Rule 3.4. Fairness to Opposing Party and Counsel.

Colorado Court Rules

Colorado Rules of Professional Conduct

Advocate

As amended through Rule Change 2018(6), effective April 12, 2018

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Cite as RPC 3.4

History. Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. See Rule 16, Colorado Rules of Criminal Procedure.

Colorado Court Rules
Colorado Rules of Professional Conduct
Transactions with Persons Other Than Clients
As amended through Rule Change 2018(6), effective April 12, 2018
In 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; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Cite as RPC 4.1
History. Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:
COMMENT

False Statements

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements. For dishonest conduct generally see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.
Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the

representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with Person Represented by Counsel.

Colorado Court Rules

Colorado Rules of Professional Conduct

Transactions with Persons Other Than Clients

As amended through Rule Change 2018(6), effective April 12, 2018

Rule 4.2. Communication with Person Represented by Counsel

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

Cite as RPC 4.2

History. Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client

concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person, such as a contractually-based right or obligation to give notice, is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[9A] A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b), and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

Rule 4.3. Dealing with Unrepresented Person.

Colorado Court Rules

Colorado Rules of Professional Conduct

Transactions with Persons Other Than Clients

As amended through Rule Change 2018(6), effective April 12, 2018

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Cite as RPC 4.3

History. Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and

explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[2A] The lawyer must comply with the requirements of this Rule for pro se parties to whom limited representation has been provided, in accordance with C.R.C.P. 11(b), C.R.C.P. 311(b), Rule 1.2, and Rule 4.2. Such parties are considered to be unrepresented for purposes of this Rule.

Rule 4.4. Respect for Rights of Third Persons.

Colorado Court Rules

Colorado Rules of Professional Conduct

Transactions with Persons Other Than Clients

As amended through Rule Change 2018(6), effective April 12, 2018

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Cite as RPC 4.4

History. Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. A document is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the

document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately wrongfully obtained by the sending person.

For purposes of this Rule, "document" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by applicable law or paragraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.

Colorado Court Rules

Colorado Rules of Professional Conduct

Law Firms and Associations

As amended through Rule Change 2018(6), effective April 12, 2018

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Cite as RPC 5.3

History. Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

Note:

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See See

Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority, over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 8.4. Misconduct. Colorado Court Rules
Colorado Rules of Professional Conduct

Maintaining the Integrity of the Profession

As amended through Rule Change 2019(17), December 6, 2019, effective immediately

Colo. R. Prof'l. Cond. 8.4

Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(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, and investigators, who participate in lawful investigative activities;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;
(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law; or
(i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.

RPC 8.4

Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; paragraph (c) amended and Adopted by the Court, En Banc, September 28, 2017, effective immediately; amended and adopted September 19, 2019, effective 9/19/2019; amended and adopted December 6, 2019, effective 12/6/2019.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct,

knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally

answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including antiharassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

ANNOTATION Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Improper Recording of an Attorney's Charging Lien", see 32 Colo. Law. 61 (February 2003). For article, "Discipline Against Lawyers for Conduct Outside the Practice of Law", see 32 Colo. Law. 75 (April 2003). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications", see 33 Colo. Law. 53 (October 2004). For comment, "Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception", see 75 U. Colo. L. Rev. 301 (2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008). For article, "Litigating Disputes Involving the Medical Marijuana Industry", see 41 Colo. Law. 103 (August 2012). Annotator's note. Rule 8.4 is similar to Rule 8.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. A hearing board always has discretion in determining the appropriate sanction for attorney misconduct and may impose any of the forms of discipline listed in C.R.C.P. 251.6, which range from private admonition to disbarment. In re Attorney F, 2012 CO 57, 285 P.3d 322. Hearing board erred, therefore, in concluding that it was compelled by case law to impose a public censure instead of private admonition. In re Attorney F, 2012 CO 57, 285 P.3d 322. Attorney's refusal to return documents belonging to client's parents and assertion of a retaining lien constitute conduct which is prejudicial to the administration of justice. People v. Brown, 840 P.2d 1085 (Colo. 1992). Lawyer violated section (c) when he represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of

businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999). Attorneys are responsible for ethical violation when their investigator surreptitiously recorded his telephone interview with employee of defendant. Even if lawyers had no prior knowledge of the investigator's recording, once they learned that the interview was done without the employee's consent, they should not have listened to or used the recording without the employee's consent. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009). Attorney violated sections (a) and (c) by failing to notify a client that he never paid two medical bills that he had promised to pay, recording a false deed of trust memorializing a purported loan from two married clients to another client even though the clients had unequivocally refused to make the loan, and attempting to enter into a business transaction with clients without making disclosures required by rule 1.8. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011). Lawyer violated section (c) when he failed to disclose the fact of his client's death during settlement negotiations. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007). Failure of former district attorney to make ordered child support payments constitutes conduct prejudicial to the administration of justice and conduct that adversely reflects upon a lawyer's fitness to practice law. People v. Primavera, 904 P.2d 883 (Colo. 1995). Attorney who conditioned settlement agreement on plaintiffs not pursuing a grievance against him violated section (d) and constituted conduct prejudicial to the administration of justice. In re Lopez, 980 P.2d 983 (Colo. 1999). When a public defender gave his client the impression that he would provide better representation if the client hired him as private counsel, his conduct prejudiced the administration of justice under section (d), for which public censure was warranted. People v. Casias, 279 P.3d 667 (Colo. O.P.D.J. 2012). Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998). A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002). There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002). Suspension appropriate where prosecutor engaged in intentional deception in order to secure a suspect's arrest. The prosecutor's conduct violated the public and professional trust, was intentional, created potential harm, and involved aggravating factors, thus, justifying suspension. In re Pautler, 47 P.3d 1175 (Colo. 2002). When considering discipline of attorneys who criticize judges, the New York Times standard should be applied because of the interests in protecting attorney speech critical of judges. Under the New York Times standard (New York Times Co. v. Sullivan, 376 U.S. 254(1964)), a two-part inquiry applies in determining whether an attorney may be disciplined for statements criticizing a judge: (1) Whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice--that is, with knowledge that it was false or with reckless disregard as to its truth. In re Green, 11 P.3d 1078 (Colo. 2000). Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996). Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997). Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that hindered a client's right to choose his or her own lawyer by interfering with the client's right to discharge his or her lawyer at any time, with or without cause. People v. Wilson,

953 P.2d 1292 (Colo. 1998). Public censure was appropriate where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998). Knowingly deceiving a client by altering a settlement check generally would warrant a 30-day suspension, however, because the client was uninjured by the deception and the respondent had no previous discipline in 13 years of practice, public censure was adequate. People v. Waitkus, 962 P.2d 977 (Colo. 1998). One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993). Six-month penalty justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imposition of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse; and (6) relative inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993). Six-month suspension appropriate for respondent convicted of drunken driving offense and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 460 (Colo. 1997). Multiple criminal and traffic convictions demonstrate a pattern of misconduct, and the presence of multiple offenses warrants suspension for six months with the requirement of reinstatement proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998). Demonstration of four conditions required for attorney publicly censured after conviction of driving while ability impaired: Continue psychotherapy, remain on antabuse, submit monthly reports regarding progress on antabuse, and execute written authorization to therapist to release medical information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996). Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997). Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998). Forty-five-day suspension warranted for attorney's professional misconduct involving the improper collection of attorney's fees in six instances. People v. Peters, 849 P.2d 51 (Colo. 1993). Suspension of three months is appropriate when attorney engaged in sexual intercourse with dissolution of marriage client on one occasion, had a history of disciplinary sanctions, but cooperated with the disciplinary investigation. People v. Barr, 929 P.2d 1325 (Colo. 1996). Suspension for one year and one day, with conditional stay of all but 60 days, warranted for attorney's backdating of brief and certificate of service, after which attorney voluntarily reported misconduct, attempted to rectify the violation, cooperated in disciplinary proceedings, and showed genuine remorse. People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008). Suspension for one year and one day appropriate where attorney, among other disciplinary rule violations, violated section (d) by failing to pay attorney fees until two years after a malpractice action against the attorney and section (h) by engaging in two non-sufficient funds transactions involving his "special" account, and twenty-two non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997). Suspension for one year and one day appropriate where attorney had a selfish or dishonest motive in retaining fees he received from clients that rightfully belonged to his law firm, but had no prior disciplinary record and made a timely good faith effort to provide restitution. People v. Bronstein, 964 P.2d 514 (Colo. 1998) (overruled in In the Matter of Thompson, 991 P.2d 820 (Colo. 1999)). Suspension for one year and one day warranted where attorney violated section (c) by knowingly submitting a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998). Suspension of one year and one day appropriate where attorney

committed offense of third-degree sexual assault on a client and recklessly accused a lawyer and judge of having an improper ex parte communication. In re Egbune, 971 P.2d 1065 (Colo. 1999). It is appropriate to condition reinstatement, after suspension for a year and a day, upon the attorney's submission to an independent medical examination by a qualified psychiatrist, where the attorney's belief in a conspiracy to remove her from the practice of law was both ingrained and illogical. The suspension is warranted because the attorney violated section (d) by threatening to sue witnesses if they testified at a hearing over an award of attorney fees and section (c) by secretly negotiating with opposing litigants for additional attorney fees when the attorney's contingency fee contract with her former clients gave them a potentially valid claim to a portion of the fees. People v. Maynard, 275 P.3d 780 (Colo. O.P.D.J. 2010). Two-year suspension warranted when attorney entered Alford plea to defer judgment on a charge of soliciting for child prostitution. People v. Gritchen, 908 P.2d 70 (Colo. 1995). Driving while under the influence of alcohol with an expired driver's license and no proof of insurance, and accepting one ounce of cocaine as payment for legal services from a person believed to be a client facing drug charges, warranted a three-year suspension. People v. Madrid, 967 P.2d 627 (Colo. 1998). Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997). Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998). Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998). A long period of suspension, rather than disbarment, is warranted when acts complained of occurred before an earlier disciplinary action against the attorney and mitigating factors exist. Attorney's actions were more properly viewed as a pattern of misconduct. In re Van Buskirk, 981 P.2d 607 (Colo. 1999). Thirty-day suspension appropriate where attorney overdrew his Colorado Lawyer Trust Account Foundation (COLTAF) account but shortly thereafter deposited sufficient funds to cure the deficiency, negligently failed to keep adequate trust account records, knowingly and repeatedly failed to respond to several requests for information from the office of attorney regulation counsel, eventually provided bank records that revealed no further misconduct on his part, and faced a number of challenges in his personal life at the time he knowingly failed to cooperate with the office of attorney regulation counsel. People v. Edwards, 201 P.3d 555 (Colo. 2008). Behavior toward client that precipitated conflict on day of client's criminal trial, forcing client's newly appointed public defender to seek a continuance to have adequate time to prepare violates this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993). Pushing another attorney in the courtroom, resulting in a conviction for third-degree assault, warranted a 30-day suspension. People v. Nelson, 941 P.2d 922 (Colo. 1997). Lawyer who imposed unauthorized charging lien and subsequently failed to release such lien, and who testified at grievance proceedings that he kept documents belonging to third parties in order to protect his client's financial interests, which was the first instance at which such a theory was raised, violated this rule. Although the attorney's motives were dishonest and selfish, the grievance against the attorney involved in multiple offenses, the attorney violated a disciplinary rule at the grievance proceedings, and the attorney failed to acknowledge wrongful nature of his conduct, the mitigating factors included the fact that the attorney had not been subject to prior grievances and the attorney was relatively inexperienced. Thus, the appropriate sanction is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992). In determining appropriate sanction, it is not important whether injured party was attorney's client, when attorney-respondent was appointed conservator. People v. Vigil, 929 P.2d 1311 (Colo. 1996). Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997). Disbarment warranted for respondent who continued to practice law while under suspension. Respondent was suspended based upon conviction for possession of cocaine, a class 3 felony, and upon release from prison represented to several persons that he was a licensed attorney and provided legal services to those persons. Board's finding that respondent had a history of prior discipline, a dishonest or selfish motive, displayed a pattern of misconduct, had committed multiple offenses, had

engaged in a bad faith obstruction of the disciplinary process, had refused to acknowledge any wrongful conduct on his part, had substantial experience in law, and could offer no mitigating factors warranted disbarment. People v. Stauffer, 858 P.2d 694 (Colo. 1993). Disbarment appropriate remedy where attorney neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998). Disbarment is the presumed sanction for knowing misappropriation of funds from clients or one's law firm, barring significant mitigating circumstances. People v. Guyerson, 898 P.2d 1062 (Colo. 1995); People v. Varallo, 913 P.2d 1 (Colo. 1996); In the Matter of Thompson, 991 P.2d 820 (Colo. 1999) (overruling People v. Bronstein, 964 P.2d 514 (Colo. 1998)); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008). Disbarment appropriate when attorney accepted legal fees, performed limited services, abandoned the client, and then misappropriated the unearned fees. People v. Kuntz, 942 P.2d 1206 (Colo. 1997). Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996). Structuring financial transaction to enable client to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002). Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995). One-year and one-day suspension plus payment of restitution and costs proper for attorney who induced a loan through misrepresentations, assigned a promissory note obtained with proceeds of such loan without lender's knowledge or consent, and misrepresented that sufficient funds were in trust account to cover check. People v. Kearns, 843 P.2d 1 (Colo. 1992). False statements by attorney in connection with an accident in which the attorney was at fault adversely reflects on attorney's fitness to practice law. People v. Dieters, 935 P.2d 1 (Colo. 1997). Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993). Attorney's repeated assurances to client that he would file a motion for reconsideration, his failure to do so, and his neglect of a legal matter entrusted to him constitute disciplinary violations warranting suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993). Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel, constituted disciplinary violations warranting a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999). Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996). Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion and then failed to appear at a deposition. People v. Huntzinger, 967 P.2d 160 (Colo. 1998). Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996). Suspension stayed, in view of respondent's cooperation and remorse, conditioned upon successful completion of six-month probationary period and ethics refresher course. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007). Lawyer advertisement containing false, misleading, deceptive, or unfair statements violates this rule and warrants public censure where respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. People v. Carpenter, 893 P.2d 777 (Colo. 1995). Public censure appropriate where attorney misrepresented the status of a dismissed case to his client, the resultant actual harm to the client was only the cost of hiring a new lawyer to pursue an appeal of the dismissal, the attorney's law firm reimbursed the client for all fees it had collected, the attorney reimbursed the firm for such fees, the only aggravating factor was a 1994 letter of admonition given to the attorney for improperly communicating with a represented person, and mitigating factors included the absence of a dishonest or selfish motive, remorse, and full and free disclosure in the disciplinary

proceedings. People v. Johnston, 955 P.2d 1051 (Colo. 1998). Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993). Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995). Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996). Public censure appropriate where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998). Public censure appropriate for attorney who had been reprimanded in Connecticut for failure to file federal income tax return and attorney had not been disciplined before in Colorado. People v. Perkell, 969 P.2d 703 (Colo. 1998). Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997). Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)). Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996). Public censure warranted for attorney's solicitation of prostitution during telephone call with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997). Public censure was warranted where attorney made inappropriate, harmful, offensive, harassing, and sexually abusive comments to potential client. The mitigating factors found by the hearing board do not compel a different result. People v. Meier, 954 P.2d 1068 (Colo. 1998). Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993). Two-year suspension was an adequate sanction where attorney neglected client matters by representing that he would file a lawsuit and neglected to do so, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by agreeing to represent client and thereafter failing to advise the client of attorney's suspension, and where attorney further engaged in misrepresentation by collecting legal fees and costs from client while attorney was under suspension. People v. de Baca, 948 P.2d 1 (Colo. 1997). Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo. 1997). Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998). Depositing personal funds into a COLTAF account to hide personal assets from creditors supports a 90-day suspension with conditions of reinstatement. People v. Alster, 221 P.3d 1088 (Colo. O.P.D.J. 2009). Suspension of one year and one day was appropriate based on evidence of three separate incidents in which the attorney physically assaulted his girlfriend. It was immaterial that no charges had been filed in any of the incidents, because the acts alone reflected adversely on the attorney's fitness to practice

law. The fact that the attorney's behavior was not directly related to his practice of law was a factor to be considered, but was not conclusive. The attorney had failed to take any steps toward rehabilitation following the incidents, and the three separate assaults showed a pattern of misconduct. Therefore, it was appropriate to suspend the attorney and require him to demonstrate rehabilitation and completion of a certified domestic violence treatment program as a condition of reinstatement. People v. Musick, 960 P.2d 89 (Colo. 1998). Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003). Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998). Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998). Pleading guilty to one count of bribery evidences conduct warranting disbarment. People v. Viar, 848 P.2d 934 (Colo. 1993). Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994). Disbarment is warranted where attorney was convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997). Disbarment appropriate sanction for attorney who intentionally killed another person. Despite a lack of prior discipline in this state, giving full faith and credit to another state's law and its jury finding that attorney intentionally took her husband's life by shooting him 10 times with a firearm, disbarment is an appropriate sanction. People v. Sims, 190 P.3d 188 (Colo. O.P.D.J. 2008). Disbarment is warranted for attorney convicted of one count of sexual assault on a child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998). Disbarment was appropriate, despite existence of mitigating factors, where attorney violated section (c) of this rule by misappropriating bar association funds for his personal use and where such misappropriation was knowing. People v. Motsenbocker, 926 P.2d 576 (Colo. 1996). Disbarment was appropriate for knowing misappropriation of funds despite fact respondent had not been previously disciplined. People v. Dice, 947 P.2d 339 (Colo. 1997). Disbarment is appropriate when a lawyer knowingly misappropriates client funds in the absence of extraordinary mitigating factors. Mitigating factors such as stress due to prolonged divorce, personal financial losses, a serious motor vehicle accident, filing for bankruptcy, a deteriorating law practice, and alcohol abuse were insufficient to deviate from the rule that a clear and convincing showing of a knowing misappropriation of client funds warrants disbarment. People v. Torpy, 966 P.2d 1040 (Colo. 1998). Disbarment is warranted where attorney knowingly converted funds belonging to law firm and where attorney knowingly acted dishonestly toward the firm and the disciplinary board investigator. People v. Bardulis, 203 P.3d 632 (Colo. O.P.D.J. 2009). Disbarment is only appropriate remedy for knowingly misappropriating client funds, unless significant extenuating circumstances are present. In re Cleland, 2 P.3d 700 (Colo. 2000). Disbarment warranted for knowingly abandoning clients, converting their funds, and causing actual financial and emotional harm to them. Attorney violated duty to preserve clients' property, to diligently perform services on their behalf, to be candid with them during the course of the professional relationship, and to abide by the legal rules of substance and procedure that affect the administration of justice. People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009). Disbarment warranted for attorney convicted of conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of a false income tax return. People v. Evanson, 223 P.3d 735 (Colo. O.P.D.J. 2009). Attorney conduct violating this rule, in conjunction with other rules, sufficient to

justify disbarment when attorney knowingly commingled and misappropriated clients' funds for his personal use, neglected filing a complaint in a case until it was barred by the statute of limitations, failed to comply with court orders applicable to his child support payments, and neglected two other cases causing default judgments to be entered against his client, despite fact that one of the judgments was subsequently set aside. People v. Gonzalez, 967 P.2d 156 (Colo. 1998). Attorney who was the trustee of client's trust violated section (h) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997). Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997). Prior discipline for conduct violating this rule is an important factor in determining the proper level of discipline, therefore disbarment is merited where attorney continues to engage in misconduct. In re C de Baca, 11 P.3d 426 (Colo. 2000). Court erred when it ordered special advocate to refund fees without determining whether conduct violated section (c). In re Redmond, 131 P.3d 1167 (Colo. App. 2005). Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997). Conduct found to violate disciplinary rules. People v. Brenner, 852 P.2d 452 (Colo. 1993). Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Newman, 925 P.2d 783 (Colo. 1996); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Rolfe, 962 P.2d 981 (Colo. 1998). Conduct violating this rule sufficient to justify public censure. People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Meier, 954 P.2d 1068 (Colo. 1998); In re Wilson, 982 P.2d 840 (Colo. 1999). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. McCaffrey, 925 P.2d 269 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. McGuire, 935 P.2d 22 (Colo. 1997); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Barnthouse, 948 P.2d 534 (Colo. 1997); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Easley, 956 P.2d 1257 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Hickox, 57 P.3d 403 (Colo. 2002); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007); People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. Brennan, 240 P.3d 887 (Colo. O.P.D.J. 2009); People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011); People v. Culter, 277 P.3d 954 (Colo. O.P.D.J. 2011); People v. Duggan, 282 P.3d 534 (Colo. O.P.D.J. 2012); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012). Conduct violating this rule sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Rudman, 948 P.2d 1022 (Colo. 1997); In re Van Buskirk, 981 P.2d 607 (Colo. 1999); In re Sather, 3 P.3d 403 (Colo. 2000); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Ebbert, 925 P.2d 274 (Colo. 1996);

