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

AGENDA

June 16, 2017 9:00 a.m.
2 East 14th Ave., Supreme Court Conference Room, 4th Floor
Call-in numbers: 720-625-5050 – Access Code: 47464358#
WiFi Access Code: To be provided at the meeting

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1. Reappointments and introduction of new members Margaret Funk, Jacki Cooper Melmed, and Fred Yarger, and reappointment of current members

2. Approval of minutes:

   a. November 4, 2016 meeting [pp. 001-020]

   b. February 24, 2017 meeting [pp. 021-027]

3. Submission of Rule 1.6 reports to Court [Marcy Glenn, pp. 028-031]

4. Report from Fee Subcommittee [Nancy Cohen & Jamie Sudler]

5. Report from Rule 8.4(g) Subcommittee [Judge Webb]

6. New Business:

   a. Potential amendments to Rule 3.5(c) in light of *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) [Judge Berger, pp. 032-060]

   b. Pretexting, the sequel – Supreme Court's proposed amendment to Rule 8.4(c) [Tom Downey, pp. 061-183; pp. 091-156 of November 14, 2016 materials]

   c. Housekeeping amendments to Rule 5.4(d) and (e) [Alec Rothrock, pp. 184-223]

   d. Potential amendments to require attorney-client engagement agreements [Tony van Westrum & Dave Little, pp. 157-59 from February 24, 2017 meeting materials]

e. Potential contingent fee rule amendments [Marcy Glenn, pp. 19-22 of November 4, 2016 materials]

f. Potential advertising rule amendment proposed by U.S. Representative Goodlatte [Jim Coyle, pp. 224-227]

7. Administrative matters: Select next meeting date

8. Adjournment (before noon)

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These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On November 4, 2016
(Forty-fifth Meeting of the Full Committee)

The forty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, November 4, 2016, by Chair Marcy G. Glenn. The meeting was held in Conference Room Nº 2215 on the second floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Judge Michael H. Berger, Helen E. Berkman, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Melissa Meirink, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Matthew A. Samuelson, Marcus L. Squarrell, James S. Sudler III, Anthony van Westrum, and Judge John R. Webb. Present by conference telephone were members Boston H. Stanton, Jr. and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, James C. Coyle, Thomas E. Downey, Jr., David W. Stark, Eli Wald, and Lisa M. Wayne. Also present were Supreme Court staff attorney Melissa C. Meirink and the following guests, who introduced themselves to the members at the beginning of the meeting: Angela R. Arkin, Ann C. Gushurst, Joan H. McWilliams, Diana L. Powell, Sue A. Waters, Helen C. Shreves, and Gina B. Weitzenkorn. Guest David Littman joined the meeting after it had commenced.

I. *Court Staff Changes.*

The Chair advised the members that Christine A. Markman, staff attorney to the Court and member of the Committee since its thirty-first meeting, has left the Court's service and the Committee to become a lawyer at Wheeler, Trigg & O'Donnell LLP. The Court's staff attorneys who will now participate with the Committee are Melissa C. Meirink and Jennifer June (J.J.) Wallace.

II. *Meeting Materials; Minutes of July 22, 2016 Meeting, the Forty-fourth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-fourth meeting of the Committee, held on July 22, 2016. Those minutes were approved with corrections.

III. *Report from Rule 2.I (Parental Conflict) Subcommittee.*

Noting that the guests who were present at the meeting were with the Committee to discuss the sixth item on the meeting agenda that the Chair had included with the meeting materials, the Chair determined that that item would be the first to be considered at the meeting. That item was the proposal to add to Comment [5] of Rule 2.1 a new, third, sentence reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

The Chair referred the members to the report of the Rule 2.1, Parental Conflict, Subcommittee, beginning at page 74 of the meeting materials; and she invited the subcommittee chair, member Alexander R. Rothrock, to review the subcommittee's deliberations for the Committee.

Rothrock began by identifying the following as the members of the subcommittee: Committee members David C. Little, Ruthanne Polidori, and James S. Sudler III and, additionally, Angela Arkin, Gina B. Weitzenkorn, and Joan H. McWilliams — who were present as guests at this meeting — and Margaret Funk and Michael F. DiManna. The subcommittee had held one meeting, at which all but one of those just named were in attendance and Sue A. Waters, another guest at this meeting, was also in attendance.

