COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 6, 2012
(Thirty-First Meeting of the Full Committee)

The thirty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:09 a.m. on Friday, January 6, 2012, 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 at the meeting, in addition to Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Judge William R. Lucero, Christine A. Markman, Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, James S. Sudler III, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, and Judge John R. Webb. Excused from attendance were Gary B. Blum, Boston H. Stanton, Jr., and E. Tuck Young. Also absent was Cecil E. Morris, Jr.

I. *New Member.*

The Chair welcomed its newest member, Christine A. Markman, to the Committee.

II. *Court Adoption of Rules Amendments.*

The Chair reported that the Colorado Supreme Court adopted an amendment to C.R.C.P. 251.5(b), effective June 16, 2011, making that provision parallel to Rule 8.4(b) in establishing, as grounds for discipline, "[a]ny criminal act [by an attorney[1]] that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." The Committee had recommended that amendment to the Court by action taken at its twenty-eighth meeting, held on August 19, 2010, and the Advisory Committee of the Office of Attorney Regulation had joined in its recommendation.

The Chair remarked that it will now be harder to discipline a lawyer because of criminal acts.

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

At the Chair's request, Alexander Rothrock resumed the Committee's discussion of the interplay between amended Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC") and Rule 3.5 of the Colorado Rules of Professional Conduct ("CRPC"), a discussion that had begun at its twenty-ninth

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1. The preamble to C.R.C.P. 251.5 uses the word "attorney," as reflected in this bracket, while amended paragraph (b), like C.R.P.C. 8.4(b), uses the words "lawyer's" and "lawyer."

—Secretary

meeting, on January 1, 2011, and was continued at its thirtieth meeting, on May 6, 2011.[2] The Chair commented that she would not impose any time restriction on the Committee's discussion but that it was time for the Committee to come to a decision on the matter.

Rothrock reminded the Committee that the subcommittee to which the matter had been referred had proposed that Rule 3.5(b) be amended to mirror the text of Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC"), and that the purpose of the proposal was simply to assure that a lawyer could not be disciplined under Rule 3.5(b) for a conversation with a judge in which the judge could engage without sanction under CJC 2.9.

At its thirtieth meeting on May 6, 2011, the Committee had considered a draft that would revise both Rule 3.5 and its comment; the Committee had returned the matter to the subcommittee with instructions to retain its proposed text for the body of Rule 3.5[3] but to modify the comments Rule 3.5 to—

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

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

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.[4]

In response to that instruction, the subcommittee made no further changes to its proposal for the body of Rule 3.5 but proposed that Comment [2] read as follows [showing changes from the current text of the comment]:

> [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, ~~unless authorized to do so by law or court order~~, ***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***

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

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

3. As previously proposed by the subcommittee, paragraph (b) of Rule 3.5 would be amended as follows:

> A lawyer shall not:
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> (a) . . .
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> (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 . . . .***

4. *See* p. 12–13, minutes of the thirtieth meeting, May 6, 2012.

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 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.

A member noted that, under the "Civil Access Pilot Project" rules that the Court has adopted for courts in the five metropolitan Denver counties, judges and lawyers are encouraged to have a great deal of communication about procedural matters, in order to facilitate many civil cases. Rothrock stated that the subcommittee had not considered the CAPP rules in making its proposal with respect to Rule 3.5. The member commented that, in the meetings that he had attended in connection with the promulgation of the CAPP rules, participating judges had indicated that they expected to avoid or minimize the need for written motions and the contesting of procedural issues by having conversations with the lawyers, and the member sensed that the judges expected such conversations to be instigated by both the judges themselves and the lawyers.

Another member joined by indicating she would read proposed Rule 3.5(b) to include these kinds of conversations — whether a particular communication was initiated by the lawyer or the judge — as having been"initiated" by the judge such that the lawyer could ""reasonably believe[] that the subject matter of the communication is within the scope of the judge's authority" within the meaning the proposal, so long as one could consider the judge's furtherance of the principles of the CAPP to be "under a rule of judicial conduct." The member who first raised the CAPP responded that he could accept that reading, but he noted that he would be doing so as an advocate defending the lawyer's communication.

A member questioned whether the proposal would countenance a lawyer's *ex parte* communication with the judge, even under the CAPP principle. She said that she would not initiate an *ex parte* communication with a judge, even about a simple procedural matter; rather, she would always have opposing counsel join her in the initiating call.

The member who had first raised the CAPP said he thought we should be very clear about the permitted scope of these communications. In his view, the proposal was directed at isolating judges even further from society, the message being, "Don't talk to judges."

A member who has experience as a judge said her view was that, if a lawyer needed to get in touch with her, he could do so by an email that copied all counsel, all of whom could then participate in

the resulting telephone conversation. In her view, the subcommittee's proposal accommodated that solution.

Another member noted that she had not perceived that the CAPP rules might present a problem with *ex parte* communications with judges.

Rothrock interjected that he thought the subcommittee' proposal unwittingly solved the problem by its statement of the two exceptions to *ex parte* communications: authorization by law and initiation by the judge. The CAPP rules would provide the authorization by law. And the principle stated in Comment [2] — that "[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" — would provide the initiation required of the judge. Rothrock added that, in his view, the proposal opens communication with the judiciary rather than, as had been suggested, further closing the judges off "from society."

The member who had first raised the CAPP thanked Rothrock for his analysis.