People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Jackson, 943 P.2d 450 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Lopez, 980 P.2d 983 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Gallegos, 229 P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Alexander, 281 P.3d 496 (Colo. O.P.D.J. 2012); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012). Conduct violating this rule sufficient to justify disbarment. People v. Kelly, 840 P.2d 1068 (Colo. 1992); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Sichta, 948 P.2d 1018 (Colo. 1997); People v. Nearen, 952 P.2d 371 (Colo. 1998).

69 PROPRIETY OF COMMUNICATING WITH EMPLOYEE OR FORMER EMPLOYEE OF AN ADVERSE PARTY ORGANIZATION

Revision adopted June 20, 1987.
Addendum issued 1995.
Revised Opinion adopted June 19, 2010.

Introduction and Scope

Members of the Bar are concerned about the propriety of communicating with an employee or former employee (or other agent) of a represented organization. This opinion provides guidance in this area. It is intended to cover not only the situation where attorneys wish to communicate with the employee of a represented organization that is a party to litigation, but also those situations where there is actual knowledge of representation prior to litigation. This opinion does not address the scope of the attorney-client privilege, the persons protected under the privilege, or the limitations on *ex parte* contacts that flow from the existence of the privilege. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *Wright v. Group Health Hospital,* 103 Wash.2d 192, 691 P.2d 564 (1984).

The Committee issued an earlier version of this opinion based on DR 7-104(A)(1) of the Colorado Code of Professional Responsibility. The Committee later issued an addendum to that opinion when the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) were adopted effective January 1, 1993. The Colorado Supreme Court repealed and reenacted the Colorado Rules effective January 1, 2008. The Committee believes that it is appropriate at this time to issue a revised opinion based on the current Colorado Rules. Because members of the Bar relied on the earlier version of this opinion, in large part this opinion tracks the organization of the earlier version. The Committee has removed discussion of issues that were clarified under the Colorado Rules.

Syllabus

When deciding whether or not to communicate with a current employee or constituent[1] of an organization, which organization a lawyer knows to be represented on the subject matter of the proposed communication, the lawyer should obtain the prior consent of the lawyer representing that organization in that matter if the person is a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter, or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization, unless the communication is otherwise permitted by law or a court order.

Consent of the organization's lawyer is not required for communication with a former constituent. In communicating with a former constituent, a lawyer must not use methods that violate the legal rights of the organization, including methods that might invade the attorney-client privilege of the organization.

A lawyer does not avoid the requirement of obtaining the prior consent of the organization's lawyer by directing another to communicate with the organization's current constituent.

An attorney may interview a former constituent *ex parte* with regard to all matters except as to communications that are the subject of the attorney-client privilege.

Analysis

Colo. RPC 4.2 provides as follows:

Communicating With Person Represented by Counsel

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

Comment [7] to Colo. RPC 4.2 provides further guidance regarding contacting constituents of a represented organization:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

The purpose of Colo. RPC 4.2 is to prevent the deprivation, undermining, or bypassing of a client's right to the advice of counsel. An attorney's advice to his or her client includes explaining the law for the client's best interests; protecting the client against unfair and misleading settlements; correcting errors in the client's communication; protecting the client against self-prejudice; and preserving the client's right to privileged communications.

In other words, Colo. RPC 4.2 protects a person or organization that has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by other lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation. Colo. RPC 4.2, Comment [1].

The rule can be broken down into four parts:

1. "Communication."
2. "Subject of the Representation."
3. "Knows" to be represented in the matter.
4. "Authorized by law or court order."

"Communication" is that made either by the attorney or his or her agent: "A lawyer may not make a communication prohibited by [Rule 4.2] through the acts of another." Colo. RPC 4.2, Comment [4]. This includes causing one's client to communicate directly with a constituent of a represented organization. Nevertheless, "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.*

Furthermore, whenever an attorney is going to communicate with a constituent who is not represented by counsel, he or she should identify himself or herself and the client. The lawyer also should refrain from stating that he or she is disinterested. When the lawyer knows or reasonably should know that the constituent misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Colo. RPC 4.3.

The parameters of the group protected by Rule 4.2 and Comment 7 differ in material respects from those who are clients entitled to the attorney-client privilege. *See Upjohn Co. v. U.S.,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *Wright v. Group Health Hospitals,* 103 Wash.2d 192, 691 P.2d 564(1984).

The phrase "subject of the representation" concerns the matter in which the interviewing counsel is representing his or her client. If the interviewing lawyer is communicating with a constituent of an organization regarding a matter outside the interviewing lawyer's representation, then there would be no violation of the rule; or, if the questioning lawyer knows that the opposing party is represented by a lawyer, but knows that such representation is on a totally unrelated matter, then such communication would not be a violation. Colo. RPC 4.2, Comment [4].

Where the interviewing lawyer knows that the organization is represented by an attorney but he or she is unclear about the area or scope of that representation, he or she is best advised to check with that lawyer before commencing the communication. *See State v. Yatman,* 320 So.2d 401 (Fla. 4th DCA 1975) (where a criminal defendant was represented by counsel in an existing criminal case, the prosecutor's attempt to interview that defendant for the purpose of filing a separate case based on the same criminal episode was improper). *See Abeles v. State Bar,* 9 Cal.3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973) (where a party had counsel of record, the attorney could not communicate with that party without the consent of the counsel of record, even where the client denied being represented personally by counsel of record); *In re Schwabe,* 242 Or. 169, 408 P.2d 922 (1965) (attorney was reprimanded for contacting a party directly to determine if he was in fact represented by another attorney who had so notified the attorney of such representation). Thus, if there is any question about whether the representation of a party relates to the subject matter of the communication, it is advisable to contact the purported counsel for that party in order to determine the nature of that representation, if any, before proceeding.

This leads to the next part of the Rule: "[K]nows to be represented by another lawyer in the matter. . . ." "Knows" denotes actual knowledge of the fact of representation in the matter, which knowledge may be inferred from circumstances. Colo. RPC 4.2, Comment [8]; Colo. RPC 1.0(f). Recklessness does not substitute for actual knowledge. Colo. RPC 1.0, Comment [7A]. Knowledge that the entity is represented in a different matter, even if related, is not necessarily knowledge of representation in the matter at issue. *See People v. Wright,* 196 P.3d 1146, 1147 (Colo. 2008) (Colo. RPC 4.2 "only purports to constrain a lawyer . . . from communicating about the subject of that representation, with someone who is represented by a lawyer *in the same matter*"; emphasis added); *State v. Harper,* 995 P.2d 1143, 1145-46 (Okla. 2000); *Miller v. Material Sciences Corp.,* 986 F.Supp. 1104, 1106-07 (N.D.Ill. 1997).

Even though one has indirect or general knowledge of legal representation, such as insurance carriers generally having legal counsel, there is no duty to inquire if a party has legal counsel in the specific matter in question.[2] However, a "lawyer cannot evade the requirement of obtaining consent of counsel by closing eyes to the obvious."[3] Colo. RPC 4.2, Comment [8].

"Authorized by law or a court order" simply means that which is authorized by statute, rule or order of court, and most probably the rule of any administrative agency having jurisdiction over the case. *Weinstein v. Rosenblum,* 59 Ill.2d 475, 322 N.E.2d 20 (1974). This includes "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." In addition it may include investigative activities of government lawyers. Colo. RPC 4.2, Comment [5]; *see also* CBA Formal Ethics Ops. 93 and 96.

A lawyer may seek a court order authorizing communication with a person if the lawyer is uncertain if that communication is prohibited by Colo. RPC 4.2. In exceptional circumstances, such as where necessary to avoid reasonably certain injury, a lawyer may seek a court order authorizing a communication that would otherwise be prohibited by Colo. RPC 4.2. Colo. RPC 4.2, Comment [6].

Once it has been determined that an organization is represented by counsel, it should be determined which constituents of that organization may be contacted and which may not be contacted directly by the lawyer.

Constituents who may be contacted differ from those who may not be contacted by their role (or lack of role) with respect to the organization's legal affairs and their authority to obligate or bind the organization regarding the subject matter of representation. Colo. RPC 4.2 prohibits a lawyer from con-

tacting a constituent of a represented organization if that constituent "supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Colo. RPC 4.2, Comment [7].

Constituents who interact with the organization's lawyer on other matters, or with authority to obligate or bind the organization with respect to other matters, but not with respect to the matter involved in the proposed communication, are not within the scope of Colo. RPC 4.2 and Comment [7]. Thus, any constituent of a corporation, no matter how senior, who does not have decision-making authority or regularly consult with the organization's lawyer *concerning the matter involved* would not be protected by Colo. RPC 4.2 and Comment [7] (unless his or her acts, omissions, or statements regarding the matter involved would bind or be imputed to the organization).

Colo. RPC 4.2 does not preclude a lawyer from interviewing fact witnesses who are employed by a represented organization but who are not part of the group identified by Comment [7]. *See, e.g., Cole v. Appalachian Power Co.*, 903 F.Supp. 975, 979 (S.D.W.Va. 1995) ("*ex parte* interviews of employees who are 'mere witnesses' to an event for which the organization is sued (i.e., holders of factual information), are permitted"); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C. 1993) (protective order barring further *ex parte* contacts with employees of defendant railroad would not extend to employee-witnesses); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc*., 144 F.Supp.2d 1147, 1157 (D.S.D. 2001) ("ex parte interviews of employees who are 'mere witnesses' to an event for which the corporation or organization is sued (i.e., holders of factual information), are permitted"); *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 961 F.Supp. 1288, 1293 (E.D.Mo. 1997) ("[s]imply because an employee witnessed an event for which the organization is sued" does not prevent *ex parte* contact); *Terra Int'l v. Mississippi Chem. Corp*., 913 F.Supp. 1306, 1320 (N.D.Iowa 1996) ("court rejects any 'automatic representation' rule, which would require a total ban on ex parte contacts with any current employees on the ground that all are automatically represented by the organizational party's counsel simply by virtue of their employment with the organization").

The need to inquire into the responsibilities and authority of a constituent does not apply to an organization's former constituents. Comment [7] provides explicitly that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." However, as discussed above, Colo. RPC 4.2 is designed in part to preserve the confidentiality of privileged attorney-client communications. Accordingly, the inquiring attorney may not, while communicating with the organization's former constituent, inquire into privileged attorney-client communications; nor may the inquiring attorney listen while the former constituent attempts to divulge privileged communications voluntarily. The organization's privilege belongs to the organization, not the constituent, and can be waived only by the organization. *See A. v. District Court,* 191 Colo. 10, 550 P.2d 315, 323 (1976), *cert. denied*, 429 U.S. 1040 (1977); *Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653, 659-61 (D. Colo. 1992) (citing previous version of this Opinion); *see also* Colo. RPC 1.13.

In conclusion, unless authorized by the organization's or constituent's lawyer or by law or by court order, a lawyer may not communicate with a current constituent of a represented organization "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." A former constituent of a represented organization may be interviewed *ex parte* with regard to all matters except as to communications which are the subject of the attorney-client privilege.

NOTES

1. For convenience purposes, we use the term "constituent," which includes employees and other agents or representatives of an organization. *See* Colo. RPC 4.2, Comment [7].

2. Based on the preceding discussion of "subject matter," if one has direct information, not indirect general knowledge, that an organization is represented by a lawyer and one is uncertain whether the representation extends to the subject matter of the communication, the safest course is to establish the scope of the representation, and the scope of the communication, with the lawyer before communicating.

3. In the event that a lawyer wishes to communicate with a person not known to be represented by counsel, the lawyer must abide by Colo. RPC 4.3, which addresses communications with unrepresented persons.

96 *Ex Parte* Communications With Represented Persons During Criminal and Civil Regulatory Investigations and Proceedings

Adopted July 15, 1994
Revised March 17, 2012

Introduction

Police and other law enforcement agents historically have possessed broad powers, within constitutional limits, to investigate alleged violations of criminal and civil regulatory laws. These powers include the authority to conduct pre-arrest and pre-indictment investigations, including undercover operations. During these pre-arrest and pre-indictment investigations, police and other law enforcement agents are entitled to interview witnesses, potential suspects, and even the accused if he or she waives his or her constitutional rights to remain silent.

After a person has been taken into custody and/or is charged in an adversarial proceeding, these broad police powers are significantly restricted by the Fifth and Sixth Amendments to the U.S. Constitution. The Fifth Amendment prohibits law enforcement personnel, in the absence of a waiver, from conducting custodial interrogations of the accused. The Sixth Amendment substantially restricts the ability of law enforcement personnel to communicate *ex parte* with criminal defendants once adversarial proceedings have been initiated.

In recent years, prosecutors and other lawyers charged with enforcing criminal and civil regulatory laws have begun to play a larger role in pre-arrest and pre-indictment investigations. This trend has been viewed positively by the general public and the bar because of the perception that a lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards.

This expansion of the traditional prosecutorial responsibility for trying and disposing of cases to organizing and supervising criminal and civil regulatory investigations, however, has created considerable uncertainty in the law as to whether ethical rules of conduct should restrain lawyers engaged in criminal and civil regulatory investigations from contacts with persons known to be represented by counsel beyond those restrictions provided for by the U.S. and Colorado Constitutions. The overwhelming preponderance of federal and state court decisions holds that the restriction on contacts with a represented person contained in Rule 4.2 of the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) does not apply during the investigative stage of criminal proceedings and prior to arrest or indictment, but does apply once adversarial proceedings have begun. *See United States v. Talao*, 222 F.3d 1133, 1138-41 (9th Cir. 2000) (applying California's version of Rule 4.2); *United States v. Ryans*, 903 F.2d 731, 735-36 (10th Cir.) (discussing cases decided under predecessor rule DR 7-104(A)(1)), *cert. denied*, 498 U.S. 855 (1990); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *United States v. Grass*, 239 F.Supp.2d 535, 539-46 (M.D.Pa. 2003) (applying Pennsylvania's version of Rule 4.2).1 Authorities similarly hold that Rule 4.2's restriction does not apply during the investigative stage of civil enforcement proceedings, but does apply once adversarial proceedings have begun. *See* Colo. RPC 4.2, Comment [5] (noting that "[c]ommunications authorized by law may also include investigative activities of lawyers representing governmental entities . . . prior to the commencement of . . . civil enforcement proceedings"); *United States v. Teeven*, 1990 WL 599373 at *2-*4 (D.Del. Sept. 28, 1990) (finding that *ex parte* interviews by government attorneys conducting civil False Claims Act investigation did not violate Delaware's version of Rule 4.2); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).

The CBA Ethics Committee (Committee) issued an earlier version of this formal opinion based on DR 7-104(A)(1) of the Colorado Code of Professional Responsibility. The Committee believes that it is appropriate at this time to issue a revised opinion based on the current Colorado Rules and, particularly, on Rule 4.2's use of the term "represented person" rather than "represented party." Because members of the bar relied on an earlier version of this opinion, in large part this opinion tracks the organization of the earlier version. The Committee has removed discussion of issues that were clarified or changed under the Colorado Rules.

Scope

The purpose of this opinion is to provide guidance to lawyers in evaluating the ethical propriety of *ex parte* communications with persons known to be represented by counsel. The Committee recognizes that there are a variety of strongly held and cogently articulated positions on the application of Colo. RPC 4.2 to prosecutors and other lawyers involved in enforcing criminal and regulatory laws. The Committee is aware that as a result of this divergence of opinion, prosecutors and other members of the bar need guidance on the applicability of Colo. RPC 4.2 to their contacts with parties known to be represented by counsel during criminal and civil regulatory enforcement proceedings.