As stated in the subcommittee's report, Rothrock said that the subcommittee approached the matter by first discussing whether any wording should be added to the Rules of Professional Conduct that referred to the impact parental conflict in litigation can have on children — and, if some statement should be included, whether it should be placed in the text of a rule or in a comment to a rule. There was, he said, disagreement on what, if anything should be added to the C.R.P.C. but agreement that, if anything were to be added, it should be placed in a comment and not in a rule. Further, while some participants felt that nothing should be added, even to a comment, they, as well as those who wished to make an addition, felt that the text quoted above was acceptable if any addition were to be made.

Noting that the participants on the subcommittee were "not representative of the populace as a whole," Rothrock directed the members to the sixth and seventh numbered paragraphs of the subcommittee's report for a summary of the views of those participants. Those opposing any addition to the Rules expressed concerns both about adding text to the C.R.P.C. that applied only to a particular area of legal practice and about the unwanted effect that any such addition to the Rules might lead to the establishment of a standard of care applicable to civil claims against lawyers. Rothrock emphasized that Rule 2.1 itself is a standard of conduct for disciplinary purposes, not a standard of care for civil liability.[1]

But, Rothrock continued, no participant argued that parental conflict cannot have harmful effects on children; perhaps this proposed addition to Comment [5] of Rule 2.1 is "the only way to tackle the problem." The purpose of the proponents of the addition is just to try to raise the consciousness of the bar to the fact of the problem; they believe that the addition would do some good, ultimately, by changing the behavior of some parents in divorce. Those opposed, however, see the proposal as an over-reaction, one that could lead to lawyer liability if the lawyer failed to give the advice contemplated by the addition. Some also felt that the addition of this language for this particular practice area could lead to requests from other practice areas for language of the same ilk covering concerns pertinent to those other practice areas.

Rothrock said that the proposed wording — "an attorney should consider" — is not a command or requirement. Comment [5] contemplates advice that might be given and, therefore, the lawyer should consider giving it.

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1. The second and third sentences of Section [20] of the Scope section of the Colorado Rules of Professional Conduct states—

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.
>
> —*Secretary*

STANDING COMMITTEE 002

Rothrock concluded his review by saying the language quoted above is the language that the subcommittee proposed to the Committee — although some of the subcommittee participants would prefer that no addition be made.

To a member's question of whether there was any subcommittee opposition to the proposed text of the sentence to be added to Comment [5], Rothrock said there was no opposition to the language — no proposal for alternative language — though some participants wanted no such addition.

A member, who had been a member of the subcommittee, said that member and another participant on the subcommittee had been the ones who thought no addition should be made. In their view, the addition would not actually change parental behavior: A certain number of clients will not listen to anyone; this will not change behavior. This member and the colleague on the subcommittee were skeptical.

A member asked whether the subcommittee had concluded that a lawyer may presently give the contemplated advice — that parental conflict can harm children — to a client in the absence of such a provision in a rule or comment. Rothrock replied that it is understood that such advice may already be given under the current Rules without this addition.

The member who had earlier spoken of skepticism said the American Academy of Matrimonial Lawyers already has a practice standard calling for this advice.[2]

The member who had asked whether such an addition was thought to be necessary to enable lawyers to give this advice without violating a principle of the Rules asked the guests whether they believed that such an addition was necessary or at least would induce more lawyers to give this advice than now do so.

One of the guests replied that she did not know whether lawyers already give such advice; she was of the view that lawyers think their client is the parent with whom they have engaged, and they do not consider the children. The membership of the American Academy of Matrimonial Lawyers is small, so its practice standard is not widely known; and this guest would like to see the addition made to Comment [5]. Matrimonial lawyers do not think they have a duty to the children of their clients; she cited letters from parents who have stated that they did not hear this advice from their lawyers.

Another guest agreed that those who have been litigants in inter-parental disputes report that no one ever gave them such advice. She added that the toll on children is pretty alarming. The proponents of the addition understand that the lawyers' role is to act on behalf of their clients, but the proponents want to encourage lawyers, by this addition to the comment, to give that advice for the protection of the children. The addition, she said, would be a way to start the process of changing behavior.