The Chair asked for comment on the subcommittee's proposal from those members who were familiar with the views of the Office of Attorney Regulation Counsel. One who had been a participant on the subcommittee said he had closely followed the development of the proposal and that he supported it. His experience was that, when a problem of *ex parte* communication reached the OARC, the facts were usually very clear; the typical circumstance involves a communication in a municipal or other lower court in which both the judge and the lawyer were involved in what clearly was an impermissible conversation. Looking at the concerns expressed by the member who had raised the CAPP, this member felt that the subcommittee's proposal adequately facilitated the kinds of conversations envisioned under the CAPP rules.

A member noted that proposed Comment [2] was longer than it need be, there being a repetition of the references to rules permitting "ex parte communications for scheduling, administrative, or emergency purposes . . . ." Another member agreed that there was repetitious language but noted that the repetition came from citation to two different rules; he approved of the comment as written on the grounds that we sought to have the comment be complete in itself, without the need for the reader to refer elsewhere for additional text. Another member added that the comment as written was educational.

On a member's motion, the subcommittee's proposal was approved without change.

The Chair thanked Judge Webb for first raising the issue — the gap between CJC Rule 2.0 and C.R.P.C. Rule 3.5 — and thanked Rothrock and the subcommittee for providing the reconciliation of the two provisions.

IV. *Rules 4.1, 4.2, 4.3, 5.1, and 8.4(c) and "Testers."*

The Chair then invited Thomas Downey to lead the discussion of what the Chair characterized as the main event for the day, the question of whether the Committee should propose amendments to the Rules to permit "pretexting" of one kind or another.

Downey began by reminding the Committee that the pretexting subcommittee had been formed at the twenty-ninth meeting, on January 21, 2011 and that it had provided an interim report to the Committee at the thirtieth meeting, on May 6, 2011. He reported that the subcommittee had met a number of times over the entire year of its existence, and he noted that the names of the participants can

be found in the first footnote of the subcommittee's report that had been provided to the Committee in advance of this meeting. He thanked those participants for their incredibly hard work.

Downey said that the subcommittee had considered lots of issues and had prepared a number of drafts of its proposal, working toward the final product that has now been submitted to the Committee and that is summarized on the twentieth page of the materials provided by the Chair for this meeting. The subcommittee is, he said, recommending that Rule 8.4(c) be modified by the addition of a limited exception, applicable to both governmental lawyers and those in private practice, permitting them to advise clients, investigators, and non-lawyer assistants concerning conduct involving misrepresentation and nondisclosure in investigations, while continuing to prohibit direct participation by the lawyers themselves in any deception or subterfuge. The proposal would continue the current proscription by Rule 8.4(c) of "conduct involving dishonesty, fraud, deceit or misrepresentation," with these exceptions permitting a lawyer to—

> direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:
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> (1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (B) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or
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> (2)(A) [*sic*] the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.[5]

Downey recalled that, when the Committee considered the matter at its May 6, 2011 meeting, the discussion had included the possibility of providing situation-specific exceptions for, first, government lawyers involved in law enforcement; second, government lawyers involved in the enforcement of civil laws; and third, lawyers in private practice in specified circumstances. But, instead, the subcommittee's proposal is for one set of exceptions applicable to both governmental and private lawyers. He noted, though, that a minority of the subcommittee was of the view that any exception to the broad proscriptions of existing Rule 8.4(c) should be limited to government lawyers or, perhaps, even to just criminal prosecutions.

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5. The following comments would be added to Rule 8.4:

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

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

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

Downey asked two guests, Adam L. Scoville of RE/MAX, LLC and Matthew T. Kirsch of the Office of the United States Attorney for the District of Colorado, to provide to the Committee the perspectives, respectively, of lawyers in private — particularly, intellectual property — practice and of those in governmental positions.

Scoville said that the lawyer with an intellectual property practice typically sees a need for pretexting in trademark enforcement cases, and he recalled that the catalyst for the Committee's consideration of pretexting was an inquiry from the Intellectual Property Law Section of the Colorado Bar Association.[6] The intellectual property bar, he said, believes that a lawyer's use of investigators, under proper supervision, is necessary and appropriate to determine whether trademark infringements are occurring. The use of investigators in such cases is a perennial topic at continuing legal education seminars on trademark law, with the tension between the requirement that there be an adequate pre-filing investigation to support an infringement complaint and the limitations imposed by Rule 8.4(c). Many lawyers are of the view, he said, that they may engage investigators to act simply like potential customers, not using complex ruses. But that view is jeopardized by the literal wording of Rule 8.4(c) and by the supreme court's *Pautler*[7] decision; the latter stops a lot of intellectual property lawyers from employing investigators, figuring that, if stopping an axe murderer were not sufficient grounds for an exception to Rule 8.4(c), then working up a proper trademark infringement case would not suffice.

Scoville said that the sense of the intellectual property bar is that, if Rule 8.4(c) and *Pautler* are not to be impediments to investigations, then the bar is entitled to know what the boundaries are; if that rule and that case are to be taken literally, then the leaders of the Intellectual Property Law Section need to advise the bar of the risk and back the practitioners away from the line.