Syllabus

Established case law and the Colorado Rules permit communications with represented persons during the investigative stage of criminal and civil regulatory enforcement proceedings, and prohibit such communications once formal proceedings have commenced, subject to several well-defined exceptions.

Analysis

Colo. RPC 4.2, entitled "Communications with Person Represented by Counsel," governs lawyers' *ex parte* communications with parties represented by counsel and provides:

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

The rule generally applies if (1) the person has retained a lawyer or obtained court appointed counsel, (2) the representation concerns the subject matter in question, and (3) the opposing lawyer "knows" the person is represented by counsel concerning the subject matter of the communication. *See generally People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (describing conditions in which attorney–client relationship exists); *People v. Morley*, 725 P.2d 510, 517-18 (Colo. 1986) (same); *Klancke v. Smith*, 829 P.2d 464, 466 (Colo.App. 1991) (same). As explained in Comment [8] to Colo. RPC 4.2, the opposing lawyer is required to have actual knowledge that the person is represented, but the opposing lawyer "cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

Underlying Colo. RPC 4.2 is the recognition that when two parties in a legal proceeding are represented, it is unfair for a lawyer to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party. Disciplinary authorities in all fifty states and the District of Columbia have enacted some version of Colo. RPC 4.2 or other similar prohibitory rules. The prohibition embodied in Colo. RPC 4.2 against communication with a represented party recognizes the inherent danger in a layperson conducting negotiations with an opposing lawyer and the likelihood that such negotiations would destroy the confidence essential to the attorney–client relationship and hamper the subsequent performance of the represented party's counsel. *United States v. Batchelor*, 484 F.Supp. 812, 813 (E.D.Pa. 1980).

A. Communications With a Person Represented by Counsel Made During the Course of Investigations or Other Proceedings Into Alleged Unlawful Conduct

In the course of criminal and civil regulatory enforcement investigations, a prosecuting attorney or government lawyer may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if the communication is made in the course of an investigation into possible unlawful conduct. Except in those situations described in section C below, the communication must occur prior to the attachment of the Fifth and Sixth Amendment rights to counsel with respect to charges against the person arising out of the criminal activity that is the subject of the investigation or other proceeding. *See United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d at 739; *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 464 U.S. 852 (1983); *United States v. Lemonakis*, 485 F.2d at 955-56; *People v. Hyun Soo Son*, 723 P.2d 1337, 1339-42 (Colo. 1986); *People v. Rubanowitz*, 688 P.2d 231, 247 (Colo. 1984).2

Such contact may take the form of attempts to interview the suspect about the matter being investigated, interviews, undercover activity designed to elicit information from the suspect, or simple observation of the allegedly unlawful behavior. On the other hand, a prosecuting attorney or government lawyer may not engage in deceit or misrepresent the lawyer's role in the matter. *In re Pautler*, 47 P.3d 1175, 1180-81 (Colo. 2002);3 Colo. RPC 8.4(c).

Most courts interpreting Colo. RPC 4.2 or its predecessor, DR 7-104(A)(1), have reached the conclusion that a lawyer's actions as described above are "authorized by law." For example, in *United States v. Ryans*, the Tenth Circuit held that the use of an informant, on instructions from the prosecutor, to surreptitiously record incriminating conversations with suspects who had retained counsel, but who had not been either arrested or indicted, did not violate DR 7-104(A)(1). *Ryans*, 903 F.2d at 740. *See also United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *Sutton*, 801 F.2d at 1366; *Fitterer*, 710 F.2d at 1333.

The rationale for the court's conclusion in *Ryans* and in similar cases is that prosecutors, by the very nature of the office they hold, are required to investigate possible criminal conduct and, thus, their actions in directing or supervising such investigations are "author-ized by law." *Ryans*, 903 F.2d at 738.

A district attorney is a member of the Executive Branch of government and is obligated to perform duties as are provided by law. Colo. Const. art. VI, § 13; *People v. District Court*, 767 P.2d 239, 241 (Colo. 1989); *Beacom v. Board of County Comm'rs*, 657 P.2d 440, 445 (Colo. 1983); *People v. District Court*, 186 Colo. 335, 338, 527 P.2d 50, 52 (1974). A district attorney has the power to investigate and determine who should be prosecuted. *People v. Schwartz*, 678 P.2d 1000, 1007-08 (Colo. 1984); *People v. District Court*, 632 P.2d 1022, 1024 (Colo. 1981). Statutorily, district attorneys are required to appear on behalf of the state, counties, or judicial districts, CRS § 20-1-102(1), to employ necessary investigators, CRS § 20-1-209, and to render advice to law enforcement officers concerning preparation and review of affidavits for search warrants, CRS § 20-1-106.1.

District attorneys are classified as peace officers and are empowered to enforce state laws while acting within the scope of their authority and in the performance of their duties. CRS § 16-2.5-132. By way of example, district attorneys not only prosecute violations of law, they are also required to assist grand juries in their investigations, CRS § 20-1-106; conduct investigations into organized crime, CRS § 18-17-107; and investigate consumer fraud, CRS § 6-1-107. Federal prosecutors also have statutory or similar authority to prosecute federal crimes, *see* 28 USC § 547, and to participate in federal criminal investigations, *see* Fed.R.Crim.P. 6.

On previous occasions, we have defined what "authorized by law" means in other areas of professional conduct. *See* CBA Formal Ethics Op. 69 (2010 Revision);4 CBA Formal Ethics Op. 93. The Colorado Supreme Court has offered guidance as to what "authorized by law" means as applied to public servants. In *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993), the Court stated:

A public servant is authorized by law to perform particular acts if there is a legislative enactment, a legally adopted administrative rule or regulation, or a judicial pronouncement which defines his duties. . . . Moreover, a county official is "authorized by law" to perform any other acts necessary to carry out these express responsibilities.

See also Gomez v. United States, 490 U.S. 858, 864 (1989) (noting that any additional duties performed pursuant to a general authorization in a statute should reasonably bear some relation to the specified duties). Thus, "authorized by law" may be authorization by way of legislative enactment, administrative rule or regulation, or judicial decisions. Additionally, prosecutors may rely on fundamental decisions of law in the areas of criminal law and procedure, as discussed below.

B. *Ex Parte* Communications With Represented Persons Concerning Pending Criminal Matters

After attachment of a person's Fifth and Sixth Amendment rights to counsel, a lawyer may not communicate, or cause another to communicate, with a represented party. *See Dickerson v. United States*, 530 U.S. 428, 432 (2000); *Maine v. Moulton*, 474 U.S. 159, 180 (1985); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *People v. Martinez*, 789 P.2d 420, 422 (Colo. 1990). Consequently, it is improper and unethical for a lawyer to direct or approve police or informer contacts designed to elicit information from a represented party that would violate the suspect's rights under the Fifth and Sixth Amendments. Thus, in situations where it would be improper under the Fifth and Sixth Amendments for a police officer or a police informant acting at the direction of the police to attempt to elicit incriminating information from a represented suspect, it would be unlawful and unethical for a lawyer to direct or participate in such conduct. *See United States v. Henry*, 447 U.S. 264, 274-75 (1980); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah*, 377 U.S. at 206-07. *See also* Colo. RPC 4.4(a), 8.4(a).

C. Exceptions to the General Prohibition of *Ex Parte* Communications With Represented Persons Concerning Pending Criminal Matters

There are certain well-recognized exceptions to the general rule against *ex parte* contacts with a represented party that permit a lawyer to communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Fifth and Sixth Amendments rights to counsel. These exceptions are applicable when:

1. -The purpose of the communication is to determine whether the person is in fact represented by counsel. *See, e.g.*, CRS § 16-7-301; *Edwards*, 451 U.S. 490 (Powell, J. concurring).

2. Counsel for the represented person is given notice of the communication and consents to it. *See, e.g., Gennings v. People*, 808 P.2d 839, 845 (Colo. 1991).

3. The communication is made pursuant to discovery procedures, or judicial or administrative process, including but not limited to the service of subpoenas. *See, e.g.*, Colo.R.Crim.P. 16, 41.1.

4. The communication is made in the course of an investigation of new or additional criminal activity to which the Sixth Amendment right to counsel has not attached, and the new or additional criminal activity may include:

a. Criminal activity that is separate from the criminal activity that is the subject of the pending criminal charges;

b. Criminal activity that is intended to impede or evade the administration of justice as to the pending charges, such as obstruction of justice; subornation of perjury; jury tampering; murder, assault, or intimidation of a witness; bail jumping; or unlawful flight to avoid prosecution; and

c. Criminal activity that represents a continuation, after the filing of an information or indictment, of criminal activity that is the subject of pending criminal charges, such as the continuation of a conspiracy or scheme to defraud after the filing of an information or indictment. *See People v. Hyun Soo Sun*, 723 P.2d 1339-42; *People v. Rubanowitz*, 688 P.2d 247.

5. -The prosecutor reasonably believes that there is an imminent threat to the safety or life of any person, the purpose of the communication is to obtain information to protect against the risk of serious injury or death, and the communication is reasonably necessary to protect against such risk. *But see Pautler*, 47 P.3d 1180 (rejecting argument that imminent public safety exception applies if a prosecutor has available alternatives that do not involve violating the Colorado Rules). If circumstances permit, it is preferable for a prosecutor to seek a court order to engage in communication with a represented person.5

Conclusion

The Committee recognizes that in the context of criminal and civil enforcement proceedings, lawyers may perform duties that are distinctly different from those performed in the private practice of law. Recognizing those distinctions, we interpret Colo. RPC 4.2 and the case law to permit communications by prosecutors and government lawyers with parties represented by counsel during the investigative stage of criminal and civil proceedings, and to prohibit such communications, subject to several well-defined exceptions, once formal proceedings have commenced.

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

Notes

1. Articles discussing issues related to contacts between prosecutors and targets of criminal or civil enforcement proceedings under the current versions of ABA Model Rule of Professional Conduct 4.2 (which is substantially identical to Colo. RPC 4.2) include Richmond, "Deceptive Lawyering," 74 *U. Cinn. L.Rev.* 577 (2005), and Joy and McMunigal, "Anti-Contact Rule in Criminal Investigations," 16 *Wtr. Crim. Just.* 44 (2002). These issues also are discussed in a three-part article by Carl A. Pierce, the reporter for the ABA committee that issued the updated version of ABA Model Rule 4.2, entitled "Variations on a Theme: Revisiting the ABA's Revision of Model Rule 4.2," 70 *Tenn. L.Rev.* 121 (2002) (Part 1), 70 *Tenn. L.Rev.* 321 (2003) (Part 2), and 70 *Tenn. L.Rev.* 643 (2003) (Part 3).

2. The Second Circuit has suggested that Disciplinary Rule 7-104(A)(1) (and by analogy Colo. RPC 4.2) may prohibit certain conduct by law enforcement agents and lawyers even before arrest or indictment. *See United States v. Hammad*, 858 F.2d 834, 838-39 (2d Cir. 1988); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Sam Goody, Inc.*, 518 F.Supp. 1223, 1224-25 n.3 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

In *Hammad*, the defendant sought to suppress statements obtained by an informant sent by the prosecutor to obtain a statement from the suspect. The prosecutor had issued a grand jury subpoena to the informant as a pretense to help the informant gain the suspect's trust so as to elicit the admissions from the suspect. Starting from the premise that DR 7-104(A)(1) (and consequently Colo. RPC 4.2) generally is inapplicable to prosecutors because the investigation of possible criminal activities, even as to suspects who have retained counsel, fits within the "authorized by law" exception to DR 7-104(A)(1), the Second Circuit went on to hold that DR 7-104(A)(1) applied on the facts of the case to render the contact improper. The court concluded that the prosecutor had overstepped the already broad powers of the prosecutor's office and thus the prosecutor's conduct was not "authorized by law."

Hammad gives little guidance to prosecutors as to which actions would be viewed as not "authorized by law" under Colo. RPC 4.2. The Second Circuit has since affirmed, however, that the "authorized by law" exception applies to legitimate investigative techniques such as using informants to record conversations with charged defendants about other, uncharged conduct. *See United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993). Given the fact-intensive nature of these determinations, the Committee believes that a lawyer contemplating *ex parte* contacts between law enforcement agents or government informants and persons who have retained counsel prior to the attachment of the Fifth and Sixth Amendment should be careful not to overstep the lawyer's authority.

3. *Pautler*'s application to prosecutors who are not themselves engaged in deceit or making misrepresentations is unclear. Prosecutors should consider the application of *Pautler* when advising law enforcement officers about communicating with represented persons in specific circumstances.

4. All CBA Ethics Committee Formal Ethics Opinions are available at www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions.

5. In other circumstances where a prosecutor, acting in good faith, has a reason to believe that contact with a represented person is necessary to prevent the obstruction of justice or other interference with the proper functioning of the legal system, a prosecutor should seek a court order authorizing communication with the person. *See* Colo. RPC 4.2, Comment [6]. These circumstances could include, for example, a situation in which an organization's constituent, whom a lawyer has claimed to represent in the constituent's individual capacity, initiates a communication for the purpose of disclosing attempts by the organization or other organizational constituents to suborn perjury or obstruct justice. n

112 SURREPTITIOUS RECORDING OF CONVERSATIONS OR STATEMENTS

Adopted July 19, 2003.

Disclaimer to Formal Opinion 112, Surreptitious Recording of Conversations or Statements.

In September 2017 the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct adding this exception:

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

This new exception supersedes that portion of Formal Opinion 112 relating to directing agents to surreptitiously record conversations, provided doing so is part of lawful investigative activities. The Committee currently is considering modifying or amending the Opinion.

Syllabus

Surreptitious recording of a conversation or statement occurs where one party to the conversation (the recording party) has consented to the recordation but at least one other party to the conversation or statement is not aware of the recording. Because 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. For the same reason, a lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the "fruit" of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully- and independently-obtained recording.

The Committee believes that, assuming that relevant law does not prohibit the recording,[1] there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life. 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. The Committee recognizes a "private conduct exception" because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful. However, the Colorado Supreme Court has not recognized either of these exceptions to the general prohibition against surreptitious recording by lawyers.

Issues

Under what circumstances, if any, may an attorney surreptitiously record or direct another to surreptitiously record an in-person or telephone conversation with another person? Do the ethics rules recognize distinctions between surreptitious recording by attorneys in civil and criminal matters? Do the rules recognize distinctions between attorneys who surreptitiously record conversations in the course of representing clients or otherwise acting in a professional capacity, versus attorneys acting in a purely private capacity?

This opinion does not address non-consensual recording, *i.e.*, wiretapping, in which a non-party to the conversation engages in surreptitious recording. It also does not address the circumstances, if any, in

which lawyers may use false pretenses to gather evidence, for example in investigating claims of housing discrimination and trademark infringement.

Existing Legal Authority

The Committee does not write on a clean slate. In its Formal Opinion 22 ("CBA 22"), originally issued on January 26, 1962, the Committee considered the broad question of whether "[a] lawyer, by means of a mechanical or electronic device, [may] record conversations with and statements by other persons." The Committee resolved the issue under the then-applicable Colorado Canons of Professional Ethics (the predecessor to the Colorado Code of Professional Responsibility ("Colorado Code") that, in turn, preceded the Colorado Rules of Professional Conduct ("Colorado Rules")). The Committee concluded:

> One of the principal purposes of the Canons of Ethics is to increase public confidence in the legal profession. This end can be achieved only if individual members of the Bar earn a reputation as men of honor, integrity and fair dealing. Conversely, every deceptive practice and resort to artifice by an attorney must necessarily demean the Bar as a whole in addition to the particular attorney involved.
>
> . . .
>
> [W]e believe that the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded. Moreover, one reason for an attorney intentionally not disclosing that a particular conversation or statement is being recorded may be a belief that the person whose conversation is being recorded would choose his words more carefully, or speak less freely, or not at all, if such knowledge were imparted to him.
>
> . . .
>
> [T]here is inherent in the undisclosed use of a recording device under these circumstances an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold.

In 1974, the American Bar Association ("ABA") reached a similar result in its Formal Opinion 337 ("ABA 337"), concluding that under the ABA Model Code of Professional Responsibility, with a possible exception for conduct by law enforcement officials, a lawyer may not engage in undisclosed recording of any conversation.

The Colorado Supreme Court relied on CBA 22 and ABA 337 in *People v. Selby*, 198 Colo. 386, 606 P.2d 45 (1979), an attorney disciplinary case, as support for the following broad statements: "A lawyer may not secretly record any conversation he has with another lawyer or person. Candor is required between attorneys and judges. Surreptitious recording suggests trickery and deceit." 606 P.2d at 47. *Selby* involved a criminal defense attorney who surreptitiously recorded an in-chambers conference with the trial judge and the prosecutor, then used partial quotations out of context from the surreptitiously-recorded conference, and testified falsely before the Grievance Committee concerning the circumstances of the taping. Under those circumstances, the Court ordered disbarment. *See also People v. Wallin*, 621 P.2d 330, 331 (Colo. 1981) (citing *Selby*, disciplining attorney for, *inter alia*, surreptitious recording of telephone conversation with witness).

In *People v. Smith*, 778 P.2d 685 (Colo. 1989), the Colorado Supreme Court suspended an attorney for his involvement in undercover activities related to a criminal investigation of a former client. Acting at the request of the Colorado Bureau of Investigation, the lawyer surreptitiously recorded an in-person conversation in which the former client sold illegal drugs to the attorney. The Court cited *Selby* for the general rule that "[t]he undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound." *Id.* at 687. The Court also recognized the potential for a "prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others," *id.*, but it found that potential exception inapplicable where the respondent was a private, not prosecuting, attorney: "We do not agree that the above-described policy considerations [in favor of law enforcement objectives] permit private counsel to deal dishonestly and deceitfully with clients, former clients and others. To hold otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings." *Id.* The Colorado Supreme Court cited neither CBA 22 nor ABA 337 in *Smith*. *See also Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653, 663 (D.Colo. 1992) (in *dictum*, recognizing existence of "'prosecuting attorney' exception," but limiting it to law enforcement authorities, not private attorneys).