Another guest noted that there is a statutory basis for the idea that the lawyer engaged in this field of practice does have a role to play in protecting children, since the court need not approve a parenting plan unless it is found to be in the best interest of the child. But that consideration is possible only if both parents are represented by lawyers in the process. And that, the guest concluded, implies that there is a qualitative difference in the process that comes about because of the presence of lawyers as representatives of the parents. She added that she felt this proposal to add the suggested text to

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2. *See* "Bounds of Advocacy, Goals for Family Lawyers," American Academy of Matrimonial Lawyers, *available at* http://ny.aaml.org/sites/ny.aaml.org/files/bounds_of_advocacy.pdf.

—*Secretary*

STANDING COMMITTEE 003

Comment [5] was the least that could be done; she would be even more forceful in telling lawyers that this is a part of their role in the process.

A member of the Committee spoke to say that he had handled no domestic relations case since he was in law school and that his knowledge about this matter comes from representing lawyers facing discipline before the Attorney Regulation Counsel and in mediating legal malpractice cases from within the domestic relations practice area. To him, the allegations made by former clients in those contexts are generally unbelievable: "I never knew this. My lawyer never told me this." This member starts his consideration of this proposal with the view that there should be no content in the Rules directed toward specific practice areas and continues with the belief that it is inappropriate to think that the Rules can regulate practice styles. As he put it, some lawyers are always ready to go to war; others are calmer; still other seek to get the respective clients into mediation. There are, in short, different approaches to the practice of law, he said. The proposal that is before the Committee, he said, is an opening for the Committee's "legislating the practice of law." In contrast, he pointed out, the Colorado Bar Association's Ethics Committee did not take a similar route when asked by lawyers practicing water law to provide special rules regarding conflicts of interest that can arise within that practice area.

To those comments, a guest responded that no one could be more interested in protecting lawyers from risks of litigation than she; but, she felt, this proposal presented no such litigation risk: The proposed language would be discretionary. It would, she added, help young lawyers understand what is permitted. This is not, she said, just water rights; one half of Colorado children are or will be children of divorce. The proposal would guide young lawyers. If the proposal did not have a positive impact, the Committee could, in the future, reject any proposal for a rule with an additional duty; she added that this proposal does not in fact impose an additional duty. The proposal gives permission to lawyers to do what they have been doing for a long time.

A guest, who introduced his comments by noting that he has served on the Colorado Bar Association's Ethics Committee for eight or nine years, spoke in opposition to the previous comments of the member who had disapproved of adding special rules to the C.R.P.C. for particular areas of practice. The guest said that he has, for the last two or three years, made a presentation at a seminar on ethics; he would like to be able to tell the attendees, in the future, that the Supreme Court has added the proposed text to the comment, calling the attendees' attention to that comment in Rule 2.1 by saying that the lawyer has the specific option of discussing, with the client, the effects on the client's children of an allocation of the client's parental rights and responsibilities. The added text in the comment would give the lawyer, as advisor, the context for revisiting with the client the impact of "high conflict" on children. It would give the lawyer another tool to use in difficult cases.

A member spoke to say he had been a member of the subcommittee; he noted that the subcommittee had first rejected the addition of this matter to the text of Rule 2.1, before considering its addition to a comment to that rule. He had, himself, at first been opposed even to the addition of the concept to a comment for the reason previously expressed by the other member: We do not tell lawyers about conduct within specific practice areas. But, he said, he had "come around" because this matter is so important, involving the well-being of minor children. In his view, the adoption of the proposal would not mean the Committee was moving down a slippery slope; "this is the end of the matter" if the Court adopts the proposal. Important to his conclusion, he said, is the fact that the proposal does not establish a rule of conduct.

Another member referred back to the remarks of the member who had expressed the view that the Rules should not contain special statements about particular areas of law practice. This member asked what other alternatives there might be for providing this important "education" to parents about the adverse impacts of their disputes with one another on their minor children?