At Downey's request, Scoville commented on the development of the law in other states, noting that other states have not yet amended their rules to provide for pretexting in investigations. In one case, a furniture manufacturer had terminated a distribution relationship with a furniture distributor and then received information that the distributor was engaging in bait-and-switch sales practices, misrepresenting the origin of its inventory. The manufacturer sent "interior designers" to the distributor to ask questions such as "Is the quality the same?" and "Is there no other place to obtain this line of furniture any more?" When the distributor challenged that conduct, the court condoned it, determining that the "interior designers" were merely inducing the distributor to engage in its routine business and were not attempting to trick it into saying something it would not otherwise have said. In a case involving snowmobile dealership, the court concluded otherwise, broadly holding that the distributor was a "represented party" for purposes of Rule 4.2 and that the investigator should have disclosed his engagement by opposing counsel.[8] In a case involving pretexting to determine whether blacks were subjected to prepayment obligations that were not imposed on whites, the court took a similar view of the low-level employees who were the targets of the pretexting, finding them to be represented by their company's lawyer for purposes of Rule 4.2.

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6. *See* p. 8 of the minutes of the twenty-ninth meeting of the Committee, on January 21, 2011.

7. 47 P.3d 1175 (Colo. 2002). "[Rule 8.4(c)] and its commentary are devoid of any exception."

> The obligations concomitant with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals. . . . We limit our holding to the facts before us. Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.

Id. 47 P.3d at 1182.

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

Scoville said that pertinent cases in other jurisdictions represent a continuum from permitted pretexting to prohibited pretexting: The investigator is not permitted to trick the target into saying something that the target would not otherwise have said, but the investigator may conduct the kinds of transactions that other customers would conduct. Some cases have barred the introduction of evidence obtained by pretexting, but Scoville characterized such cases as egregious, such as one involving an investigator's entrapment of a judicial clerk in an effort to obtain a judge's recusal. Like *Pautler*, Scoville said, such a case was "outside the bounds."

Scoville summed up with an answer to this question: If other states have not seen a need to modify their rules of ethics to permit some pretexting, why is Colorado different? His answer was the *Pautler* case, which suggests a much more stringent boundary around Rule 8.4(c) than might exist in other states.

Next, Matthew Kirsch summarized the position stated by United States Attorney John Walsh in a letter that was included in the meeting materials. Kirsch said that the U.S. Attorney's Office encounters the matter of pretexting in both criminal prosecutions and civil cases. Such cases may involve deception as necessary to accomplish enforcement of the law; deception in such cases is regularly used and is appropriate and has been approved by the United States Supreme Court.

Examples abound in criminal cases involving the use of confidential informants, both informants who may themselves have committed crimes and "regular citizens" who may be assisting in the investigation of crimes. There are also cases involving law enforcement officers who work in undercover capacities; the most common example of this is a drug "buy" by an undercover officer, although cases also involve illegal weapon sales and investment frauds, in which investments are made to uncover the fraud. Tax fraud is another example, with statistical analysis being used to uncover anomalies in patterns of fraudulent Schedule Cs prepared by professional tax preparers. Walsh also cites, Kirsch noted, civil cases involving the use of investigators from the Department of Housing and Urban Development to uncover illegal lending practices and home purchase discrimination.

So, Kirsch said, the basic premise of the office is that deception techniques are often used and are necessary for enforcement of many laws.

Second, Kirsch argued, public policy supports the supervision of such activities by lawyers. Lawyers are better able to discern the ethical and legal boundaries of permitted deception than are lay investigators. The result of lawyer supervision of deception is a better evidentiary product coupled with respect for the rights of citizens.

But the U.S. Attorney's Office is, like the private bar, concerned about the import of *Pautler* on these practices. *Pautler* suggests that it may be improper for a lawyer even to supervise deception by investigators, law enforcement officers and others. It is Walsh's and Kirsch's hope that, by participation on the pretexting subcommittee, they can eliminate legal uncertainty in this area. They believe that the subcommittee's proposal accomplishes that, while adhering to the *Pautler* prohibition of direct lawyer conduct amounting to those activities proscribed by Rule 8.4(c). They believe that clarity on the matter would be useful for lawyers engaged in law enforcement.

Downey added that the subcommittee has received input from Jan Zavislan, Colorado Deputy Attorney General, who has expressed concurrence with Walsh's views and who noted that the issue of permitted pretexting and deception has been of great concern to the last four Colorado attorneys general, as it has been to the prosecutorial and intellectual property communities since the *Pautler* decision was rendered.

At Downey's request, Rothrock reviewed the treatment of pretexting under similar ethics rules in other states, referring the members to the chart of cases that was included in the materials for the meeting. A seminal case is that of *Apple Corps Limited v. International Collectors Society*,[9] in which defendants, in an effort to fend off citation for contempt of a consent decree regarding use of likenesses of the Beatles, had sought sanctions for plaintiffs' lawyers alleged misconduct in

> [purchasing] Sell-Off Stamps by (1) speaking to ICS's sales representatives without the consent of ICS's counsel; and (2) not revealing to ICS's sales representatives that they were attorneys or persons acting under the direction of attorneys. Defendants claim this behavior violates three disciplinary rules: (1) the rule forbidding attorneys from engaging in deceitful conduct (Rule 8.4(c)); (2) the rule restricting attorneys from communicating with parties represented by counsel concerning the subject of the representation (Rule 4.2); and (3) the rule regarding an attorney's dealings with an unrepresented party (Rule 4.3).