CBA 22 relied on Canon 22 of the old Colorado Canons for its conclusion that surreptitious recording is inherently unethical. That canon stated that a lawyer's conduct "should be characterized by candor and fairness." ABA 337, *Selby*, *Wallin* and *Smith* relied on DR 1-102 of the ABA Model Code and the Colorado Code, which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud,

deceit, or misrepresentation," and "any other conduct that adversely reflects on his fitness to practice law." ABA 337; *Smith*, 778 P.2d at 686-87; *Wallin*, 621 P.2d at 331; *Selby*, 606 P.2d at 46.

The Colorado Rules took effect on January 1, 1993. Colorado Rule 8.4(c) maintains the prohibition against "conduct involving dishonesty, fraud, deceit or misrepresentation." Colorado Rule 4.4 addresses "respect for rights of third persons," and proscribes "means [of representation of a client] that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person." Colorado Rule 4.1 prohibits making false or misleading statements of facts to third persons, but does not require disclosure of material facts to third persons unless disclosure is necessary to avoid assisting a client in a criminal or fraudulent act. No published Colorado decision has considered the issue of surreptitious recording under the Colorado Rules.

On June 24, 2001, the ABA issued its Formal Opinion 01-422 ("ABA 422"), which abandoned ABA 337's general prohibition on surreptitious recording of conversations by attorneys. In its place, ABA 422 recognized a general rule that, where state law permits surreptitious recording of conversations, a lawyer may do so without violating the ABA Model Rules. However, ABA 422 further concluded that a lawyer may not misrepresent that the conversation is not being recorded and that the surreptitious recording of conversations with clients is, at the least, inadvisable. ABA 422 relied on multiple considerations, including the fact that surreptitious recording of conversations is now a more widespread, accepted and expected practice than it was in 1974 (when ABA 337 was issued); hence, ABA 422 concluded that it should no longer be treated as inherently deceitful. The opinion further identified the numerous exceptions that had developed to the general rule against surreptitious recording as stated in ABA 337; the opinion concluded that a better approach would be to substitute a general rule *permitting* such conduct except "where it is accompanied by other circumstances that make it unethical." Finally, to support that conclusion, ABA 422 relied on differences between the Model Rules and the predecessor Model Code: the Model Rules do not include the prohibition on "even the appearance of impropriety" that had appeared in the Model Code, and Model Rule 4.4 directly addresses the circumstances under which a lawyer may gather evidence from third parties, in terms that are broad enough to encompass surreptitious recording. Based on all of those factors, ABA 422 concluded that a general prohibition of surreptitious taping is no longer appropriate.

Analysis

Surreptitious Recording is Generally Deceitful and, Therefore, Prohibited

The Committee believes that the reasoning of CBA 22 remains sound, *i.e.*, that despite advances in technology and reduced expectations of privacy, "the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded," and, therefore, that "there is inherent in the undisclosed use of a recording device . . . an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold." Canon 22, which was the basis for CBA 22, required lawyer conduct to be "characterized by candor and fairness." Colorado Rule 8.4(c), like prior DR 1-102, prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." As a result, for the same reason that CBA 22 and the Colorado Supreme Court concluded that it is improper for an attorney to surreptitiously record conversations or statements, the Committee reaches the conclusion under the Colorado Rules that, generally, a lawyer may not surreptitiously record conversations with a third person.

For the same reasons, it is also generally improper for an attorney to direct or even authorize another, such as an investigator or legal assistant, to record conversations surreptitiously. *See* Colo. RPC 5.3 (lawyer may not direct or ratify conduct of nonlawyer who is employed or retained by or associated with the lawyer if that conduct would violate the Colorado Rules); Colo. RPC 8.4(a) (it is misconduct for lawyer to violate rules through the act of another); *e.g.*, CBA Ethics Comm. Abstract 98/99-05 (where private investigator retained by an attorney surreptitiously recorded a witness interview without the lawyer's prior knowledge or approval, the attorney should not listen to or use the tape without the witness' permis-

sion). On the other hand, the general prohibition applicable to a lawyer does not preclude a client or third party acting on the client's behalf from independently engaging in surreptitious recording. For example, if a client has recorded conversations with others before hiring a lawyer, the lawyer should not be required to advise the client to cease recording conversations and should be able to use those recordings; an opposite result would limit the rights the client otherwise would have simply because the client hired a lawyer. However, if the lawyer learns facts indicating that the client's past recording was improper under the law, the lawyer has a duty not to use the unlawful recording. *See* Colo. RPC 1.2(d) (lawyer may not assist or counsel client to engage in fraudulent conduct); Ariz. Op. 88-08 at 8 (lawyer was barred from using client's secret tape recording, made during deposition break, of conversation between opposing counsel and his client; permitting use of the tape would "come too close to assisting the client in the underlying improper conduct," in violation of Arizona's identical version of Rule 1.2(d)). If a client asks the lawyer if prospective recording by the client would be permissible, the lawyer should be permitted to advise the client of the legal (as distinguished from ethical) parameters that apply to surreptitious recording, and then to leave the decision to the client.

The Committee Believes that There Should Be Limited and Discrete Exceptions to the General Rule Against Surreptitious Recording

The prohibition articulated in CBA 22 is broad and absolute: "It is improper for an attorney to record by means of a mechanical or electronic device conversations or statements without disclosing that the conversations or statements are being recorded." In the view of the current Committee, CBA 22 stated the prohibition *too* broadly. The Committee identifies two circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life.

The Committee recognizes that the Colorado Supreme Court has yet to recognize either of these exceptions to the general rule against surreptitious recording, and that the Committee's endorsement of the exceptions arguably is inconsistent with the Court's decisions in *Selby* and *Smith*.[2] As a result, attorneys should exercise particular care in relying on this ethics opinion, which, like all CBA ethics opinions, is advisory only.

The Criminal Law Exception

With regard to surreptitious recordings, criminal law materially differs from civil law for two reasons. First, the practice of criminal law regularly implicates fundamental constitutional rights that generally are absent from the everyday practice of civil law. Second, surreptitious recordings are and have long been commonplace in criminal law, where conversations with witnesses, subjects, targets, law enforcement officers and others often are recorded surreptitiously in an effort to gather evidence for trial. *See People v. Velasquez*, 641 P.2d 943, 949 (Colo. 1982). Surreptitious recordings are a powerful tool for both law enforcement and defense counsel. Not surprisingly, courts have long sanctioned surreptitious recording as an appropriate, effective means of gathering evidence in the criminal arena. *See People v. Morley*, 725 P.2d 510, 515 (Colo. 1986) ("while the undercover operation was itself built on deceit [and surreptitious recordings], governmental activity in the pursuit of crime 'is not confined to behavior suitable for the drawing room'") (*quoting United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985)). This is because, as the Supreme Court has recognized for more than forty years, the United States Constitution offers no protection for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)). Any analysis of the ethical propriety of surreptitious recording in the criminal context must include a careful consideration of the implications for both the defense and prosecution, and, ultimately, of the constitutional rights of the defendant.

The Committee further recognizes that surreptitious recording as a method to gather evidence in criminal matters will continue regardless of whether attorneys may ethically participate in such recording. In other words, investigative agents will act independently in surreptitiously recording conversations for the prosecution or defense, regardless of whether attorneys have a role in the process. An absolute prohibition against attorney involvement simply would remove attorneys from the activity, but would not stop the activity itself. The absence of attorney involvement presents its own risks in light of the constitutional implications of surreptitious recordings. The Committee believes that without the input of lawyers, investigators lacking formal legal training might surreptitiously record conversations under circumstances that could be unconstitutional or otherwise unlawful. The Committee concludes that it is preferable to promote substantive involvement of attorneys, rather than to create an ethical bar to such participation.

Therefore, based on the historical and court-approved practice of surreptitious recording in criminal matters, and to encourage attorney oversight of such recording, the Committee draws a bright-line distinction between criminal and civil law and adopts the reasoning set forth in ABA 422 for the criminal law setting. The Committee's approach also finds support in court and ethics opinions in other states.[3]

In the opinion of the Committee, an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter. By way of example, the Committee identifies three common situations in which an attorney may actively participate in surreptitiously recording a conversation in a criminal matter without violating his or her ethical obligations:

A prosecutor or criminal defense attorney may legally advise investigative agents to surreptitiously record conversations for the purpose of gathering admissible evidence, or to participate in the execution of a court-issued wire-tap or other order permitting surreptitious recording. For example, a prosecutor may direct a law enforcement officer or government informant to surreptitiously record a conversation during a drug deal.

A prosecutor or criminal defense attorney may counsel his or her client to surreptitiously record a conversation for the purpose of gathering admissible evidence. For example, this might occur when a defense attorney has determined that it is in his or her client's best interest to cooperate with the prosecution as a government informant.

An attorney acting as an investigative agent, with no role as an attorney on the case, may surreptitiously record a conversation for the purpose of gathering admissible evidence. This situation might arise when a law enforcement officer also is a licensed attorney, or when the attorney himself or herself is the subject or target of an investigation. However, an attorney who surreptitiously records a conversation as an investigative agent may not thereafter act as an attorney in the case.

The criminal law exception that the Committee recognizes is not unlimited. A prosecutor or criminal defense attorney may not surreptitiously record conversations where the law prohibits such recording. Nor may a prosecutor or criminal defense attorney participate in surreptitious recordings, either himself or herself or through others, where such conversations are for purposes other than gathering admissible evidence. For example, conversations among attorneys or *pro se* parties concerning trial preparation, plea negotiations, or proffers are not for the purposes of gathering admissible evidence, and an attorney therefore could not ethically record such conversations surreptitiously.

The Private Conduct Exception

Colorado Rule 8.4 applies to a lawyer's conduct both in the representation of clients and in the lawyer's private life. Lawyers may be subject to discipline under that rule for conduct arising in their private lives, outside of an attorney-client relationship. *See, e.g., In re Hickox*, 57 P.3d 403, 405 (Colo. 2002) (disturbing the peace, assault, and domestic violence); *People v. Reaves*, 943 P.2d 460 (Colo. 1997) (driving while impaired, harassment, and disorderly conduct); *People v. Nelson*, 941 P.2d 922 (Colo. 1997) (third-degree assault); *People v. McGuire*, 935 P.2d 22, 24 (Colo. 1997) (disturbing the peace and damaging private property); *see generally* Patrick O'Rourke, *Discipline Against Lawyers for Conduct Outside the Practice of Law*, 32 *The Colorado Lawyer* 75, 76-78 (April 2003). Specifically, the ban under

Colorado Rule 8.4(c) on conduct involving dishonesty, deceit, fraud or misrepresentation applies to both professional and private activities. *See, e.g., People v. Rishel*, 50 P.3d 938, 942 (Colo. O.P.D.J.) (attorney disbarred for converting season-ticket-pool money); *but see* David B. Isbell and Lucantino 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 *Georgetown J. Legal Ethics* 791, 816 (1995) (acknowledging that Model Rule 8.4(c) applies regardless of whether attorney is acting in professional or private capacity, but arguing that rule applies to private conduct only when it is so grave as to call into question the lawyer's fitness to practice law).

The Committee has found no controlling law in Colorado as to whether legally but surreptitiously recording a conversation in one's private capacity constitutes dishonesty, fraud, deceit or misrepresentation.[4] There is authority from outside Colorado that permits surreptitious recording by a lawyer acting as a private citizen rather than in a professional capacity. *See, e.g.*, ABA 422; *In re Hunter Studios, Inc.*, 164 B.R. 431, 439 (Bankr. E.D.N.Y. 1994) (conclusion that a lawyer may not surreptitiously record conversations does not apply in the context of an attorney acting in a purely private capacity: "The unfavorable characteristics of the action when taken by an attorney engaged in the representation of someone other than her or himself, are not present when taken by a layperson or non-engaged attorney. The non-engaged attorney should have the same rights as the layperson . . ."); Ariz. Op. 75-13 (June 11, 1975) (attorney may document threats, obscene calls, etc.); *cf.*, New York City Ethics Op. 2003-2 (2003) (lawyer may surreptitiously tape a conversation "if the lawyer has a reasonable basis for concluding that disclosure of the taping would significantly impair pursuit of a generally accepted societal good," including to preserve evidence of threats made against the lawyer or a client).[5]

The Committee concludes that purely private surreptitious recording is not necessarily deceitful. In the opinion of the Committee, the logic underlying CBA 22, ABA 337, *Selby*, and *Smith* is that third persons expect lawyers not to record conversations—and, thus, it is inherently deceitful to surreptitiously record conversations—*when those third parties are speaking with lawyers in their professional capacity as lawyers.* The Committee notes that Canon 22, on which the Committee principally relied when it issued CBA 22, addressed only "[t]he conduct of the lawyer *before the Court and with other lawyers*" (emphasis added), rather than *all* of a lawyer's conduct, including his or her purely private conduct. *See also Smith*, 778 P.2d at 687 (permitting surreptitious recording of conversations with former client "would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship . . ."); *Selby*, 606 P.2d at 47 ("[A] lawyer has a very special responsibility for candor and fairness in all of his dealings with a court. Absent mutual trust and confidence between a judge and a lawyer—an officer of the court—the judicial process will be impeded and the administration of justice frustrated.").

When the surreptitiously-recorded conversation does not relate to the representation of clients, there is no heightened expectation of privacy or "honor, integrity and fair dealing"; indeed, the third person might not even know that he or she is communicating with an attorney. For these reasons, the Committee believes that a lawyer's recording of a private conversation is not necessarily deceitful. Therefore, for example, if a lawyer is subject to harassing telephone calls or threats of harm having no relationship to his or her representation of clients or professional activities, Rule 8.4(c) should not apply to prohibit that activity.

NOTES

1. As in many other states, under Colorado law, it is lawful for a person, whether a lawyer or a non-lawyer, to surreptitiously record telephone and in-person conversations with another person if the recording person is a participant in the conversation. CRS § 18-9-304. In addition, as discussed below, a large body of constitutional law in the criminal realm bears on the ethical limits of surreptitious recording of conversations by or at the direction of prosecutors and criminal defense attorneys.

2. On the other hand, an argument can be made that, because *Selby* did not need to address the existence of either a criminal law or private conduct exception, its broad language constitutes *dictum* when applied beyond the narrow fact pattern that existed in the case. Similarly, although the respondent in *Smith* received discipline for surreptitious recordings at the request of law enforcement personnel, that outcome arguably flowed from the fact that the lawyer recorded conversations with a former client rather than with a third person.

3. *E.g.*, Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline Op. 97-3 (1997) (recognizing exception to prohibition against secret recording for prosecutors and criminal defense attorneys); Arizona State Bar Association Ethics Committee Op. 90-02 (1990) (recognizing exception for recording of witness statements in connection with investigation of criminal conduct or defense of criminal case); Supreme Court of Tennessee Board of Professional Responsibility Formal Ethics Opinion 86-F-14(a) (allowing surreptitious recordings of witness interviews in investigation of criminal conduct or defense of criminal case); Kentucky Bar Association Ethics Opinion KBA E-279 (1984) (allowing attorneys defending criminal charges to surreptitiously record conversations with witnesses); Association of the City Bar of New York Opinion 80-95 (1980) (ethical prohibition on surreptitious recordings does not apply to lawyers working on criminal cases).

4. *But c.f., Matters Resulting in Diversion*, 29 *The Colorado Lawyer* 117, 118 (Oct. 2000) (attorney agreed to participate in diversion program for surreptitiously recording a telephone conversation with a former client in an attempt to collect her bill) (citing Colo. RPC 8.4(c)).

5. The Committee does not rely on a "good cause" exception to operation of the ethics rules as the basis for its analysis. *See People v. Pautler*, 47 P.3d 1175, 1181 (Colo. 2002) (rejecting "greater good" justification for prosecutor's violations of Colorado Rules 4.3 and 8.4(c)); *see also* Isbell and Salvi, 8 *Georgetown J. Legal Ethics* at 807 ("There is no valid ethical distinction to be drawn that turns on whether the deception serves a larger social purpose.").

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USE OF SOCIAL MEDIA FOR INVESTIGATIVE PURPOSES

Adopted September, 2015
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Introduction

As various forms of social media have become commonplace, lawyers increasingly utilize social media and social networks as investigative tools. Various social media such as Facebook, Twitter, LinkedIn, and YouTube are potential treasure troves of information concerning opposing parties, witnesses, jurors, opposing counsel, and judges. Use of social media to obtain information in the course of representing clients implicates a number of ethical issues. In many respects, the ethical issues involved in conducting investigations through social media are neither novel nor unique. The Colorado Bar Association Ethics Committee (Committee) recognizes, however, that various jurisdictions and bar associations have expressed differing views about the application of established ethical principles to some aspects of the rapidly-evolving world of investigation through social media. As social media continue to change, and new forms of social media are developed, lawyers should seek guidance from the principles discussed in this opinion and the provisions of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) referenced herein.

This opinion addresses ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information regarding witnesses, jurors, opposing parties, opposing counsel, and judges. The opinion also addresses circumstances in which lawyers seek to access restricted portions of a person's social media profile or website that ordinarily may be viewed only by permission.

This opinion does not address a lawyer's use of social media for marketing or for disseminating information. This opinion also does not address the extent to which lawyers may have to become familiar with or utilize social media to comply with the applicable standard of care or the ethical obligation to provide competent representation to clients.

Syllabus

A lawyer may always view the public portion of a person's social media profile and any public posts made by a person through social media. A lawyer acting on behalf of a client may request permission to view a restricted portion of a social media profile or website of an unrepresented party or unrepresented witness only after the lawyer identifies himself or herself as a lawyer, and discloses the general nature of the matter in which the lawyer represents the client. A lawyer acting on behalf of a client may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by counsel in that same matter, without obtaining consent from that counsel. When requesting or obtaining information from a third person who has access to restricted portions of a social media profile or website of a party or witness, a lawyer is subject to the same standards as when requesting any other information in the hands of a third person. A lawyer may not request permission to view a restricted portion of a social media profile or website of a judge while the judge is presiding over a case in which the lawyer is involved as counsel or as a party, nor may a lawyer seek to communicate *ex parte* with a judge through social media concerning a matter or issue pending before the judge. A lawyer may not request permission to view a restricted portion of a social media profile or website of a prospective or sitting juror. A lawyer must never personally use any form of deception to gain access to a restricted portion of a social media profile or website, but a lawyer may advise, direct, or supervise others regarding the use of deceptive tactics to gain access

to a restricted portion of a social media profile or website if those tactics are part of lawful investigative activities.[1] A lawyer may not otherwise avoid prohibitions relating to the use of social media for investigative purposes by delegating investigative tasks to others.