STANDING COMMITTEE 004

A guest noted that all of the guests work in this very arena, providing educational programs for lawyers and judges alike about such impacts on children. But, she said, there are lawyers who do not attend such programs and do not receive such education: "Those who hang their shingles do not go to those special education programs." So, the matter should be talked about "through the rule"; those lawyers should learn of the matter in the process of becoming members of the bar. So many lawyers, she added, do not have the breadth of experience that those present at this meeting take for granted. This proposed addition to the comment would provide an "entry level" education for lawyers entering domestic relations practice. This proposed addition would require the lawyer to think about the conflict-impact issue; it would not require the lawyer to make a statement to the client about the issue.

Another guest said that those who practice law should be proud of what they do in many areas of the law. To her, it is apparent that the proposal calls merely for the addition of a comment; it is not a rule of conduct. It is appropriate for the comment to acknowledge a special problem for children in a special area of law. She noted that the things parents in domestic conflict cannot agree upon are astonishing: which school a child should attend, and the like. The legal profession should acknowledge that its practitioners are not just advocates but are also part of the larger community. The proposed comment is a way of talking to the lawyer about how this matter of adverse impact on children can be considered in the lawyer's practice. "Family law is different," she said.

A member said that she was not convinced that the proposal was a slippery slope into regulation of conduct in special practice areas. This, she said, just speaks to a special area; she reminded the Committee of the recent addition of Comment [14] to Rule 1.2, providing that a lawyer may counsel and assist a client regarding the provisions of Colorado law regulating conduct with respect to cannabis but directing the lawyer also to advise the client about related federal law and policy. Marijuana law is not necessarily a special area of law practice, she said, but it is getting special attention. She added that it is distressing to her to see the command "shall" in a comment — as Comment [14] commands that the lawyer who undertakes to counsel with respect to cannabis "shall also advise the client regarding related federal law and policy." In contrast, the proposal permitting lawyers to discuss the adverse effects on minor children caused by strife over parental rights is not, in her view, a slippery slope. If it is not helpful, at least it does not create a standard of practice and cannot serve as the basis for a grievance against a lawyer, since it merely states that the lawyer "should consider" advising the client about the adverse impacts contemplated by the comment. She observed that Rule 2.1 already provides, in its rule text, that, in the realm of litigation, "a lawyer should advise the client of alternative forms of dispute resolution"; the proposal at hand was not different from that.

The member who had earlier spoken to say that she had been a member of the subcommittee and had, with one other subcommittee member, thought no addition should be made, because it would not actually change parental behavior, spoke again. She said that, as a judge, about a third of her cases involve domestic relations. Yes, she said, there is a problem that the proposal seeks to address. She has seen parenting after the parents have attended the divorce classes that are mandatory in all jurisdictions: If you file with children, you must attend the course. Originally, the courses were taught by very competent lecturers. Then changes were made to the Colorado Rules of Civil Procedure to provide for initial status conferences in divorces, with the judge and the parties; good judges took advantage of those conferences to point out that bad parental conduct is harmful to the children. She agreed with the comment of a guest that there needs to be an effort to educate judges about what is good behavior in this regard. But, she added, we must consider that, in calendar year 2015, sixty-five percent of divorce cases were conducted without any lawyer, seventy-five percent of all parties having no lawyer. The proposed comment will affect a very limited number of parties. For the other cases, there must be a better way — better than a C.R.C.P. comment directed only at lawyers — to get the message to all parents. Her conclusion was that, if the Committee thought addition of the proposed text to the comment would change behavior, it should proceed to do that; in her view, it would not be useful.

STANDING COMMITTEE 005

To those comments, a guest drew upon the cited fact that, around the country, seventy-five percent of parties in divorces do not have lawyers and added that mediators in such cases hear from parties who are parents with children that the parents do not want lawyers because they think the presence of lawyers in the process will destroy the civility between them. If, then, this comment is intended to be directed toward parents, through their lawyers, we need first to get rid of the perception that the lawyers, by intruding, will destroy that civility. But, if lawyers are mainly involved in cases that already involve conflict, the proposed comment will be useful. This can, she said, help the profession erase its "terrible reputation."

