidance to lawyers.

A member of the subcommittee pointed out that its supplemental report identifies, at pages 26 and 27, why a mere comment cannot be effective. In this member's view, the Committee has exhausted itself in its consideration of alternatives and should be content that Colorado remain among the forty or so states that have done nothing to the broad text of Rule 8.4(c).

The member who had moved that the Committee make no proposal said that, while she had not gone through all of the comments, she was sure that some of them have cited specific cases in their text.[24] She suggested that a comment be added that simply reviewed what pertinent cases have said about the issue.

The Chair responded by stating that the Committee has not proposed to alter the import of any rule by way of a comment citing to a case. She read the text of Paragraph [21] of the Scope of the Rules—

> The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

A participant asked whether the idea behind the suggestion for a comment was simply to state what the Committee has been hearing in its deliberations: The lawyer does not engage in prohibited fraud, deceit, or misrepresentation when the lawyer gives advice about conduct that a person may lawfully engage in. A member who had been a proponent for the addition of a comment agreed that that embodied the idea behind the suggestion for a comment.

A member moved to table the discussion. The motion was seconded and adopted.

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24. *See* Comment [7A] to Rule 1.0 and Comment [15] to Rule 1.5,

The secretary noted the difficulty he would face in preparing minutes of the meeting and the concern that the Committee should have about the import of its deliberations, deliberations that led to no action: After much deliberation, the Committee has determined to make no proposal to the Court, ostensibly with the result that Rule 8.4(c) will not be changed and with, perhaps, the implication that the Court's standing committee — the committee that is dedicated to considering the state of the Rules of Professional Conduct and suggesting their modification when warranted — has, after receiving and considering at great length a request from the intellectual property rights bar that was subsequently joined in by lawyers engaged in law enforcement, determined that no change should be made to the rule to clarify that lawyers may advise, direct, or supervise others in connection with investigations that might entail deceit or misrepresentation but that are themselves lawful under substantive law. While the implication that Rule 8.4(c) prohibits such activities is not absolute — in fact, the Committee simply could not solve the puzzle, although a substantial number of its members felt that such activity is permitted under the current text of the rule and that the rule could be amended to make that clear and no majority has come together in concurrence that such activities are prohibited — the resulting inaction will certainly lend to the anxieties of lawyers engaged in a wide variety of practices.[25]

A member said he thought the Court would be interested in the subcommittee's gathering of caselaw and rules-changes from other states and in the Committee's deliberations and that detailed minutes of those deliberations would be useful to it. He noted that the Court seems to have valued the reports it has gotten from the Chair on behalf of the Committee on other matters, even those in which the Committee has not concluded its deliberations with proposals for change. It would be helpful to the Court to receive an explanatory letter from the Chair about the Committee's deliberations, over a year and a half, of the pretexting issue, accompanied by the minutes of those deliberations.

The member who had proposed that the Committee take no action moved that the members who had promoted an explanatory comment work up the text for such a comment and get the text to the subcommittee for further refinement.

Another member offered to second that motion but noted that the subcommittee might not want to do more work on the matter.

To that latter comment, Downey noted that the subcommittee was indeed tired, but he undertook, if others did develop some comment to deal with pretexting in light of Rule 8.4(c), to reconvene the

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25. At p. 39 of the supplemental report, the minority denied the existence of any negative implication from that course of action:

> The majority recognizes the concern of some stakeholders that for the Standing Committee to have considered this issue, but then chosen to do nothing further, could be perceived as an endorsement of the broadest possible interpretation of Pautler. Such a perception could reduce the comfort that some government lawyers find in Formal Ethics Opinion 112, "Surreptitious Recording of Conversations or Statements," (July 19, 2003) ("The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants."), or that other lawyers involved in investigations may take from the explicit, if brief, comment in Pautler distinguishing the attorney's actions from other states' exceptions for the supervision of covert investigations. See *Pautler*, 47 P.3d at 1179 and n.4.
>
> The minority believes that drawing any inferences from inaction by the Standing Committee would be very speculative. The somewhat analogous rule of statutory construction applies only where the legislature has taken "action in amending a previously construed statute without changing the portion that was construed." People v. Swain, 959 P.2d 426, 431 (Colo. 1998). Further, the OARC's representative on the Standing Committee has declined to take a position. This suggests that if the Standing Committee does nothing, OARC would simply continue to exercise reasonable prosecutorial discretion. After all, notwithstanding the shadow cast by Pautler, stakeholder comments confirm that covert investigations are ongoing, in both government and private proceedings.

subcommittee to look at that product and, with its knowledge of the topic gained from its other work, make comments on the comment.

With that undertaking made on behalf of the subcommittee, the motion for the development of a comment was adopted, seven voting in favor, six opposed.

The Chair said that her motion would be to renew the previously defeated motion to adopt the minority's first alternative but with additional text limiting the investigations to matters of law enforcement. She was of the view that the motion may have failed on its first vote out of the belief by some members that the majority's proposal would be adopted; she felt that, since no action had prevailed, a majority of the members might, on reconsideration, adopt that motion.

But another member renewed his concern about the negative implications for private lawyers, especially for those in intellectual property rights practice, that an affirmative statement covering only government lawyers acting in connection with law enforcement would carry.

The Chair's motion for reconsideration failed by a substantial number of votes.

Another member moved that the Chair be directed to provide the Court with a report of the Committee's deliberations; even though the Committee had failed in its effort to deal with the issue, the Court might take action. That motion was seconded.

The member who had first mentioned the prospect of a slippery slope said that she would welcome a reconsideration of the motion to adopt the majority's proposal.

The Chair noted that the Committee could take the pending motion to provide the Court with a report of the Committee's deliberations as a motion for an alternative course should the Committee first reconsider the majority's proposal but then fail to adopt it.

A participant suggested that the motion be to adopt the majority's proposal but with the addition, at its end, of the language that had been offered to limit the investigations to those for the enforcement of federal, state, or local criminal or civil regulatory law.

Another member pointed out that the proper order of motions would be, first, a motion to reconsider the motion to adopt the majority's proposal; if that motion were adopted, the next motion would be one directed toward specific text.

The member who had seconded the motion that the Chair provide a report to the Court withdrew her second of that motion.

A member moved the reconsideration of the majority's proposal.

A member who had been among the minority on the subcommittee said that he would vote against the motion for reconsideration, because the meeting seemed to be evolving into one in which votes would be taken until some answer was obtained.

The Chair said that she sympathized with that sentiment but felt that those who wanted to move forward with the majority's proposal should be given a clear vote on that matter. She called for a vote on the motion to reconsider. It failed.

The Chair called for discussion to draw closure on the matter.

A member renewed her request that the Chair report to the Court about the Committee's deliberations, providing to the Court material that had been gathered that would be useful to it.

But another member, who had favored the majority's report, argued that there was too much room for the Chair's own interpretation in such a report.

To that, the Chair noted that the Court would receive all of the minutes from the three meetings at which the matter had been considered, as well as both reports that the subcommittee had prepared. The Court would receive it all.

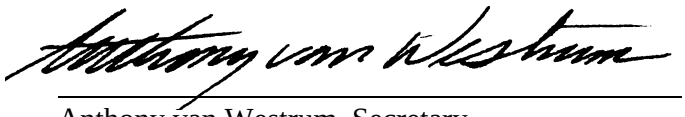
The motion that the Chair provide such a report to the Court was adopted.

The Chair thanked the subcommittee and all who participated in its work and in the Committee's deliberations.

IV *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The Committee did not have time to reach the remaining items on its agenda, including scheduling of its next meeting The Chair has advised that she will communicate with the members by email to schedule that meeting for mid-October 2012, at a location still to be determined.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its thirty-third meeting, on November 16, 2012.]