As Rothrock explained, the *Apple Corps* court looked at a 1995 article from the GEORGETOWN JOURNAL OF LEGAL ETHICS in determining that plaintiff's counsel had not violated New Jersey's Rule 8.4(c)—

> The attorney disciplinary rules prohibit an attorney from engaging in deceitful conduct. RPC 8.4(c) states that an attorney may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." RPC 8.4(c) is not by its terms limited only to material representations. It applies to lawyers not only when they are acting as lawyers but also when they are acting otherwise than in a lawyerly capacity. See David B. Isbell & Lucantonia N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers; An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 816 (1995). However, RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes. *Id.* at 812, 816–18.
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> Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. *Id.* at 792–94. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. *Id.* at 794–795, 800 . . . . The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. . . .
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> Courts which have addressed the issue have approved of attorneys' use of undercover investigators who pose as interested tenants to detect housing discrimination or as prospective employees to detect employment discrimination. See Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 799; Richardson v. Howard, 712 F.2d 319, 321–22 (7th Cir.1983) (observing that the evidence provided by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); see also Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir.1990); Wharton v. Knefel, 562 F.2d 550, 554 n. 18 (8th Cir.1977); Hamilton v. Miller, 477 F.2d 908, 909 n. 1 (10th Cir.1973).
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> Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling ICS directly and attempting to order the Sell–Off Stamps. If Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business.
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> Furthermore, the literal application of the prohibition of RPC 8.4(c) to any "misrepresentation" by a lawyer, regardless of its materiality, is not a supportable construction of the rule. The language of RPC 8.4(c) must be interpreted in the context

9. 15 F. Supp 2d 456 (D.N.J. 1998).

of the statutory scheme of which it is a part. In this regard, it is significant to take note of RPC 4.1(a) which provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ." If the drafters of RPC 8.4(c) intended to prohibit automatically "misrepresentations" in all circumstances, RPC 4.1(a) would be entirely superfluous. As a general rule of construction, however, it is to be assumed that the drafters of a statute intended no redundancy, so that a statute should be construed, if possible, to give effect to its entire text. U.S. v. Nordic Village, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (it is a "settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect"); Colautti v. Franklin, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); Commonwealth of Pennsylvania Dep't. of Pub. Welfare v. United States Dep't. of Health & Human Svcs., 928 F.2d 1378, 1385 (3d Cir.1991).

As stated by Mr. Isbell and Professor Salvi:

> That principle [of statutory construction] would require that Rule 8.4(c) apply only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud, and deceit. In other words, it should apply only to grave misconduct that would not only be generally reproved if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person's fitness to be a lawyer. Investigators and testers, however, do not engage in misrepresentations of the grave character implied by the other words in the phrase [dishonesty, fraud, deceit] but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence.

Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 817. Accordingly, Plaintiffs' counsel and investigators did not violate RPC 8.4(c).[10]

Rothrock characterized the court's opinion as a bit of a struggle, given the "absoluteness" of the proscription of Rule 8.4(c), a proscription that is not keyed to materiality. In contrast, Rule 4.1, to which the court turned for an understanding, does turn on materiality. As Rothrock explained, the court determined that a serious rule, with serious consequences, should not be applied to immaterial lies, such as telling the lawyer's child that there is a Santa Claus (Rothrock noted, as the court had, that Rule 8.4(c) applies as well to a lawyer's private conduct as to that engaged in as a lawyer representing a client). In Rothrock's view, Colorado should not leave the matter of pretexting to complex and uncertain analyses on a case-by-case basis but, rather should have a rule that says what we want it to say: The use of investigators is okay.

Rothrock noted that, in 2003, Virginia simply modified Rule 8.4(c) to limit its proscriptions to "conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law*," language that is similar to that used in Rule 8.4(b) and, now, in Colorado C.R.C.P. 251.5(b) regarding a criminal act by a lawyer "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Virginia solution has also been adopted in North Dakota and Oregon. The theory, Rothrock explained, is that a lawyer's use of an investigator for undercover activity that involves some deception does not reflect adversely on the lawyer's fitness to practice law; but, he said, the subcommittee dismissed that approach as being too subtle, too uncertain, to be a satisfactory solution.

Rothrock noted that Alabama has, instead of modifying Rule 8.4(c), modified Rule 3.8 to provide prosecutors with the following protection:

> (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage

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10. *Id.* at 475 [footnotes omitted].

> in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Subsequently to the adoption of this modification, an Alabama ethics opinion extended the principle to lawyers in private practice.

Most states, however, have tackled the problem by modifications of Rule 8.4(c), some limiting the changes to prosecutors and others including private lawyers within the changes. Rothrock said it would be fair to say that the subcommittee's proposal is most similar to the changes made in Iowa and Oregon — Oregon also having a federal case on point. Those states provide much of what the subcommittee proposes, although, he noted, Iowa's change is only in the comment, not in the body of the rule; concerned that a comment could not trump the text of a rule, the subcommittee rejected the Iowa approach.

Rothrock concluded by asserting that the subcommittee's proposal incorporates the best of the concepts utilized in other states, providing guidance to both prosecutors and lawyers in private practice while limiting the permitted activity "as much as possible" and providing useful cross-references to other rules. The proposal is, he said, the best of what is out there.