Analysis

The Internet has become indispensable for lawyers in the twenty-first century for, among other things, marketing, conducting investigations and legal research, and obtaining general information in connection with the practice of law. Social media are among the many tools available to lawyers for these purposes. Social networks have been defined as follows:

> [I]nternet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings, and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted.[2]

The capabilities, features and security measures available to users of social media are in a constant state of flux. As social media and social networks evolve, ethical issues undoubtedly will arise that will have to be analyzed on a case-by-case basis. Lawyers utilizing social media in the practice of law should stay reasonably informed of these changes and how they may impact their ethical obligations.[3]

I. Accessing the Public Portion of a Person's Social Media Profile and Public Posts Made by a Person in Social Media

Individuals cannot control all of the information, observations, or opinions posted about them on the Internet, including through social media. To the extent they decide to establish their own social media presence, however, individuals generally have some degree of control over the information included. Depending upon the type of social media utilized and the privacy settings

available, individuals may exercise some control over the people, or class of people, to whom certain information is available. Some information posted by a person through social media is available to anyone, or almost anyone, who has Internet access. Other information is accessible only to those granted specific permission by the individual who created the profile.

For purposes of this opinion, the *public portion* of a person's social media profile or webpage refers to the information posted by an individual through some form of social media that is available to and viewable by anyone with access to the Internet or at least by anyone who subscribes to, or is a member of, the larger social network through which the information is posted. For purposes of this opinion, the *restricted portion* of a person's social media profile or website refers to information or portions of the profile accessible to and viewable by only those receiving specific permission from the person who established the profile or posted the information.

Bar association ethics committees that have addressed this issue generally agree that lawyers may view any information publicly posted by a witness, or included on the public portion of that person's social media profile.[4] Such information is treated no differently from any other publicly available information or public record. The Committee believes that the same rule applies to the public portion of a social media profile or posting established by any other individual, including an opposing party, opposing counsel, a judge before whom the lawyer is appearing, or a juror. The Committee concludes that simply viewing the public portion of a person's social media profile or any public posting made by an individual does not constitute a "communication" with that person. Therefore, the lawyer's conduct in viewing such material does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system. Similarly, a lawyer may view or utilize information to which the lawyer already has access through the lawyer's social media connections.

Several provisions of the Rules prohibit or limit communications between a lawyer and various types of individuals involved in the legal system. Colo. RPC 3.5(b) prohibits *ex parte* communications between a lawyer and a judge, juror, prospective juror, or other official by means prohibited by law. Colo. RPC 4.2 prohibits a lawyer who represents a client from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the same matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. Colo. RPC 4.3 restricts communications between a lawyer who represents a client and a person who is *not* represented by counsel. The Committee believes that these rules are not implicated when a lawyer reviews or attempts to review the public portion of social media profiles of any of the classes of persons identified in Rules 3.5, 4.2, and 4.3, because the lawyer's actions in such circumstances do not constitute a form of communication with the individual.

In expressing this opinion, the Committee realizes that some social media networks automatically notify a person when someone views his or her profile. In these circumstances, the person whose profile is viewed may also receive information concerning the individual who viewed the profile. Some bar association committees have opined that it is proper for a lawyer to view a juror's social media profile *only* so long as the juror remains unaware that such investigation is occurring.[5] The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility expressed its disagreement with this view, reasoning that in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber.[6] The Committee agrees with the ABA's view in this regard. Moreover, the Committee believes that the same logic applies

when a lawyer views the public portion of a social media profile or posting of a judge or a person the lawyer knows to be represented by counsel. Judges who maintain a presence on social media should expect that attorneys and parties appearing before them will view the public portion of the judge's profile. Similarly, lawyers should advise their clients to expect opposing counsel or their agents to view the public portions of their social media profiles.

There may be circumstances in which a lawyer might take improper advantage of the fact that a particular individual will receive automatic notification that the lawyer or someone on the lawyer's behalf viewed the individual's social media profile. Colo. RPC 4.4(a) provides that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. A lawyer who engages in repetitive viewing of an individual's social media profile could potentially violate Colo. RPC 4.4(a) if if the lawyer knew the other person would receive notice each time the lawyer viewed the profile, the lawyer had no other legitimate purpose for the repetitive viewing, and the repetitive viewing rose to the level of harassment or intimidation. To constitute a violation of the Rules, this would have to be an extreme situation, and it would be an exception to the general opinion expressed herein.

II. The Use of Deception to Gain Access to a Restricted Portion of a Social Media Profile or Website

In most respects, conducting investigations or discovery through social media is no different than performing these tasks by any other means. In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Colo. RPC 1.6. *See* Colo. RPC 4.1. It also is professional misconduct for a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Colo. RPC 8.4(c). Given these clear provisions of

the Rules, a lawyer must never personally use deception to gain access to a restricted portion of a social media profile or website. This prohibition includes "pretexting" and other forms of trickery through which the person seeking access to a restricted portion of a social media profile pretends to be someone other than himself or herself. As stated in an article in the Colorado Supreme Court Attorney Regulation Counsel Newsletter, "donning an alias and 'friending' someone on Facebook to gain access to restricted information is prohibited."[7]

Personally engaging in any form of deception to gain access to the restricted portion of a person's social media profile violates Colo. RPC 8.4(c), and it also violates Colo. RPC 4.1 if the lawyer's actions occur during the representation of a client. This type of conduct also may violate Colo. RPC 4.3, which provides that in dealing on behalf of a client with a person who is not represented by counsel, the lawyer shall not state or imply that the lawyer is disinterested. A lawyer assuming a false identity in seeking access to information from a restricted portion of a social media website in a client matter may imply to the person from whom information is sought that the lawyer is a disinterested person. This would create a false impression if the lawyer is actually seeking information from the third party in connection with a client matter.

No exception in the Rules permits a lawyer to personally employ deception or subterfuge to gain access to restricted information through social media. In *In Re Pautler*, 47 P.3d 1175 (Colo. 2002), the Colorado Supreme Court clarified that deceitful conduct by a lawyer is never justified, even in exigent circumstances. In *Pautler*, a deputy district attorney posed as a public defender in order to convince a murder suspect to turn himself in to law enforcement authorities. The attorney believed he was protecting the public through his actions because the suspect already had confessed to multiple killings and was still at large. In the course of affirming the discipline imposed on Mr. Pautler, the Court clarified that lawyers "must adhere to the highest moral and

ethical standards, even in circumstances in which they believe that lying serves the public interest."[8]

However, lawyers may advise, direct, or supervise others, including law enforcement agents, investigators, and clients, in the use of deceit or misrepresentation, provided that the use of deceit or misrepresentation occurs during "lawful investigative activities." Colo. RPC 8.4(c); *see also* CBA Op. 136. During lawful criminal investigations, for example, government lawyers may advise or supervise others engaged in deceit or misrepresentation related to social media. Lawyers also may advise or supervise others engaged in this type of conduct in civil cases, provided that the conduct occurs during lawful investigative activities. As Opinion 136 explains, whether conduct is a part of lawful investigative activities is a legal question that is heavily dependent upon the relevant facts, and there is little relevant legal precedent. Lawyers considering whether to advise, direct, or supervise others engaged in this conduct should proceed extremely cautiously.[9]

III. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of an Unrepresented Party or Witness

Viewing a restricted portion of a social media profile generally requires some form of communication with the person who established the profile. Through this communication, the person seeking access communicates a request that may be accepted, rejected, or simply ignored. There is no difference under the Rules between interviewing a person and communicating with that person through social media. Bar association ethics committees and commentators differ regarding the information lawyers must include when requesting access to a restricted portion of a social media profile or website of an unrepresented party or witness. Both the New York City Bar Association Committee on Professional Ethics and the Commercial and Federal Litigation Section of the New York State Bar Association have opined that an attorney or the attorney's agent

may use his or her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[10] The Oregon State Bar expressed a similar opinion, with the caveat that if the account holder from whom access is requested asks for additional information from the requesting lawyer, or if the lawyer has some other reason to believe that the person misunderstands the lawyer's role, the lawyer must either must provide additional information and not state or imply that the lawyer is disinterested, or the lawyer must withdraw the request.[11]

On the other hand, the New Hampshire Bar Association Ethics Committee opined that a lawyer's request for access to a restricted portion of a social media profile that discloses the lawyer's name, but not the lawyer's identity and role in pending litigation, is generally improper because it omits material information.[12] Although the New Hampshire opinion cited as authority for this conclusion a 2009 Philadelphia Bar Association Professional Guidance Committee opinion, the Philadelphia opinion does not deal directly with the issue of a lawyer seeking access to a restricted portion of a social media profile in the lawyer's own name. Instead, it addresses the propriety of having another person seek access, whose name would not be recognized or associated with the lawyer. The Philadelphia opinion concluded that such conduct would violate Pennsylvania ethics rules that are substantially identical to Colo. RPC 4.1 and 8.4(a) and the former version of Colo. RPC 8.4(c), and would possibly violate the Pennsylvania equivalent of Colo. RPC 4.3 (pertaining to dealing with an unrepresented person).[13]

This Committee generally agrees with the New Hampshire opinion. A lawyer who represents a client and personally requests access to the restricted portion of a social media profile established by an unrepresented party or witness implies that he or she is disinterested if disclosure includes the fact that he or she is a lawyer, but does not include additional information. In regard

to communications with unrepresented persons in general, Comment [1] to Colo. RPC 4.3 provides in part:

> An unrepresented person, particularly when not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, the lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.

A person who is a witness or an unrepresented party may not recognize the lawyer by name. A witness may not even be aware of the existence of an ongoing legal dispute or of pending litigation. A person receiving a "friend request" from a lawyer or an agent of a lawyer under these circumstances may be inclined to allow access based upon false assumptions. Other individuals may be more suspicious or protective by nature. Except when a request is part of lawful investigative activities permitted by Colo. RPC 8.4(c), as described below, lawyers and their agents must provide sufficient disclosure to allow the unrepresented person to make an informed decision concerning whether to grant access to restricted portions of a social media profile. This means (1) providing the name of the lawyer requesting access or for whom the requesting person is acting as an agent, (2) disclosing that the lawyer is acting on behalf of a client, and (3) disclosing the general nature of the matter in connection with which the lawyer is seeking information. The lawyer also must identify the client if disclosure is necessary to avoid a misunderstanding regarding the lawyer's role. For example, a lawyer representing a party in a personal injury matter seeking access to a restricted portion of the profile of someone identified as a bystander witness would need to provide his or her real name, disclose that he or she is a lawyer, and state that the lawyer seeks access in connection with representation of a client in a personal injury matter in which this person has been identified as a witness. If the lawyer is seeking access to a restricted portion of the social media profile of an unrepresented party, the above-quoted comment to Colo. RPC 4.3

also suggests that the lawyer may have to explain that his or her client has interests opposed to those of the unrepresented party.

The Committee also agrees that an attorney violates the ethical duty not to deceive by personally requesting access to the restricted portion of an unrepresented person's social media profile without disclosing the reason for the request.[14] Some individuals may be willing to allow anyone access to the restricted portion of their social media profile. Other people, however, are more discerning in allowing access to the restricted portions of their profiles. In such cases, the true identity of the person seeking access to the profile and the other information discussed above would be material to the person's decision to grant or deny access. Accordingly, a lawyer's failure to include information concerning the lawyer's identity and the reasons for his or her request could be a misrepresentation by omission. In this regard, Comment [1] to Colo. RPC 4.1, which applies when a lawyer is representing a client, provides in pertinent part that "omissions or partially true but misleading statements can be the equivalent of affirmative false statements."

Based on Colo. RPC 8.4(c), however, a lawyer may advise, direct, or supervise another who makes a social media access request in a way that might be considered deceptive or misleading, including by omitting the reason for the request, provided that the request occurs during lawful investigative activities. Colo. RPC 4.3 does not apply when a lawyer provides such guidance pursuant to the specific exception in Colo. RPC 8.4(c). *See* CBA Op. 136.

A lawyer's ethical obligations are different when seeking access to the restricted portion of a person's social media profile for reasons unrelated to either the representation of a client or a legal matter in which the lawyer is personally involved. When, for example, a lawyer seeks to "friend" another person on Facebook for purely social reasons or in connection with professional networking, the lawyer need not disclose the additional information required when doing so with

respect to a client matter or a legal matter in which the lawyer is a party.

IV. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Person the Lawyer Knows to be Represented by Counsel

In the course of representing a client, a lawyer may not personally request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel. Colo. RPC 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. If a request for access to the represented person's social media profile is for the purpose of gaining information for use in the matter in which the lawyer represents a client, then the communication would be prohibited. On this issue, various bar association ethics committees and commentators appear to be substantially unanimous.[15]

As with other forms of prohibited conduct discussed in this opinion, a lawyer may not circumvent the prohibition against contacting a person the lawyer knows to be represented by counsel under the circumstances discussed above by utilizing the services of a third party, including a non-lawyer, except while advising, directing, or supervising others engaged in lawful investigative activities. Colo. RPC 8.4(c); CBA Op. 136; CBA Formal Op. 96, "Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory Investigations and Proceedings" (adopted 1994, revised 2012). Moreover, the prohibitions relating to communications with a person represented by counsel apply even if the represented person initiates or consents to the communication. *See* Colo. RPC 4.2, cmt. [3]. Accordingly, a lawyer representing a client in a matter must not accept a request to participate in a social media website from a person the lawyer knows to be represented by counsel in that matter. If the lawyer and the

person represented by another lawyer are already part of the same limited social network, the lawyer should avoid posting communications relating to the representation that might be viewed by the represented party.

V. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of a Prospective or Sitting Juror

Pursuant to Colo. RPC 3.5(a), a lawyer shall not seek to influence a juror or prospective juror by means prohibited by law. Pursuant to Colo. RPC 3.5(b), a lawyer shall not communicate *ex parte* with a juror or prospective juror during the proceeding unless authorized to do so by law or court order. As with witnesses and parties, requesting permission to view a restricted portion of a social media profile of a prospective or sitting juror involves a communication with that person. Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication, whether a lawyer or someone else acting on the lawyer's behalf initiates the communication. The same prohibition would apply to communications through social media initiated by a juror. Essentially, communications between a lawyer and a juror through social media are no different than face-to-face communications or telephonic communications between a lawyer and a juror.

After a jury is discharged, the provisions of Colo. RPC 3.5(c) also would apply to communications through social media, just as with any other form of communication between a lawyer and a former juror. Rule 3.5(c) provides that a lawyer shall not communicate with a juror or prospective juror after discharge of the jury if:

> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate;
>
> (3) the communication involves misrepresentation, coercion, duress

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

Even if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media. *See* Colo. RPC 3.5, cmt. [3].

VI. Requesting or Obtaining Information from a Person With Access to Restricted Portions of a Social Media Profile or Website of a Party or Witness

In some circumstances, lawyers or their agents do not have direct access to restricted portions of the social media profile of a party or witness, but may know a third person who does. The lawyer's ethical obligations when dealing with the third person on behalf of a client will partially depend on the status of the third person. Except as permitted by Colo. RPC 8.4(c), a lawyer may not request that the third person make requests for new or additional information from a party or witness if the lawyer would be legally or ethically prohibited from requesting or obtaining it directly. Moreover, the lawyer may not request the third person to engage in deceptive conduct to obtain access to new or additional information from a party or witness through social media. The analysis of such conduct would be the same as under Section II of this opinion.

The Committee believes that the use of social media in this scenario does not significantly alter the lawyer's ethical obligations. Even if the Committee assumes the lawyer is not otherwise prohibited from communicating with the third person, the lawyer must adhere to the same ethical standards that apply whenever the lawyer requests information from a third person who is not a client. A lawyer may advise a client concerning the client's legal rights to access a restricted portion of a social media profile or website. Also, consistent with Colo. RPC 4.2, a lawyer may advise a client concerning direct communications through social media that the client is legally

entitled to engage in with another party the lawyer knows to be represented by counsel. *See* Colo. RPC 4.2, cmt. [4]. However, a lawyer may not simply use the client as a means of communicating directly with a represented party in circumvention of Rule 4.2. *See also* Colo. RPC 8.4(a).

VII. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Judge Presiding Over a Case in Which the Lawyer Is Involved as Counsel or as a Party

Lawyers are not the only members of the legal profession utilizing social media. A 2013 national survey of state judicial employees reported that 37% of responding judges used Facebook, specifically, to read and consume content, while 23.1% said they posted and commented on personal Facebook pages; and 9.83% of judges who responded said they read and consumed content on Facebook in their professional roles, while 5.33% said they posted or shared content in a professional capacity.[16]

Some ethics opinions have concluded that a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge.[17] The Colorado Judicial Ethics Advisory Board has not yet addressed the issue. While it is beyond the scope of this opinion, and beyond the authority of the Committee, to opine on the obligations of judges under the Colorado Code of Judicial Conduct, Colo. RPC 3.5 requires lawyers to consider the interplay between a lawyer's actions and a judge's obligations and authority under the Code of Judicial Conduct.

Colo. RPC 3.5 also covers communications between a lawyer and a judge during a proceeding before the judge. Lawyers may not seek to influence a judge by means prohibited by law, nor may they communicate *ex parte* with a judge during the proceeding concerning the matter before that judge, unless authorized to do so by law or court order. *See* Colo. RPC 3.5(a) and (b). Rule 2.9 of the Colorado Code of Judicial Conduct, for example, provides that except in limited

circumstances, a judge "shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Rule 2.4(B) of the Code provides that a judge "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Lawyers are prohibited from seeking to influence a judge through improper *ex parte* communications or any other means that would cause the judge to violate the provisions of the Code of Judicial Conduct.