A guest who had not previously spoken commented that the number of parties in divorce cases who are not represented by lawyers is troubling. But "multiple exposures" to the thought that they should strive to avoid harm to their children will nevertheless be useful to them as they go through the process; sometimes they just have not realized that the ongoing pressures of the divorce process are troubling to the children. In accord with the previous comment that the added text would give the lawyer, as advisor, another tool for explaining the impact of "high conflict" on children in difficult cases, this proposal would not be a "magic bullet," but that limitation does not mean the amendment should not be made. The change effected by the amendment will be just a suggestion, not a rule imposing a requirement on lawyers. And, the guest added, "the system" needs to change from the ground up: It must become as socially unacceptable to harm children in the course of divorce as it has become to smoke or to drive while under the influence of alcohol.

A member noted that it is already known that "high conflict" is harmful; one just needs to be "a functioning human being" to have that awareness. She noted that the proposed addition, to the effect that there can be parental conflict in divorces involving children, states the obvious: Even if the parties are "getting along" and are headed toward an agreed settlement of their marriage, there is nevertheless "conflict" between them. The member would change the dialogue from "high conflict" to "extreme conflict" to make the distinction.

Another member spoke in support of the proposal. He noted that there is universal agreement that divorce involves real conflict and that, as had been suggested by another member, there is no downside to making the addition. Would the change actually help? To this member, even if there were but a small number of cases in which the change had an effect, the change should be made, as it would not cause harm. As to whether this would be a "slippery slope" down which other discipline-specific changes might be proposed, the member was certain that this Committee and the Supreme Court itself could guard against that result.

The guest who had previously noted the efforts that the domestic relations bar makes to educate judges and lawyers about the adverse impacts of divorce conflict on children, and the failure of some lawyers to attend such educational opportunities, added that the addition of the proposed text to the comment will be beneficial if parents can be steered away from conflict escalation by the counseling of their lawyers given early in the divorce process. When a lawyer explains such concerns to the client, it can have a huge benefit over what the court might be able to accomplish by words from the bench. The trust that clients have with their counsel is an important component of that beneficial effect. As to the comment previously made that attempted to distinguish between high conflict and extreme conflict, this lawyer had seen conflict over matters such as who shares the Christmas holiday with which parent; the tension over that issue, or similar issues regarding birthdays, can be damaging to the children. She added an observation about watching parents exchanging custody of children in Walmart parking lots. If lawyers can play a role, by advising clients about the adverse effects of conflict on children, from the beginning of the divorce process, there will be advantages.

STANDING COMMITTEE 006

The member who had expressed concern about the gradation of conflict said that she understood the possibility of benefits such as those of which the guest had spoken but added she was remained confused about what the proposal was intended to accomplish. The conflict between the divorcing parents arises because they do not love each other. What is added, she asked, by a comment that suggests to their lawyers that they be reminded that their conflict "sucks for the children"?

A guest responded that the goal is to open a new avenue, in which the lawyer, having pointed out the possibility for adverse effects on the children, can say, "Let's choose the better way, because there are better and worse ways to go about this process. We can have a sophisticated fight in court, or we can do it another way."

To that, another guest added, "This information is not getting to the parents."

A third guest noted that lawyers are trained to be advocates for their clients; the proposal will let them know that it is "okay to talk to parents about this aspect of the whole picture." In response to a member's inquiry about the role of the judge in this regard, the guest replied that, hearing this from a judge in a status conference is "just a black robe telling the parties."

To that, the member who had made the inquiry commented that, if the status conferences includes not just judges but also family coordinators, those coordinators can be directed to explain to the parents the adverse impacts that the process can have on children. There are, the member said, "things within the system that can be sharpened up."

A member commented that, looking at other comments to Rule 2.1, this proposal is not, in fact, of a different ilk. She referred specifically to Comment [4] of the rule, which already refers to "family matters."[3] She asked, though, why the subcommittee's proposal would put the added text in Comment [5] of the Rule rather than Comment [2],[4] which, she noted, already speaks of "effects on other people." She added that she was not opposed to the addition but was just wondering about its location.