Downey pointed the members to Part III, captioned "Preliminary Considerations," of the subcommittee's report, contained in the meeting materials. That part manifests that the subcommittee's principal focus to date has been the *Pautler* decision, and its conclusion is that the decision is not a barrier to modification of the rules governing pretexting because the supreme court can by its own amendment of the rules of professional conduct that it promulgates, "overrule" the *Pautler* opinion. Downey pointed out that the court recognized, in footnote 4 of the *Pautler* opinion, that Oregon and Utah permitted governmental deception.[11] Downey commented that, each time he re-reads *Pautler*, he sees that the court was careful to state that it was dealing with the text of Rule 8.4(c) that provided no exceptions to its mandate, in contrast to the text of the rule in some other states, and thereby indicated that it was aware that the text could be modified to permit what was previously prohibited. Downey said the subcommittee sees the *Pautler* decision as a reason for any change to be stated specifically.

Rothrock interjected that he was not aware of any activity within the American Bar Association's Center on Professional Responsibility to propose any modification to the strict text of the model Rule 8.4(c).

Downey agreed with Rothrock's earlier comment that the subcommittee was of the view that any change should be stated in the text of Rule 8.4(c) and not left to a comment. He added that the subcommittee was also of the view that permitting the lawyer to supervise the deceptive conduct of investigators would have the advantage of providing appropriate control over the investigators' conduct.

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11. Footnote 4 in *In re Pautler* reads as follows:

Only Utah and Oregon have construed or changed their ethics rules to permit government attorney involvement in undercover investigative operations that involve misrepresentation and deceit. See Utah State Bar Ethics Advisory Opinion Comm., No. 02-05, 3/18/02, and Or. DR 1-102(d), respectively. The recently issued advisory opinion of the Utah Bar Ethics Committee holds that attorneys may participate in "otherwise lawful" government investigative operations without violating the state's ethics rules. *Id.* The Oregon rule is more restrictive. It encompasses similar investigative operations, but limits the attorney's role to "supervising" or "advising," not permitting direct participation by attorneys. See Or. DR 1-102(d).

Downey said the subcommittee considered other rules as well — Part IV of the subcommittee's report reviews Rule 3.8, Special Responsibilities of a Prosecutor; Rule 4.1, Truthfulness in Statements to Others; Rule 4.2, Communications with Persons Represented by Counsel; Rule 4.3, Dealing with Unrepresented Persons; and Rule 5.3, Responsibilities Regarding Nonlawyer Assistants. It has determined, however, that, while amendments to the comments of one or more of those rules might be appropriate, it was not likely to recommend any change to the text of any of them.

Downey summarized a point that is elaborated upon in the subcommittee's report: The proposal is more permissive as to governmental lawyers and more restrictive as to non-governmental lawyers, reflecting a reconciliation effort in the subcommittee to avoid majority and minority reports.

While saying he would not get into the details of the subcommittee's proposal, Downey outlined it as adding two exceptions to the existing, proscriptive text of Rule 8.4(c). [See the proposed text of the exceptions on page 5 of these minutes.] For lawyers in private practice, the exception extends only to matters of "background, identification, purpose, or similar information." For government lawyers, the exception includes covert action that is within the scope of the lawyer's duties in the enforcement of law and is purposed to "gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering." By the comments that the subcommittee proposes,[12] it would be made clear that the lawyer may not himself engage in "covert activity" and that conduct that is covered by one of the proposed exceptions to Rule 8.4(c) would not be violative of the proscriptions of Rule 8.4(a) against knowingly assisting or inducing another to violate the Rules of Professional Conduct or doing so oneself through the acts of another.

Downey summarized the subcommittee's work as follows: It had its work cut out for it. It listened to the concerns of the bar about the impediments of Rule 8.4(c) and *Pautler* to covert activities that is in fact perceived as appropriate, leaving many lawyers in unwitting violation of the current proscriptions, perhaps by erroneously thinking that, if they don't really know what their investigators are doing, they are safe from discipline. That perception is not correct.

Downey then invited comments from the members. The Chair interjected to structure the discussion: She asked, first, for a discussion about concept — is this a good idea, to create exceptions to Rule 8.4(c), is it a path that the Committee wants to go down at all? Then the Committee would turn to the specifics of the proposal. She recognized that there is a relationship between the two divisions she envisioned but asked that the general question be considered first.

The Chair opened the discussion with a question to Downey and the subcommittee participants: Did the subcommittee receive the views of the criminal defense bar? She noted that the chart showing activity in other states was useful, but it only shows where action has been taken to permit some exceptions to the strict proscriptions of Rule 8.4(c) — she wondered whether there were examples of states considering, but then rejecting, change, deciding instead not to accommodate any kind of deception.

Downey replied that the subcommittee had not specifically sought the views of the defense bar. It had spoken only to the U.S. Attorney's Office, the Colorado Department of Law, and the Federal Equal Employment Opportunity Commission. Likewise, the subcommittee did not solicit the views of the Colorado District Attorneys Association. He said that, on the criminal law enforcement side of the matter, the subcommittee had felt that it understood the issues well enough, although he admitted that those issues might be nuanced.

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12. *See* n. 5 to these minutes for the subcommittee's proposed comments.

Kirsch added, however, that the subcommittee had gotten concurrence by the Colorado Defense Bar Association to U.S. Attorney Walsh's expressed views.