The Committee believes that Colo. RPC 3.5 does not prohibit lawyers from participating on social networking sites with judges, seeking permission to view restricted portions of a judge's social media profile, or becoming "friends" with judges through social media during any period in which the lawyer is not appearing in a legal matter over which the judge presides. However, Colo. RPC 3.5 prohibits a lawyer from actively communicating *ex parte* with a judge during the period the lawyer is appearing as counsel or as a party before a judge, concerning or relating to the matter before that judge. This prohibition would clearly apply to any *ex parte* communications through social media concerning the legal matter itself, or issues therein, from the time the legal matter is assigned to the judge through the date that the judge's participation or potential participation in the matter has concluded. A lawyer generally should not send a "friend request" to a judge while the judge is presiding over a case in which the lawyer is appearing as counsel or a party. At least one commentator has recommended that to eliminate any risks and to comply with Rule 3.5, a lawyer and judge who know they are part of the same restricted social network, and who learn that the lawyer is to appear in a matter before the judge, should "un-friend" one another.[18] While the Committee does not believe such steps are mandated, lawyers must be cautious about what they post on any social media network of which they know a judge is a member while they have legal

matters pending before that judge.

Conclusion

Social media provide a valuable and powerful investigative tool. Undoubtedly, the various forms of social media existing at the time this opinion is issued will undergo significant changes, and additional forms of social media will be developed. Therefore, it is impossible to address all of the specific features of social media and the ethical obligations of lawyers utilizing them for investigative purposes. In general, lawyers utilizing social media for investigative purposes should be guided by the Rules and should consider how they would apply to other more traditional means of obtaining information and forms of communication.

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[1] *See* Colo. RPC 8.4(c); CBA Formal Op. 136 [TBC], "Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation" (2019) (CBA Op. 136).

[2.] N.Y. City Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2010-2, "Obtaining Evidence from Social Networking Websites" (2010) (N.Y. City Bar Op. 2010-2).

[3.] The ABA recently amended the comments to Rule 1.1 of the Model Rules of Professional Conduct to require lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Model Rule 1.1, cmt. [8]. The Colorado Supreme Court has not adopted this comment as of the date of this opinion; but Colorado attorneys should consider it as instructive.

[4] *See*, *e.g.*, N. H. Bar Ass'n Ethics Advisory Comm., Advisory Op. 2012-13/05, "Social Media Contact with Witnesses in the Course of Litigation" (2013) (N.H. Op. 2012-13/05); San Diego Cnty. Bar Legal Ethics Comm., Legal Ethics Op. 2011-2; N.Y. Bar Ethics Op. 843 (2010) (San Diego Cnty. Op. 2011-2).

[5] *See*, *e.g.*, N.Y. City Bar Ass'n Op. 2012-2; N.Y. Cnty. Lawyers Ass'n Comm. on Prof. Ethics, Formal Op. 743 (2011).

[6] ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 466, "Lawyer Reviewing Jurors' Internet Presence" (2014).

[7] James Carlson and Amy DeVan, "New Tools, Same Rules," 1 OARC Update (Summer 2013), *available at* coloradosupremecourt.com/newsletters/summer_2013 (Carlson & DeVan).

[8] *Pautler*, 47 P.3d at 1175.

[9] Lawyers providing advice, direction, or supervision pursuant to Rule 8.4(c) have duties to be aware of criminal statutes potentially applicable to fraudulent activity and other access to social media, *see* Colo. RPC 1.1, cmt. [8], and not to counsel or assist a client to engage in criminal conduct, *see* Colo. RPC 1.2(d).

[10] N.Y. City Bar Ass'n Op. 2010-2; Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (2014) (N.Y. State Bar Ass'n Guidelines).

[11] Or. State Bar Formal Op No. 2013-189, "Accessing Information About Third Parties Through a Social Networking Website" (2013) (Or. Op. 2013-189).

[12] N.H. Op. 2012-13/05). *See also* Carlson & DeVan, (advising lawyers who make a "friend" request seeking nonpublic information of an **unrepresented** party to "truthfully identify yourself and your purpose") (bolded text in original)

[13] Phil. Bar Ass'n Prof. Guidance Comm. Op. 2009-02 (2009).

[14] The San Diego County Bar Legal Ethics Committee opined that regardless of whether the person sought to be "friended" is represented and whether the person is a party to the matter, an attorney violates the ethical duty not to deceive by making a "friend request" to a person's social media page without disclosing why the request is being made. *See* San Diego Cnty. Bar Ass'n Legal Ethics Op. 2011-2 (2011) (San Diego Cnty. Op. 2011-2).

[15] *See, e.g.,* San Diego Cnty. Op. 2011-2 (stating that "as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation"); Carlson & DeVan ("Don't…attempt to 'friend' a represented party, even if you are truthful about the identity and purpose."); N.H. Bar Ass'n Op. 2012-13/05 (opining that a lawyer may not send a request to access restricted information to a person using the lawyer's name and disclosing the lawyer's role if the lawyer knows the person is represented by counsel); Or. Op. 2013-189 ("If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent."); N.Y. State Bar Ass'n Guidelines ("A lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by such person.").

[16] Christopher Davey and Carol Taylor, 2013 CCPIO New Media Survey, A Report of the Conference of Court Public Information Officers (2013), *available at* www.ccpio.org. In previous surveys, judge respondents who said they used social media profile sites without reference to the

specific type of site grew from 40% in 2010 to 46% in 2012. *Id.*

[17] Hope A. Comisky and William M. Taylor, "Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing," 20 Temple Pol. & Civ. Rts. L. Rev. 297, 308 (Spring 2011) (citing Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 7 (2010)) (Comisky & Taylor); *see* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 ("The Committee believes that a Kentucky judge or justice's participation in social networking sites is permissible, but the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct."); *see also* N.Y,. Judicial Ethics Comm. Op. 08-176 (permitting judge to join social network that includes lawyers and litigants). *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 462, "Judges' Use of Electronic Social Networking Media" (2013).

[18] Comisky & Taylor, 20 Temple Pol. & Civ. Rts. L. Rev. at 310.

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Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation

Adopted May 2019

I. Introduction and Scope

In September 2017, the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) adding this exception:

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

(Emphasis added.) No comment accompanied this change.

This opinion discusses the implications of this exception, the permissible limits of a lawyer's involvement in investigative activities, the exception's effect on other Rules, and some commonly recurring situations in which the exception may apply.

II. Syllabus

Revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in lawful investigative activities involving dishonesty, fraud, deceit, or misrepresentation. Left unchanged is the ethical

prohibition against a lawyer personally participating in activities involving dishonesty, fraud, deceit, or misrepresentation, regardless of the lawfulness of those activities.

Whether an investigative activity is "lawful" is a mixed question of fact and law. While this opinion provides some guidance regarding this question, a lawyer asked to advise, direct, or supervise an investigative activity should conduct independent research based on the facts and circumstances of a particular case.

In general, criminal investigations are likely to be considered "lawful investigative activities" even if they involve dishonesty, fraud, deceit, and misrepresentation, provided those activities are not designed to mislead courts or other tribunals. In civil matters, investigative activities are likely to be considered lawful if they are designed to ferret out violations of constitutional, statutory, or common law. This is especially true if the conduct involves posing as customers or other members of the public and does not involve attempts to induce or coerce a subject into making statements or taking action that the subject would not otherwise have taken.

III. Discussion and Analysis

A. Policy Underpinnings of Rule 8.4(c)

Rule 8.4(c) protects against conduct that "jeopardizes the public's interest in the integrity and trustworthiness of lawyers." *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Or. 2004). Colorado's Office of the Presiding Disciplinary Judge has endorsed this view, stating that "dishonesty . . . encompasses fraudulent, deceitful, or misrepresentative conduct evincing 'a lack of honesty or integrity in principle; a lack of fairness and straightforwardness.'" *People v. Katz*, 58 P.3d 1176, 1189 (Colo. OPDJ 2002) (quoting *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990)); *People v. Schmeiser*, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact). The focus of the Rule is on dishonesty "which encompasses fraudulent, deceitful, or

misrepresentative behavior." *Shorter*, 570 A.2d at 767 (construing prior DR 1-102(A)(4)); *see also Conduct of Carpenter*, 95 P.3d at 208–09 ("[C]onduct involving 'dishonesty' is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity" (internal quotations omitted)).

The United States Supreme Court has long recognized the propriety of using undercover agents, pretext, and deception in lawful investigations. *See Lewis v. U.S.*, 385 U.S. 206, 209 (1966) ("the Government is entitled to use decoys and to conceal the identity of its agents"). The Colorado Supreme Court has similarly approved deception in criminal investigations, observing that many crimes simply "could not otherwise be detected unless the government is permitted to engage in covert activity." *People in the Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988); *see also People v. Bailey*, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities); *People v. Nelson*, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance" causing defendant to open apartment door held not to render subsequent entry unlawful); *People v. Roth*, 85 P.3d 571, 574 (Colo. App. 2003) (police use of fictitious drug checkpoint was lawful and did not require suppression of evidence); *People v. Zamora*, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext in asking to inspect apartment for fictitious crime did not render consent to warrantless search involuntary; whether conduct is lawful turns on whether defendant's consent is voluntary).

The Committee also has recognized that a lawyer's involvement in lawful criminal or civil regulatory investigations can ensure that the investigation complies with constitutional parameters, "as well as high professional and ethical standards." CBA Formal Op. 96, "Ex Parte

Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings" (rev. 2012) (CBA Op. 96).

The American Bar Association (ABA) instructs prosecutors to "provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use," and that ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve 'deceit.'" *See* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Standard 1.3(g); *see also* H. Morley Swingle & Lane P. Thomasson, Feature: *Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (Mar.-Apr. 2013) ("A prosecutor would not be doing his job effectively if he or she refused … to help [an] officer prepare to conduct a lawful covert operation[.]").

B. Lawyers May Not Personally Participate in Dishonesty, Fraud, Deceit, or Misrepresentation

While recognizing the value of deception as a tool for law enforcement and of lawyer oversight of such investigations, courts have drawn a clear line between a lawyer advising and supervising covert activities and personally participating in them.

Prior to the revision of Rule 8.4(c), the Colorado Supreme Court refused to recognize any exception that would allow a lawyer to personally engage in deceptive activities, even under the most extenuating of circumstances. In *In re Pautler*, 47 P.3d 1175 (Colo. 2002), a prosecutor was disciplined for impersonating a public defender in an attempt to achieve the peaceful surrender of a barricaded axe murderer who had demanded to speak to a public defender as a condition of his surrender. *Id*. at 1176–77. The Colorado Supreme Court held that then-existing Rule 8.4(c) made no exception for investigatory activities. *Id*. at 1179. Instead, the court repeatedly emphasized that lawyers must not personally engage in behavior "that involves deceit

or misrepresentation" even during investigative activities. *Id*. at 1180; *see also In re Gatti*, 8 P.3d 966 (Or. 2000) (reaching a similar result under an older version of Oregon's counterpart to Rule 8.4(c)).

Revised Rule 8.4(c) does not alter the result in *Pautler*, but makes clear that a lawyer may "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in "lawful investigative activities" involving dishonesty, fraud, deceit, or misrepresentation.

C. Lawful Investigative Activities

Revised Rule 8.4(c) applies to all Colorado lawyers. Whether the exception created by revised Rule 8.4(c) applies in a particular circumstance turns on a legal question: "What constitutes a lawful investigative activity?" In cases determining whether deception was used in pursuit of "lawful investigative activities," there is a "discernable continuum" of conduct ranging "from clearly impermissible to clearly permissible" actions. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

Existing case law on what constitutes "lawful investigative activities" may be distilled into several guiding principles. Caution must be exercised in applying existing law, however, as material differences exist between revised Rule 8.4(c) and the Rules in other jurisdictions.

First, hiring investigators to pose as customers or consumers is a proper, lawful investigative technique. Such a ruse is designed to ferret out ongoing wrongdoing, such as discrimination or inappropriate use of a product or trademark infringement that would be otherwise difficult, if not impossible, to discover without the deception. Courts traditionally have allowed pretextual or undercover investigations in civil rights cases and, somewhat less consistently, in intellectual property investigations. Lawyers "can employ persons to play the

role of customers seeking services on the same basis as the general public." *Hill*, 209 F. Supp. 2d at 880.

Second, investigators must take care not to induce or coerce the target of an investigation into making statements he or she otherwise would not have made to a member of the public. Investigators "cannot trick employees into doing things or saying things they otherwise would not do or say." *Id*. A proper investigation should merely "note or reproduce" a witness's usual behavior. An operation designed to induce someone into doing or saying something he or she would otherwise not do or say, would likely not qualify as a lawful investigation. *In re Curry*, 880 N.E.2d 388, 405 (Mass. 2008).

Third, any deception should not *impede* a lawful investigation. *See In re Malone*, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel); *accord In re Friedman*, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding an ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

Fourth, lawyers may not affirmatively mislead a court or other tribunal. *See People v. Reichman*, 819 P.2d 1035, 1036 (Colo. 1991) (holding that a lawyer may not knowingly deceive the judicial system by filing false criminal charges to bolster an undercover investigator's credibility); *see also* Colo. RPC 3.3(a).

Fifth, relevant considerations in a civil investigation include whether the investigation was a "straightforward effort to gather evidence"; whether the investigation is "designed to reproduce the subject's usual behavior" or was designed to "trick" the subject into doing something atypical; whether the investigation is gathering information "readily available to the public"; the degree of intrusiveness of the investigation (with less intrusive investigations less

likely to run afoul of constraints on permissible lawful investigative activities or ethical rules); whether those targeted by the investigation are "suspected wrongdoers"; whether there are other ways to collect evidence of the wrongdoing; and whether a supervisory lawyer has reviewed and approved the investigation. *See* Judy Z. Kalman & Mariya Treisman, *Pretextual Investigative Techniques and the Rules of Professional Conduct*, NAGTRI J., Vol. 3, Issue 1 (Feb. 2018) (collecting cases).

Finally, a number of states have defined the scope and contours of "covert activity" for purposes of lawful investigations. For example, Oregon has specifically stated that "lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights" is acceptable, "provided the lawyer's conduct is otherwise in compliance" with the Rules. Or. RPC 8.4(b). Further, Oregon permits covert activity to be commenced "only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place[,] or will take place in the foreseeable future." *Id*.; *accord* Iowa RPC 32:8.4, cmt. [6] (same).

Revised Colorado. RPC 8.4(c) is not so explicit and was adopted without any comment providing guidance to lawyers, government or private. In drawing guidance from Oregon, Iowa, and other states that have adopted variants of ABA Model Rule 8.4(c), it is important to keep in mind that the express language of such variants and their comments circumscribe the ethical boundaries of a lawyer's involvement in investigative activities in those jurisdictions. Lawyers practicing in Colorado who are consulted regarding investigative activities must analyze each situation on a case-by-case basis, and exercise their own sound professional judgment, informed by legal research.

D. Relationship to Other Rules

While revised Rule 8.4(c) may seem to be a significant departure from previous standards, it is better viewed as a narrow governing exception. This section considers other Rules potentially affected by revised Rule 8.4(c), starting with those that, at least on their face, are most likely to be affected. After analysis, however, the Committee concludes that many of these Rules are unaffected, or largely unaffected, by revised Rule 8.4(c).

1. Rule 8.4(a) (Misconduct)

Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Revised Rule 8.4(c) provides a narrow exception to this anti-circumvention rule. It is a settled rule of statutory construction that "a specific statutory provision prevails over a general provision." *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1236 (Colo. 1996). The Committee believes that revised Rule 8.4(c)'s express authorization for a lawyer to "advise, direct, or supervise others" "in conduct involving dishonesty, fraud, deceit or misrepresentation" controls over application of the general anti-circumvention rule, so long as the advice, direction, or supervision occurs in furtherance of a "lawful investigative activit[y],".

Further, it is the opinion of the Committee that, even before the enactment of revised Rule 8.4(c), subsection (a) did not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, even if such action involves conduct involving dishonesty, fraud, deceit, or misrepresentation. For example, in Colorado and other states that have adopted a "unilateral consent" rule, it is generally lawful for a nonlawyer to surreptitiously record a conversation to which he or she is a party, though a lawyer may not. *See People v. Selby*, 606 P.2d 45, 47 (1979) (holding a lawyer may not secretly record a conversation with another lawyer or person); CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements"

(2003). Even before the adoption of revised Rule 8.4(c), a lawyer could have advised a nonlawyer client of his or her legal right to engage in such a surreptitious recording.

2. Rule 4.1 (Truthfulness in Statements to Others)

Rule 4.1 provides:

> In 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; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Because revised Rule 8.4(c) does not permit a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 4.1 and the result in *Pautler* are unaffected. *See* Colo. RPC 4.1, cmt. [1].

3. Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.2 states:

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

Although revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise" a nonlawyer where the investigative activity in question is a "lawful investigative activity," the Committee believes that revised Rule 8.4(c) does not otherwise alter Rule 4.2's requirements. Investigation is prohibited once the lawyer knows a party is represented by counsel in a matter unless one of Rule 4.2's exceptions applies. Rule 4.2's "authorized by law" exception, however, may include "lawful investigative activity" as referenced in revised Rule 8.4(c). *See generally* CBA Op. 96.

4. Rule 4.3 (Dealing with Unrepresented Person)

Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Because Rule 4.3 applies to personal contact by a lawyer with an unrepresented party, it is unaffected by revised Rule 8.4(c), which does not authorize a lawyer to personally engage in deceitful conduct.

5. Rule 4.4(a) (Respect for Rights of Third Persons)

Rule 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

The Committee believes that conduct in accordance with revised Rule 8.4(c) would not violate the "substantial purpose" clause of Rule 4.4(a). The Committee further believes that, so long as the requirements of revised Rule 8.4(c) are observed, advising, directing, or supervising others in the use of covert or deceitful methods in the course of "lawful investigative activities" cannot be construed to be a violation of another's "legal rights."

6. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Rule 5.3 provides:

> With respect to nonlawyers employed or retained by or associated with a lawyer:
>
> . . .
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct *if engaged in by a lawyer* if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added.)

Private investigators hired by a lawyer, whether on a full-time or project basis, as well as government investigators and staff employed by the lawyer, are "nonlawyers employed or retained by or associated with a lawyer."[1] Rule 5.3 requires a lawyer to make "reasonable efforts to ensure that [such] person's conduct is compatible with the professional obligations of the lawyer."