A member commented that there were three possible scenarios: (1) The lawyer directly engages in covert activity; the proposal would continue the prohibition of direct covert activity. (2) the lawyer engages an investigator — is that "direct participation"? The member was not sure but noted the question can be resolve by stating that the client, rather than the lawyer, may make the engagement with the investigator and by stating that the lawyer can suggest such an engagement to the client pursuant to Rule 1.2(d).[13] (3) The lawyer may use or submit evidence that has been obtained by deceptive means by the client or a third person, pursuant to Rule 3.8, which proscribes the use of evidence known to the lawyer to be false but does not proscribe the use of truthful evidence obtained by deception by the client or another person.

Downey responded to these suggestions by saying that the subcommittee was not addressing rules of evidence. But, he asked, if the conduct in question constituted a violation of law, would not that take the analysis back to Rule 8.4(c) and the current proscriptions?

The member clarified that his question was whether the lawyer's submission of evidence that has been acquired by deception by others would violate any of the Rules of Professional Conduct, not whether it was permitted or blocked by some rule of evidence.

A member who is a member of the subcommittee noted that we are dealing with conduct that occurs before the submission of evidence in a proceeding — we are dealing with conduct in the gathering of evidence — and he asked what difference it can make that the investigator who gathers the evidence has been engaged by the lawyer or by the lawyer's client, alluding to Rule 1.2(d). Another noted that the distinction would break down in the case of an in-house lawyer.

The member who had begun this thread of the discussion characterized Rule 1.2(d) as "wink-wink" and pointed out that, because the subcommittee's own premise is that much deceptive conduct is in fact appropriate, the engagement of another to engage in the deception cannot be violative of Rule 1.2(d). In his view, it was not necessarily violative of Rule 8.4(c), either, as has been supposed by the subcommittee: The lawyer is not advising the client to commit fraud by engaging an investigator; rather, he is advising the client to hire an investigator to engage in lawful deception by the purchase of goods.

A member who had not previously spoken noted that the discussion was turning on a fine distinction. Take, he said, a fair housing violation investigation. A renter wants to wants to rent: he takes notes about what is said by the landlord. That is lawful conduct when done by a private person. We are saying it is problematic if done by a lawyer seeking to gather evidence about the landlord's practices. But the average person would not object to the submission of that evidence in the prosecution of a fair housing case. Why cannot the lawyer submit that evidence?

Kirsch noted that, for a Federal lawyer, there was a problem with the proposition that a lawyer might currently be precluded from advising a client to do something the client might lawfully do. The Federal agencies that the Federal lawyer represents are not his clients — he has no supervisory control

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13. Rule 1.2(d) states—

> (d) 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.

over those agencies; he cannot make them do anything or refrain from doing anything, although, Kirsch noted, the lawyer can refuse to take their case. Accordingly, in Kirsch's view, Rule 1.2(d) is not apposite. Further, for most investigations to be productive, there must be more than the asking of some questions. There is a building of scenarios, the funding of drug purchases; there is more to it than just telling a "client" to go make an investigation.

Another member who had not previously spoken cautioned that the discussion was conflating rules of evidence with rules of professional conduct. Rule 3.3(b),[14] previously alluded to, deals with taking reasonable remedial measures to adhere to the lawyer's duty to be candid with the court, including correcting errors that have already occurred in the proceeding. But the question before the subcommittee deals with conduct that, under Rule 3.3(d) would, presumably, be disclosed to the court, after which the subject evidence could be admitted. In most cases, by the time of trial — or in the course of the trial — the fact that undercover conduct occurred will necessarily have been disclosed to the court.

Another member commented that the subcommittee's proposal does not preclude a prosecutor's suggestion that an affidavit to support a search warrant be submitted on false evidence: "We are looking for an illegal gun," instead of "we are looking for illegal drugs." This possibility probably had not been considered by the subcommittee, the member noted, but it would not be precluded by the subcommittee's proposal. Once the judge has received the affidavit from the police officer and has issued the search warrant, the original deception in the affidavit cannot be remedied, can't be undone.

A member asked whether the concern was that the subcommittee's proposal would condone such conduct by government lawyers because the proposal does not preclude deception of the court itself.

Downey addressed the question by pointing out that procurement of a search warrant on false evidence would not be a lawful activity — only "lawful covert activity" is permitted — and thus would not be a permitted exception under the subcommittee's proposal.

A member who had served on the subcommittee and who now characterized herself as a dissenter said she objected to the creation of any exceptions for lawyers in private practice, as distinguished from government lawyers. Although she was not in family law practice herself, she noted that those who are often "take on the mantle of their clients," and she commented that whether particular deception is "lawful" or is to expose threats to civil rights is often in the eyes of the beholder. In her view, Rule 8.4(c) should not be amended to permit any kind of deceptive conduct by lawyers in private practice; she noted that, in saying this, she was ordinarily opposed to variations in the rules that distinguish between government and private lawyers. In answer to a member's observation, this member said she was not satisfied that the proposal's requirement that the lawyer have a good faith belief in the efficacy of the covert activity would provide sufficient protection against inappropriate conduct. Lawyers, she said, would view the matter from their clients' perspectives.

Rothrock responded to the comment by stating that, on balance, he favored the subcommittee's proposal but that he shared the concerns that the member had expressed. Downey added that the subcommittee had considered these kinds of concerns and noted that the exceptions for the private lawyer are in fact limited to "matters of background, identification, purpose, or similar information."