The Committee believes that Rule 5.3's requirement that a lawyer make "reasonable efforts to ensure . . . conduct is compatible with the professional obligations of the lawyer" includes the determination of whether the conduct the lawyer is recommending, directing, or advising is in furtherance of a lawful investigative activity. Such reasonable efforts may include reviewing the substantive law bearing on whether an investigative activity is lawful, consulting with others on this issue when appropriate, and providing guidance to those the lawyer is advising regarding how to lawfully conduct the activity. For the reasons described in Section III.D.1, revised Rule 8.4(c) provides a narrow exception to Rule 5.3(c) and allows a lawyer to "advise, direct, or supervise" a nonlawyer engaged in "conduct involving dishonesty, fraud,

[1] Process servers, skip tracers, and others hired by a lawyer also fall within the ambit of Rule 5.3, and may fall within the purview of revised Rule 8.4(c) if their tasks include "dishonesty, fraud, deceit or misrepresentation."

deceit or misrepresentation" so long as that conduct is in furtherance of "lawful investigative activities."

7. Rule 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Rule 1.2(d) provides:

> 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.

As discussed above, revised Rule 8.4(c) permits lawyers to advise, direct, and supervise clients in lawful investigative activities that involve "fraud." To that extent, the revised Rule controls over Rule 1.2(d)'s prohibition on counseling a client to engage in *fraudulent* conduct, but it does not alter the prohibitions on counseling a client to engage or assisting a client to engage in *criminal* conduct.

8. Rule 3.3 (Candor Toward the Tribunal)

As noted above in Section III, revised Rule 8.4(c) does not modify a lawyer's duty of candor to the tribunal under Rule 3.3.

IV. Illustrations

Certain issues regarding investigative activities may arise frequently in a lawyer's practice, even on a daily basis, such as the supervision of undercover law enforcement investigations.

A. Private and Government Investigators – Pretextual Investigations

As noted above, undercover investigations and deceptive investigative techniques are an accepted practice in the detection and prevention of crime. *M.N.*, 761 P.2d 1124, 1135; *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986); *Bailey*, 630 P.2d at 1068. A lawyer's involvement

in an investigation can ensure that the investigation complies with constitutional standards. CBA Formal Op. 96. Revised Rule 8.4(c) clarifies that a lawyer may advise, direct, or supervise others in lawful criminal investigations, even if those investigations are covert or use deceptive investigative techniques. *See also* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Subdivision 1.3(g).

Revised Rule 8.4(c) also applies in contexts other than criminal investigations. For example, an investigator may pretend to be a homebuyer or renter in order to detect discrimination in housing, pose as a job-seeker to gather evidence of employment discrimination, or purport to be a consumer of certain goods in order to gather evidence of consumer fraud or evidence of trademark or copyright infringement. Pursuant to revised Rule 8.4(c), a lawyer may ethically advise, direct, or supervise such a lawful, albeit deceptive, investigation by an investigator retained by the lawyer or by the lawyer's client. However, the investigation must be "lawful," and the lawyer may not personally participate in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. Surreptitious Recordings

The Committee is aware that in certain situations a lawyer's client or other persons (such as investigators) might wish to record a conversation surreptitiously. For example, a client may want to gather evidence to support a claim for employment discrimination or sexual harassment by recording statements that are being made to the employee in the work place. A party in a dissolution of marriage action may wish to record statements made by the other party that indicate the other party is hiding assets or presents a risk to the safety of the children of the marriage. Or a client may want to record threats of physical harm so that the client can seek a restraining order, support criminal prosecution, or establish evidence to support a civil claim for

intentional infliction of emotional distress. In these situations, it seems unlikely that the person to be recorded would continue to make the statements if they knew they were being recorded.

As previously noted in Section III.D.1., in Colorado it is generally lawful for a nonlawyer client to record a conversation to which he or she is a party without the other party's knowledge, even though a lawyer may not do so. A lawyer, however, should advise a client that any recording should not violate state or federal computer crime, wiretap, or eavesdropping statutes. *See*, e.g., 18 U.S.C. §2511; C.R.S. § 18-5.5-102; C.R.S. § 18-9-303; C.R.S. § 18-9-304.

Although a lawyer may not communicate with a party who is represented in a matter by another lawyer (unless the other lawyer consents), "[p]arties to a matter may communicate directly with each other." Colo. RPC 4.2, cmt. [4]. Revised Rule 8.4(c) specifically includes "clients . . . who engage in lawful investigative activities" among those persons that the lawyer may advise, direct, or supervise. Therefore, as long as the recording is lawful, revised Rule 8.4(c) permits a lawyer to advise, direct, or supervise other persons with respect to such recordings, even if made surreptitiously.[2]

C. Public Records and Social Media

Our society increasingly stores data electronically and uses the Internet to gather information. In addition, social media have become so commonplace it is easy to compile a large amount of information about someone from that person's and the person's friends' and colleagues' postings on social media. In short, public records and social media provide fertile ground for investigating a person or organization.

[2] The Committee recognizes this conclusion is contrary to the holding in *McClelland v. Blazin' Wings, Inc*., 675 F. Supp. 2d 1074, 1079-80 (D. Colo. 2009). However, that opinion, issued several years ago, was based on Colo. RPC 8.4(c) before its amendment in 2017. The court in *McClelland* relied in part on CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements" (2003), which also was based on the pre-amendment Rule. *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 11-461, "Advising Clients Regarding Direct Contacts with Represented Persons" (2011).

Important information often can be obtained by investigating through public records and social media without deception. For example, no dishonesty, fraud, deceit, or misrepresentation is required to view and record public postings made by a potential criminal defendant about a crime he or she has committed, or by a personal injury plaintiff showing photos of his or her weekend activities which refute claims of pain and physical disability. These examples involve information that has been made public and is available for anyone to see. Therefore, an investigator or a lawyer may gather such information. *See* CBA Formal Op. 127, "Use of Social Media for Investigative Purposes" (2015).

However, in some instances, information cannot readily be obtained without some form of deception or misrepresentation. One example is law enforcement officers pretending to be someone they are not in order to catch sexual predators using the Internet to lure their victims, or to detect human trafficking, drug smuggling, or other illegal activities. In such instances, information may be obtained only by gaining access to a restricted portion of a social media site by misrepresenting one's identity or the reason for wanting such access, for example, when an investigator asks to "friend" someone on Facebook without revealing the investigation. Revised Rule 8.4(c) clarifies that a lawyer may advise, supervise, or direct law enforcement in such investigations that involve deception or misrepresentation, but may not personally engage in them.

With regard to situations not involving law enforcement, such as investigating witnesses or gathering information about a party to a case, the Committee believes that revised Rule 8.4(c) now permits a lawyer to ethically advise, supervise, or direct others, including investigators or clients, with respect to use of deceptive means to gather information from a restricted portion of a social media profile or website, as long as it is in the course of a lawful investigative activity,

and as long as the lawyer does not personally engage in such conduct. *See* CBA Formal Op. 127, *supra*.

Addendum: Useful References

Case Law

Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (tester has standing to bring Fair Housing Act claim even though "the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home").

Lewis v. United States, 385 U.S. 206, 209 (1966) (the "government is entitled to use decoys and to conceal the identity of its agents").

Hoffa v. United States, 385 U.S. 293, 300 (1966) (discussing witness's failure to disclose his role as a government informer in context of illegal search and seizure under the Fourth Amendment).

United States v. Szycher, 585 F.2d 443, 447 (10th Cir. 1978) (prohibiting pretextual investigation activities "where the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction").

McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074, 1080 (D. Colo. 2009) (private investigator's conduct in surreptitiously recording defendant's employee was improper).

In re Pautler, 47 P.3d 1175, 1179 (Colo. 2002) (pre-amendment Colo. RPC 8.4(c) applied to prosecutor's conduct in impersonating a public defender).

People v. Reichman, 819 P.2d 1035, 1038-39 (Colo. 1991) (pre-amendment Colo. RPC 8.4(c) prohibition against deception applied to criminal prosecutors).

People v. Smith, 778 P.2d 685, 686 (Colo. 1989) ("the undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound").

People in the Interest of M.N., 761 P.2d 1124, 1130 (Colo. 1988) ("Unlawful activities performed by a government agent in the course of undercover law enforcement do not necessarily subject the officer to prosecution.").

People v. Morley, 725 P.2d 510, 514–15 (Colo. 1986) (undercover investigator's action in surreptitiously recording a lawyer setting up a prostitution ring in Denver was not prohibited).

People v. Bailey, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities).

People v. Vandiver, 552 P.2d 6, 10 (Colo. 1976) (rejecting claim of entrapment "[a]bsent outrageous conduct by the officers violating fundamental standards of due process").

People ex rel. Attorney Gen. v. Ellis, 70 P.2d 346, 347 (Colo. 1942) (attorney suspended for clandestinely installing espionage paraphernalia in the Governor's office).

People v. Nelson, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance," causing defendant to open apartment door, did not render subsequent entry unlawful).

People v. Roth, 85 P.3d 571, 574 (Colo. App. 2003) (defendant's plain-view disposal of drug paraphernalia in reaction to police ruse of fictitious drug checkpoint did not require suppression of evidence).

People v. Zamora, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext for asking to inspect apartment did not render consent to warrantless search involuntary).

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In re Friedman, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

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47 P.3d 1175
Supreme Court of Colorado,
En Banc.

In the Matter of Mark C.
PAUTLER, Attorney-Respondent.

No. 01SA129.
|
May 13, 2002.

Synopsis

In attorney disciplinary proceeding, the Office of the Presiding Disciplinary Judge, 35 P.3d 571, held that attorney's misconduct in deceiving murder suspect in order to encourage his surrender warranted three-month suspension, stayed during 12-month probationary period. Attorney appealed. The Supreme Court, Kourlis, J., held that: (1) no imminent public harm exception existed to the ethical principle that a lawyer may not engage in deceptive conduct; (2) attorney violated the professional conduct rule that provided that, in dealing on behalf of a client with a person not represented by counsel, the attorney was required to state he was representing a client and could not state or imply that the attorney was disinterested; and (3) suspension for three months, which was stayed during twelve months of probation during which the attorney was to take ethics courses and retake the professional responsibility examination, was reasonable.

Affirmed.

West Headnotes (7)

[1] Attorney and Client
Review

The factual findings by the attorney disciplinary board are binding on the reviewing court unless, after considering the record as a whole, the findings are unsupported by substantial evidence. Rules Civ.Proc., Rule 251.27(b).

[2] Attorney and Client
Review

Questions of law in attorney disciplinary proceedings receive de novo review as with any appeal. Rules Civ.Proc., Rule 251.27(b).

[3] Attorney and Client
Grounds for Discipline

No imminent public harm exception existed to the ethical principle that a lawyer may not engage in deceptive conduct, and thus deputy district attorney who deceived a murder suspect in order to encourage his surrender was not justified in violating the professional conduct rule prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. Rules of Prof.Conduct, Rule 8.4(c).

15 Cases that cite this headnote

[4] Attorney and Client
Defenses

Neither duress nor "choice of evils" defenses applied in attorney disciplinary proceeding in which attorney was charged with deceiving a murder suspect in order to persuade suspect to surrender to police; attorney was not acting at the direction of another person who threatened harm, nor did the attorney engage in criminal conduct to avoid imminent public injury. Rules of Prof.Conduct, Rules 4.1, 8.4(c).

3 Cases that cite this headnote

[5] Attorney and Client
Grounds for Discipline

Deputy district attorney's statutory designation as a peace officer did not justify the ethical violation in his use of deception to persuade murder suspect to surrender, where he was acting in his capacity as attorney, rather than as peace officer, at time of deception. Rules of Prof.Conduct, Rule 8.4(c).

[6] Attorney and Client
Grounds for Discipline

Deputy district attorney who deceived a murder suspect in order to encourage his surrender violated the professional conduct rule that provided that, in dealing on behalf of a client with a person not represented by counsel, the attorney was required to state he was representing a client and could not state or imply that the attorney was disinterested; at all times during the deception the attorney represented the state, but led the murder suspect to believe the attorney was a public defender who was representing the suspect. Rules of Prof.Conduct, Rule 4.3.

4 Cases that cite this headnote

[7] **Attorney and Client**
Conditions

Suspension of deputy district attorney for three months, which was stayed during twelve months of probation during which the attorney was to take ethics courses and retake the professional responsibility examination, was reasonable sanction for attorney's misconduct in deceiving murder suspect in order to encourage his surrender; attorney's deceit breached public and professional trust, attorney acted intentionally, from which actual, unquantifiable harm resulted, and attorney failed to take steps after the immediacy of the events waned to correct the blatant deception in which he took part. Rules Civ.Proc., Rule 251.27(b); Rules of Prof.Conduct, Rules 4.3, 8.4(c).

18 Cases that cite this headnote

Attorneys and Law Firms

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Colorado District Attorneys Council, Peter A. Weir, Executive Director, Denver, Colorado.

M. Katherine Howard, Deputy District Attorney, Pueblo, Colorado, Attorneys for Amicus Curiae for Attorney-Respondent.

Opinion

Justice KOURLIS delivered the Opinion of the Court.

I will employ such means as are consistent with Truth and Honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect, and honesty.
Oath of Admission-Colorado State Bar, 2002 [1]

In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender. We affirm the hearing board's finding that the district attorney in this case violated the Colorado Rules of Professional Conduct, and on somewhat different grounds, including the attorney's failure to disclose his deception immediately after the event, we also affirm the discipline imposed by the hearing board.

I.

The hearing board found the following facts by clear and convincing evidence: On June 8th, 1998, Chief Deputy District Attorney Mark Pautler arrived at a gruesome crime scene where three women lay murdered. All died from blows to the head with a wood splitting maul. While at the scene ("Chenango apartment"), Pautler learned that three other individuals had contacted the sheriff's department with

information about the murders. Pautler drove to the location where those witnesses waited ("Belleview apartment"). Upon arrival, he learned that the killer was William Neal. Neal had apparently abducted the three murder victims one at a time, killing the first two ***1177** at the Chenango apartment over a three-day period. One of the witnesses at the Belleview apartment, J.D.Y., was the third woman abducted. Neal also took her to the Chenango apartment where he tied her to a bed using eyebolts he had screwed into the floor specifically for that purpose. While J.D.Y. lay spread-eagled on the bed, Neal brought a fourth woman to the Chenango apartment. He taped her mouth shut and tied her to a chair within J.D.Y.'s view. Then, as J.D.Y. watched in horror, Neal split the fourth victim's skull with the maul. That night he raped J.D.Y. at gunpoint.

The following morning, Neal returned with J.D.Y. to the Belleview apartment. First one friend, a female, and then a second friend, a male, arrived at the apartment. Neal held J.D.Y. and her two friends in the Belleview apartment over thirty hours. He dictated the details of his crimes into a recorder. Finally, he abandoned the apartment, leaving instructions with J.D.Y. and her friends to contact police, and to page him when the police arrived.

When Pautler reached the Belleview apartment, Deputy Sheriff Cheryl Moore had already paged Neal according to the instructions Neal had left. Neal answered the page by phoning the apartment on a cell-phone. The ensuing conversation lasted three-and-a-half hours, during which Moore listened to Neal describe his crimes in detail. She took notes of the conversation and occasionally passed messages to Pautler and other officers at the scene. Sheriff Moore developed a rapport with Neal and continuously encouraged his peaceful surrender. Meanwhile, other law enforcement officers taped the conversation with a hand-held recorder set next to a second phone in the apartment. Efforts to ascertain the location of Neal's cell-phone were unsuccessful.

At one point, Neal made it clear he would not surrender without legal representation; Moore passed a message to that effect to Pautler. Neal first requested an attorney who had represented him previously, Daniel Plattner, but then also requested a public defender (PD). Pautler managed to find Plattner's office number in the apartment telephone book. When he called the number, however, Pautler received a recorded message indicating the telephone was no longer in service. Pautler believed that Plattner had left the practice of law, and he therefore made no additional attempt to contact Plattner. Upon learning that Plattner was unavailable, Sheriff Moore agreed with Neal to secure a public defender. However, no one in the apartment made any attempt to contact a PD or the PD's office.

Pautler later testified that he believed any defense lawyer would advise Neal not to talk with law enforcement. Pautler also testified that he did not trust anyone at the PD's office, although on cross-examination he admitted there was at least one PD he did trust. Law enforcement officials present at the Belleview apartment, testifying in Pautler's defense, said they would not have allowed a defense attorney to speak with Neal because they needed the conversation to continue until they could apprehend Neal. Instead of contacting the PD's office, or otherwise contacting defense counsel, Pautler offered to impersonate a PD, and those law enforcement agents at the scene agreed.

When Neal again requested to speak to an attorney, Sheriff Moore told him that "the PD has just walked in," and that the PD's name was "Mark Palmer," a pseudonym Pautler had chosen for himself. Moore proceeded to brief "Palmer" on the events thus far, with Neal listening over the telephone. Moore then introduced Pautler to Neal as a PD. Pautler took the telephone and engaged Neal in conversation. Neal communicated to Pautler that he sought three guarantees from the sheriff's office before he would surrender: 1) that he would be isolated from other detainees, 2) that he could smoke cigarettes, and 3) that "his lawyer" would be present. To the latter request, Pautler answered, "Right, I'll be present."

Neal also asked, "Now, um, at this point, I want to know, um, what my rights are-you feel my rights are right now." Pautler did not answer the question directly, but asked for clarification. Neal then indicated he sought assurance that the sheriff's office would honor the promises made. Pautler communicated to Neal that he believed the sheriff's department would keep him isolated ***1178** as requested. Pautler did not explain to Neal any additional rights, nor did Neal request more information on the topic. In later conversations, it was clear that Neal believed "Mark Palmer" from the PD's office represented him.

Neal eventually surrendered to law enforcement without incident. An officer involved in the arrest approached Pautler with the news that Neal had asked whether his attorney was present. Pautler was at the scene but did not speak with Neal, although he asked the officer to tell Neal that the attorney was indeed present. Evidence at the hearing indicated that

Neal was put into a holding cell by himself and received his requested cigarettes as well as a telephone call.

Pautler made no effort to correct his misrepresentations to Neal that evening, nor in the days following. James Aber, head of the Jefferson County Public Defender's office, eventually undertook Neal's defense. Aber only learned of the deception two weeks later when listening to the tapes of the conversation whereupon he recognized Pautler's voice. Aber testified at Pautler's trial that he was confused when Neal initially said that a Mark Palmer already represented him. Aber told the board that he had difficulty establishing a trusting relationship with the defendant after he told Neal that no Mark Palmer existed within the PD's office. Several months later Neal dismissed the PD's office and continued his case pro se, with advisory counsel appointed by the court. Ultimately, Neal was convicted of the murders and received the death penalty. The parties dispute whether Neal dismissed Aber out of the mistrust precipitated by Pautler's earlier deception.

Attorney Regulation Counsel charged Pautler with violating both Colo. RPC 8.4(c) and 4.3 of the Colorado Rules of Professional Conduct ("Rules"). The presiding disciplinary judge granted summary judgment against Pautler on Rule 8.4(c); the 4.3 charge went to a hearing board because the judge ruled that (1) whether Neal was represented, and (2) whether Pautler gave advice, were disputed questions of fact. The board subsequently found that Pautler violated Rule 4.3. With one dissent, the board set the sanction for both violations at three months suspension, with a stay granted during twelve months of probation. During that period, Pautler was to retake the MPRE, take twenty hours of CLE credits in ethics, have a supervisor present whenever he engaged in any activity implicating Colo. RPC 4.3, and pay the costs of the proceedings.

We take note of additional facts pertinent to our decision here. First, Neal was an unrepresented person at the time Pautler spoke with him; the parties stipulated to this fact after the PDJ's ruling but before Pautler's trial. Second, Pautler is a peace officer, level Ia, as defined in section 18-1-901(3)(*l*)(II)(A), 6 C.R.S. (2001), by virtue of his position in the DA's office. As such, Pautler carries a badge and is authorized to carry a weapon. He was armed during these events. He is further authorized to use lethal force, when necessary, to apprehend a dangerous felon. § 18-1-707(2)(a)(I), 6 C.R.S. (2001). Also, all parties acknowledged Pautler's reputation for honesty and high ethical standards. Finally, Pautler testified that given the same circumstance, he would not act differently, apart from informing Neal's defense counsel of the ruse earlier.

II.

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.
>
> Colo. R.P.C. pmbl.

The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation; but, they certainly do not signal that the obligation itself has eroded. For example, the profession itself is engaging in a nation-wide project designed to emphasize that "truthfulness, honesty and candor are the core of the core values of the legal ***1179** profession."[2] Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession-as well as at the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish. With due regard, then, for the gravity of the issues we confront, we turn to the facts of this case.

III.

[1] **[2]** For purposes of our decision, "the board's factual findings are binding on this court unless, after considering the record as a whole, the findings are unsupported by substantial evidence." *People v. Bennett,* 810 P.2d 661, 665 (Colo.1991); *see also* C.R.C.P 251.27(b) (mandating a "clearly erroneous" standard of review for findings of fact). Questions of law in attorney disciplinary proceedings receive de novo review as with any appeal. C.R.C.P 251.27(b); *see also* *People v. Reynolds,* 933 P.2d 1295, 1303 (Colo.1997).

The complaint charged Pautler with violating Colo. RPC 8.4: "It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." This rule and its commentary are devoid

of any exception. Nor do the Rules distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors. *See* Colo. RPC 3.8; *see also* *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).[3] The two jurisdictions that have created exceptions to this blanket prohibition limited them to circumstances inapposite here.[4]

A. Pautler's Defense

We are unpersuaded by Pautler's assertion that his deception of Neal was "justified" under the circumstances, and we underscore the rationale set forth in *People v. Reichman,* 819 P.2d 1035 (Colo.1991). 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. *Id.* at 1039.[5]

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. *Friedman,* 30 Ill.Dec. 288, 392 N.E.2d at 1334. A divided Illinois Supreme Court found such advice violated the ethics code despite the undeniably ***1180** wholesome motive. *Id.* 30 Ill.Dec. 288, 392 N.E.2d at 1336. 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. *Id.* at 604-05. The instruction was purportedly to save the testifying officer from retribution by the other corrections officers. *Id.* Again, despite the laudable motive, the New York court upheld Malone's censure for breaking the code. *Id.* at 607-08.

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).

We stress, however, that the reasons behind Pautler's conduct are not inconsequential. In *Reichman,* we also stated, "While the respondent's motives and the erroneous belief of other public prosecutors that the respondent's conduct was ethical do not excuse these violations of the Code of Professional Responsibility, they are mitigating factors to be taken into account in assessing the appropriate discipline." *Id.* at 1039. Hence, *Reichman* unambiguously directs that prosecutors cannot involve themselves in deception, even with selfless motives, lest they run afoul of Rule 8.4(c).

B. Imminent Public Harm Exception

Pautler requests this court to craft an exception to the Rules for situations constituting a threat of "imminent public harm." In his defense, Pautler elicited the testimony of an elected district attorney from a metropolitan jurisdiction. The attorney testified that during one particularly difficult circumstance, a kidnapper had a gun to the head of a hostage. The DA allowed the kidnapper to hear over the telephone that the DA would not prosecute if the kidnapper released the hostage. The DA, along with everyone else involved, knew the DA's representation was false and that the DA fully intended to prosecute the kidnapper. Pautler analogizes his deceptive conduct to that of the DA in the hostage case and suggests that both cases give cause for an exception to Rule 8.4(c).

[3] We first note that no complaint reached this court alleging that the DA in the kidnapper scenario violated Rule 8.4(c), and therefore, this court made no decision condoning that DA's behavior. But assuming arguendo that the DA acted in conformity with the Rules, one essential fact distinguishes the hostage scenario from Pautler's case: the DA there had no immediately feasible alternative. If the DA did not immediately state that he would not prosecute, the hostage might die. In contrast, here Neal was in the midst of negotiating his surrender to authorities. Neal did make references to his continued ability to kill, which Pautler described as threats, but nothing indicated that any specific person's safety was in imminent danger. More importantly, without second guessing crime scene tactics, we do not believe Pautler's choices were so limited. Pautler had several choices. He had telephone numbers and a telephone and could have called a PD. Indeed, he attempted to contact attorney Plattner, an indication that communicating with a defense attorney was not precluded by the circumstances. Pautler also had the option of exploring with Neal the possibility that no attorney would be called until after he surrendered. While we do not opine, in hindsight, as to which option was best, we are adamant that when presented with choices, at least one of which conforms to the Rules, an attorney must not select an option that involves deceit or misrepresentation. [6]

***1181** The level of ethical standards to which our profession holds all attorneys, especially prosecutors, leaves no room for deceiving Neal in this manner. Pautler cannot compromise his integrity, and that of our profession, irrespective of the cause.

C. Duress and Choice of Evils

Pautler further argues that the traditional defenses of duress [7] and "choice of evils" [8] provide examples of appropriate defenses to allegations of ethical misconduct. He also refers the court to the comment after Rule 4.1 where attorneys permissibly "misrepresent" their client's position as part of "generally accepted conventions in negotiations." Colo. RPC 4.1 cmt. Pautler does not assert that any of these exceptions apply in his case, but that their existence demonstrates that exceptions are, at times, available to the otherwise strictly interpreted ethics rules.

[4] This court has never examined whether duress or choice of evils can serve as defenses to attorney misconduct. [9] 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).

A review board in Illinois examined a similar scenario and decided against such an exception. *In re Chancey,* No. 91CH348, 1994 WL 929289, at *7 (Ill. Att'y Reg. Disp. Comm'n Apr. 21, 1994). 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. *Id.* at **2-4. Chancey signed a retired judge's name to the order. *Id.* at *3. He never intended to file the order and did not file the order, nor was the order ultimately used to deceive the felon. *Id.* Despite its non-use, and despite Chancey's undeniably worthy motive, the Illinois board reprimanded Chancey for his deceit. *Id.* at *7. 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. *Id.*

Nor does the commentary to Colo. RPC 4.1 persuade us that an exception to Colo. RPC 8.4(c) is appropriate. If anything, the fact that the commentary to Rule 4.1 made explicit an already acknowledged exception demonstrates that, where applicable, the Rules and commentary set forth their own exceptions. Neither Colo. RPC 8.4(c), nor its comment, contain any such exception. On a related point, the hearing board noted, "Both of the rules under which Pautler was charged are imperative, not permissive in application. Compliance with their mandatory provisions is required and is not subject to the exercise of discretion by the lawyer."

D. Role of Peace Officer

Finally, Pautler contends that this court has never addressed whether district attorneys, "while functioning as peace officers," may employ deception to apprehend suspects. ***1182** He suggests that because peace officers may employ lethal force when pursuing a fleeing, dangerous felon, it would be absurd to sanction an officer who instead uses artifice, simply because that officer is also a licensed attorney. We disagree.

[5] The Rules of Professional Conduct apply to anyone licensed to practice law in Colorado. *See In re C de Baca,* 11 P.3d 426, 429-30 (Colo.2000) (ruling that lawyers must adhere to the Rules of Professional Conduct even when suspended from the practice of law). The Rules speak to the "role" of attorneys in society; however, we do not understand such language as permitting attorneys to move in and out of ethical obligations according to their daily activities. Pautler cites *Higgs v. District Court,* 713 P.2d 840 (Colo.1985), for the proposition that this court has provided a test for distinguishing when prosecutors act as "advocates" and when they act as "investigators," for purposes of governmental immunity. *Id.* at 853. Such test exists, but we hold here that in either role, the Rules of Professional Conduct apply. The obligations concomitant with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals. Moreover, this case does not confront us with the propriety of an attorney using deceit instead of lethal force to halt a fleeing felon. 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.

IV.

[6] The complaint also charges Pautler with violating Rule 4.3:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall state that the lawyer is representing a client and shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give advice to the unrepresented person other than to secure counsel.

Colo. RPC 4.3. This rule targets precisely the conduct in which Pautler engaged. At all times relevant, Pautler represented the People of the State of Colorado.[10] The parties stipulated that Neal was an unrepresented person. Pautler deceived Neal and then took no steps to correct the misunderstanding either at the time of arrest or in the days following. Pautler's failure in this respect was an opportunity lost. Where he could have tempered the negative consequences resulting from the deception, he instead allowed them to linger.

While it is unclear whether Pautler actually gave advice to Neal, he certainly did not inform Neal to retain counsel. In addition, Pautler went further than implying he was disinterested; he purported to represent Neal. Without doubt, Pautler's conduct violated the letter of Colo. RPC 4.3.

For reasons substantially similar to those above, we refuse to graft an exception to this rule that would justify or excuse Pautler's actions. Instead, we affirm the ruling of the hearing board finding a violation of Colo. RPC 4.3 and turn now to consider the sanction imposed.

V.

The hearing board suspended Pautler for three months and then stayed that suspension during twelve months of probation. During the probationary period, Pautler was to fulfill various conditions including retaking the MPRE. We review this sanction under a reasonableness standard. C.R.C.P 251.27(b).

The board rendered its decision after reviewing the ABA *Standards for Imposing* ***1183** *Lawyer Sanctions* (1991 & Supp.1992) (ABA *Standards*). Those standards require examination of the duty violated; the lawyer's mental state; the potential or actual injury caused by the lawyer's misconduct; and the existence of aggravating or mitigating factors. ABA *Standards* 3.0.

The board found that Pautler violated duties to the legal system, the profession, and the public. It also ruled that his mental state was "not only knowing, it was intentional." Further, the board found actual injury to the administration of justice in that Pautler's conduct "contributed to a perceived lack of trust between Neal and his lawyers, adversely impacted subsequent judicial proceedings and resulted in

additional hearings to explore factual and legal issues created by the deceptive conduct." The board ruled the harm was perhaps unquantifiable, but certainly present. The board also found substantial "potential injury" because, had Neal discovered Pautler's deception, the "negotiating gains made by Sheriff Moore might be lost, Neal could terminate communication and resume or escalate his murderous crime spree." The board also considered the implications of whether Pautler actually became Neal's lawyer.

Addressing mitigating factors, the board acknowledged Pautler's praiseworthy motive, but also found a "secondary" motive: to keep Neal "talking about his crimes without the benefit of requested legal representation and thereby gain an advantage in subsequent legal proceedings." Other mitigating factors included Pautler's full cooperation with the Office of Attorney Regulation, *see* ABA *Standards* 9.32(e), and his lack of prior discipline, *see id.* at 9.32(a). Among the aggravators, the board found Pautler's substantial experience with the law, *see id.* at 9.22(i), and, most importantly, his lack of remorse, *see id.* at 9.22(g). While the board ultimately ruled that the mitigating factors outweighed the aggravating factors, they declined to depart from the presumptive sanction of suspension.

We conclude that the hearing board's discipline was reasonable. Pautler violated a duty he owed the public, the legal system, and the profession. His role of prosecutor makes him an instrument of the legal system, a representative of the system of justice. The fact that he lied for what he thought was a good reason does not obscure the fact that he lied-in an important circumstance and about important facts. To the extent Pautler's misconduct perpetuates the public's misperception of our profession, he breached public and professional trust. *See generally* ABA *Standards* 5.0-7.0.

Second, the record supports the board's finding that Pautler acted intentionally. He intended to deceive Neal into believing not only that the attorney on the telephone was a PD, but that the attorney represented him. Because Pautler's conscious objective was to accomplish the result, his mental state was intentional. *See* ABA *Standards* definitions.

Third, we agree that the evidence before the hearing board supported the finding of actual, unquantifiable harm. We do not agree, however, that the evidence also supported a finding of potential harm. [11]

As to the aggravating factors, we do not find adequate support in the record for the board's finding that Pautler harbored a secondary, ulterior motive. While it is undoubtedly true that Pautler sought to keep Neal on the telephone until he surrendered, no evidence suggested he did so in an effort to gain a tactical advantage in subsequent criminal proceedings. Pautler never attempted to elicit incriminating statements from Neal. Indeed, Neal had already confessed to the crimes in substantial detail, both over the telephone and in the taped confession he left at the Belleview apartment; there was little need for additional evidence. For purposes of aggravation and mitigation, we conclude that Pautler's only motive was Neal's surrender to law enforcement.

***1184** 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.

In mitigation, we credit Pautler's commendable reputation in the legal community, his lack of prior misconduct, and his full cooperation in all these proceedings. In addition, we believe Pautler's motivation to deceive Neal was in no way selfish or self-serving. He believed he was protecting the public.

[7] In light of the various factors bearing on Pautler's discipline, we do not find the hearing board's sanction unreasonable. *See* C.R.C.P. 251.27(b). Other attorneys participating in deceit and misrepresentation have received suspensions. *See, e.g., In the Matter of Gibson,* 991 P.2d 277, 279 (Colo.1999) (ordering thirty-day suspension when attorney deceived client to hide the fact that the attorney had neglected his client's tort claim); *People v. Casey,* 948 P.2d 1014, 1015 (Colo.1997) (affirming forty-five-day suspension when an attorney "represented" a teenager in criminal charges knowing the teen was using an assumed name).

In sum, we agree with the hearing board that deceitful conduct done knowingly or intentionally typically warrants suspension, or even disbarment. *See* ABA *Standards* 7.2 ("Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession ...."); *id.* at 5.11(b) ("Disbarment is generally appropriate when ... a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation...."). We further agree that the mitigating factors present in Pautler's case outweigh the aggravating factors, and affirm the imposition of a three-month suspension, which shall be stayed during twelve months of probation. This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished. At the same time, it acknowledges Pautler's character and motive.

VI.

Therefore, we affirm the hearing board's ruling that Pautler violated Rules 8.4(c) and 4.3 of the Colorado Rules of Professional Conduct. We also affirm the hearing board's probationary period, with a three-month suspension to be imposed only if Pautler violates the terms of that probation. Finally, Pautler is to pay the costs of this proceeding as ordered by the hearing board.

All Citations

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Footnotes

1 The Oath of Admission that Mark Pautler actually took when he was sworn into the Colorado Bar in 1975 read:

> "I will ... advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."
>
> Oath of Admission-Colorado State Bar, 1975

In the intervening years, this court has changed the Oath in a way that more specifically reflects the commitment to the basic precepts of the profession: fairness, courtesy, respect and honesty.

2 Professional Reform Initiative project of the National Conference of Bar Presidents, 2001.

3 We recall Justice Sutherland's famous rationale behind the heightened ethical standards imposed upon federal prosecutors:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> *Berger,* 295 U.S. at 88, 55 S.Ct. 629.

4 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).

5 Reichman violated DR 1-102(A)(4), the identically worded predecessor to Colo. RPC 8.4(c).

6 We do not address whether, under some unique circumstances, an "imminent public harm" exception could ever apply to the Colorado Rules of Professional Conduct. We hold only that this is not such case.

7 Duress is available by statute as a complete defense to criminal charges where the defendant engaged in conduct "at the direction of another person because of the use or threatened use of unlawful force upon him or upon another person" to such degree that a "reasonable person ... would have been unable to resist." § 18-1-708, 6 C.R.S. (2001).

8 "Choice of evils" is a statutory defense applicable when the alleged criminal conduct was "necessary as an emergency measure to avoid an imminent public or private injury which [was] about to occur ... and which [was] of sufficient gravity" that it outweighed the criminal conduct. § 18-1-702, 6 C.R.S. (2001).

9 Pautler cites *Montag v. State Bar,* 32 Cal.3d 721, 186 Cal.Rptr. 894, 652 P.2d 1370 (1982), and *Trammell v. Disciplinary Board,* 431 So.2d 1168 (Ala.1983), as examples where other jurisdictions have indicated that duress may be a defense to ethics violations. We note that in neither case did the court find facts sufficient to sustain the defense. While they did not reject the defense outright, the courts ruled that the facts did not warrant its application.

10 The Colorado Attorney General writing as friend of the court asserted that, during these events, Pautler acted on behalf of the police department "which is not the district attorney's client." This rationale does not comport with sections 20-1-101 to -102, 6 C.R.S. (2001), and we therefore decline to adopt it.

11 The board weighed the ramifications of Neal's discovering Pautler's deceit and "resuming or escalating his murderous crime spree." We do not view this as "potential harm" under the ABA *Standards.* The record does not suggest that Neal "probably" would have resumed his crime spree due to Pautler's deception, but for some intervening factor. Neal might have continued killing regardless, or he might not have continued even if he discovered Pautler's deception. Hypothetical, worst-case scenarios are not the proper foundation for imposing discipline.

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