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14. Rule 3.3(b) reads—

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

Another member who had served on the subcommittee said that he had begun his own participation with views similar to those the member had expressed but had become persuaded that the narrow language proposed for the private lawyer exceptions is sufficient protection against misconduct. It is, however, debatable, he acknowledged.

A member whose practice includes criminal defense said she had a lot to say about the proposal, and she began with the observation that the proposal does affect the criminal defense bar. She added that she had received the proposal only recently, when it was distributed to the members in the materials for the meeting, but that she has now disseminated both locally and nationally for comment by the defense bar. She expected that community will have a lot to say about the proposal, and she asked for time in which to gather those comments.

This member commented that the *Pautler* message from the supreme court had been very clear; she personally knew both the public defenders and the prosecutors who had been involved in the circumstances underlying the opinion. And, she said, the bar now understands the import of the *Pautler* decision; she worried that any deviation from that ruling would be a slippery slope: "Covert is covert," she said. One can say this only permits limited covert activity, but that is itself a subjective matter. She indicated that, in her experience, not all prosecutors are as mindful of proper limitations on covert activity as are those espousing these Rule 8.4(c) changes to this Committee. She added that advice and supervision over covert activity will vary from jurisdiction to jurisdiction within the state. It is one thing to supervise trained undercover officers; it is another to permit other law enforcement officers to engage in covert activity in cases of varying complexity. She used, as an example, a civil tax evasion case that changes into an investigation of criminal tax fraud; in such cases, the investigating officers often have law degrees, and they will not seek a licensed lawyer's supervision of their activity. If you add a requirement that the licensed lawyers provide supervision, you make them integral parts of the investigation, and to say that they are distinct from that investigation is but a fiction. She imagined the conversation: "We did this, what do you think?" "Well, I want you to go back and do it a different way." That involvement would make the supervising lawyer an integral part of the criminal case, would make him a witness: "The lawyer said we should do X, Y, and Z, but we decided that wasn't quite right, so we chose to do it this other way." Suddenly, the lawyer is a witness in his own case. At the least, the prosecutor should be required to disclose to the defense the protocols that were established for the case, so that the defense can consider and argue the ethical aspects of the investigation, can measure whether the investigators adhered to the established protocols. In short, this is a slippery slope, and this member asked that it not be made more common and more acceptable than it currently is.

The member added that, when looking at the proposal from the standpoint of the private lawyer, she could not imagine a criminal defense lawyer ever promoting deceptive conduct. Well, perhaps she could, citing the case of a "flipping" client who had chosen to cooperate with the government. But, in her view, there should be no exception to Rule 8.4(c) to permit any kind of deceptive conduct, because the deceptive conduct will taint the case. Certainly, she thought, deception should never be used by defense counsel.

The member said she has been involved in financial cases involving foreign activity, in which inducements have been extended to bring the defendant back to the United States jurisdiction. While that kind of conduct does not usually occur "at the district attorney's level," it may sometimes affect affidavits that are submitted to the judge: "I did not tell the judge that because I thought it was legitimate to withhold the information from the judge so that it would not be disclosed in the course of the ensuing investigation." This, she characterized, is an ends-justifies-the-means approach to the matter.

Summarizing, the member again noted that this is a slippery slope, and she acknowledged that she felt pretty passionate about the matter. She said, "*Pautler* is clear." She knows, she said, that covert

activity sometimes occurs and acknowledged that it can be "a necessary evil" in unusual circumstances. But it is the law enforcement officer who tells the confidential informant how to act, having learned that in school.

Another member suggested that it would be helpful to the Committee to have the defense bar weigh in on the proposal. He agreed that *Pautler* is certainly troublesome when applied to acceptable undercover law enforcement, which is "part and parcel" of law enforcement. He was not aware of any case that ruled against covert activity by the police, as distinguished from the prosecution. He noted that *Pautler* cited the case *People v. Reichman*,[15] a case involving alleged misconduct by the prosecution by the filing of a false indictment for the purpose of rehabilitating the credibility of an undercover officer in the drug-trafficking community. The member explained that the disciplinary case against the prosecutor in *Reichman* had been prosecuted by a special prosecutor, and he suggested that the subcommittee now solicit the views of that lawyer on its proposal. This member noted that he had once served as a prosecutor and knew, from that experience, that prosecutors in fact try to behave ethically and that they rely on "good faith" as a protection against ethical sanctions. He wondered whether *Reichman* would be decided, under the subcommittee's proposal, as it had been decided under the old Code of Professional Responsibility in 1991. *Pautler*, he said, is s strong statement in favor of honesty. The closer one gets to the border, as a lawyer, the more troubling it is. When you are advising an investigator as to the limits of his conduct, when do you become directly involved in that conduct? That can be difficult to determine. The member also noted that, among the citations in *Pautler* is *Chancey*,[16] in which an Illinois disciplinary board reprimanded a prosecutor for dishonesty notwithstanding the purity of his motive in attempting to rescue his own child from a kidnapper.[17] *Pautler* used *Chancey* to

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15. 819 P.2d 1035 (Colo.1991). The *Pautler* court explained the *Reichman* decision as follows:

> There, a district attorney sought to bolster a police agent's undercover identity by faking the agent's arrest and then filing false charges against him. Id. at 1036. The DA failed to notify the court of the scheme. Id. We upheld a hearing board's imposition of public censure for the DA's participation in the ploy. . . .
>
> To support our holding in Reichman, we cited In re Friedman, 76 Ill.2d 392, 30 Ill.Dec. 288, 392 N.E.2d 1333 (1979). There, a prosecutor instructed two police officers to testify falsely in court in an attempt to collar attorneys involved in bribery. A divided Illinois Supreme Court found such advice violated the ethics code despite the undeniably wholesome motive. Similarly, in In re Malone, 105 A.D.2d 455, 480 N.Y.S.2d 603 (N.Y.App.Div.1984), a state attorney instructed a corrections officer, who was an informant in allegations against correctional officers abusing inmates, to lie to an investigative panel. The instruction was purportedly to save the testifying officer from retribution by the other corrections officers. Again, despite the laudable motive, the New York court upheld Malone's censure for breaking the code.
>
> Thus, in *Reichman*, we rejected the same defense to Rule 8.4(c) that Pautler asserts here. We ruled that even a noble motive does not warrant departure from the Rules of Professional Conduct. Moreover, we applied the prohibition against deception a fortiori to prosecutors:
>
> District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices. This court has spoken out strongly against misconduct by public officials who are lawyers. The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility.
>
> Reichman, 819 P.2d at 1038-39 (citations omitted).

Pautler, 47 P.3d at 1179. [Citations omitted.]

16. No. 91CH348, 1994 WL 929289 (Ill. Att'y Reg. Disp. Comm'n Apr. 21, 1994).

17. After stating that "This court has never examined whether duress or choice of evils can serve as defenses to attorney misconduct. We note that the facts here do not approach those necessary for either defense: Pautler was not acting at the direction of another person who threatened harm (duress), nor did he engage in criminal conduct to avoid imminent public injury (choice of evils)," the *Pautler* court compared the *Chancey* case as follows:

> In Chancey, a prosecutor with an impeccable reputation drafted a false appellate court order for the sole purpose of deceiving a dangerous felon who had abducted his own child and taken her abroad. Chancey signed a retired

stress that motive is not relevant in determining whether a violation of Rule 8.4(c), as written, has occurred. The member pointed out that *Pautler* itself involved a very serious circumstance, a confrontation with a murderer, and that the trial court had heard from other prosecutors who testified that they had personally told fugitives, on the telephone, that they would not prosecute if there was surrender. But the *Pautler* court distinguished those cases, pointing out that, if Pautler had handed the telephone to a policeman, the matter would not have led to discipline. But, instead, Pautler pretended to be a public defender and on the fugitive's side, and thereafter he did not disclose to the fugitive's lawyers, after the surrender, what Pautler had done, thereby damaging the relationship that those lawyers had as defense counsel for the surrendered fugitive.[18]

A member asked whether there was a similar need to seek the input of representatives of corporations that engage in covert activity in civil contexts. Another member added that there are many such contexts in civil law, such as cases involving employment discrimination; she noted that the Committee has already had input from the intellectual property bar. The member who had asked the question persisted by noting that there are distinctions between the civil and criminal arenas that should be examined. Another member suggested that the subcommittee seek input from groups such as the American Corporate Counsel Association.

A member raised a couple of questions: First, is the difference between prohibited direct engagement in covert activity and permitted supervision of others' covert activity equal to the difference between instigating such activity and advising others who are already embarked on it? And, second, can state or federal public defenders engage in covert activity — which they might wish to do if they believe that the prosecution has already done so in their case — as "government lawyers"?

Without answering that question, another member commented that, as a matter of proper process, the Committee or the subcommittee should hear from other groups of the kinds that have been mentioned, something that could not be done at this meeting. "This is far-ranging stuff," he said, and the Committee needs to hear from interested groups. The member moved to table further consideration of the subcommittee's proposal, and the motion was seconded.

Kirsch interjected that he would like, at this meeting, to respond to some of the comments that had been made on behalf of the criminal defense bar.

> judge's name to the order. He never intended to file the order and did not file the order, nor was the order ultimately used to deceive the felon. Despite its non-use, and despite Chancey's undeniably worthy motive, the Illinois board reprimanded Chancey for his deceit. Rather than consider an exception in light of valid concerns over the safety of an abducted child, the board insisted on holding attorneys, especially prosecutors, to the letter of the Rules. Further, the board observed, and we agree, that motive evidence was only relevant in the punishment phase, as either a mitigating or aggravating factor.

Pautler, 47 P.3d at 1181. [Citations omitted.]

18. The *Pautler* court explained Pautler's post-incident conduct as follows:

> However, we do find an additional aggravating circumstance: Pautler's post-incident conduct. An attorney's post-incident conduct also bears upon aggravation and mitigation. See ABA Standards 9.22(j) (indifference in making restitution is an aggravating factor); id. at 9.32(d) (timely good-faith effort to make restitution or to rectify consequences of misconduct is a mitigating factor). After the immediacy of the events waned, Pautler should have taken steps to correct the blatant deception in which he took part. Instead, he dismissed such responsibility believing that the PD's office "would find that out in discovery." Although we do not agree that Pautler's subsequent failure to correct the deception was evidence of a secondary, ulterior motive, as the hearing board found, we do find that such conduct was an independent aggravating factor.

Pautler, 47 P.3d at 1184.