A member recalled that the Colorado Bar Association Ethics Committee had recommended a different comment on the issue. A guest replied that the proposal had originally been to include the concept in Rule 2.1, Comment [5], in conjunction with the instruction that Rule 1.4 might make it

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3. Rule 2.1, Comment [4], reads—

> [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

—Secretary

4. Rule 2.1, Comment [2], reads—

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

—Secretary

STANDING COMMITTEE 007

necessary for the lawyer to inform a client, in litigation, about dispute resolution mechanisms that might be alternatives to litigation. She recalled that the ethics committee had rejected the idea of an entire rule devoted to the matter but had concluded that a comment "should be considered."

The member who had commented on location reiterated that she simply wondered whether the addition would be better placed in Comment [2] to Rule 2.1; again, she said, she was not opposed to its inclusion somewhere.

The member who had voiced his concern about "legislating the practice of law" said that he was not opposed to educating lawyers about matters such as this. But he viewed the proposal as unnecessarily restricted to one particular area of practice, domestic relations. Rather, he said, if the Committee wanted to effect change, the concept contained in the proposal should be included in the Scope section of the Rules or in ¶ [2] of the Preamble, with its recognition that, "[a]s a representative of clients, a lawyer performs various functions," and its inclusion in those functions of the roles of advisor, advocate, negotiator, and evaluator. Matters such as the stressful effects of divorce proceedings on children are, he said, discussed in law schools. He agreed with the prior comment from the member who had pointed to the existing reference to "[f]amily matters" in Comment [4] to Rule 2.1. But he disagreed with the comment that this is not special treatment of a particular practice area that would put the Committee on a slippery slope; he wanted the Committee to recognize that it is in fact special treatment of one practice area. He empathized with the guest who had spoken about the position of trust that lawyers hold with clients, a position that gives their admonitions about adverse impacts on children special importance to their clients, noting that the guest had experience in representations in juvenile courts and with the question of whom it was she was representing in those cases. This member's concern, however, was that changes such as here proposed would change the roles of lawyers, incrementally. But he acknowledged that, as written, this addition would be a matter of discretion and not a basis for discipline by Regulation Counsel.

A member noted that, because of his role in the preparatory work of bringing this matter before the Committee, he had tried to remain neutral in the discussion but now wanted to express his support for the proposal because, as had been previously said, there is real impact on children in divorce proceedings and there is no downside to the addition of the proposed text, no real risk of slipping down a slope. And, he added, he favored placing the addition in Comment [2] of Rule 2.1 rather than in its Comment [5].

That member added that divorce proceedings can adversely impact persons other than children, as had been earlier noted. Putting this idea after the first sentence of Comment [2] of Rule 2.1, with its existing reference to "effects on other people" and altering its expression so that it was not exclusive to children might work.

A member referred to the earlier comment that the proposal might not be sufficiently targeted to have a real effect. As had then been said, he recounted, in every divorce there is conflict; and he asked whether the proposed addition should acknowledge that, rather than say that parental conflict "can" have a significant adverse effect on minor children. A guest responded that, in many cases, the parties come to court with "everything already worked out," so that, while their marriages cannot continue, they are not actually "in conflict." They are not in conflict; they just want a divorce. In many cases, they have observed other divorcing couples proceed through the process badly and with damage, and they want to avoid doing that themselves. To that, the member said that had not been his point. Even if both parties are in agreement, it was his suspicion that the process would still be stressful to the children. Accordingly, as the other member had said earlier, he wondered whether the proposition really is that, where there is a potential for conflict over parenting issues, that poses a problem for children. If that is the specific concern, he would be specific about it in the comment.

STANDING COMMITTEE 008

To that, a guest pointed out that things are often much better after the divorce has been finalized, when the children are no longer living in a conflicted atmosphere. She added that often young parents are thrust into conflict with one another by reason of the divorce.

And to that, the member replied that there must be a better way to say this.

A member called for a vote on the proposal to add to Comment [5] of Rule 2.1 a new, third, sentence reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

A member moved to amend the location of that sentence from Comment [5] to Comment [2] of the rule.

Another member said that she was not concerned about the fact that the proposed addition applied to just one practice area; she understood there to be a number of occasions where that was done within the Rules. But she would lessen the exclusivity of this addition by adding the words "for example," so that the added text would read—

> For example, in a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

That, she said, would keep the addition more in line with the "abstract" scope of the rule itself.

The member who had moved that sentence be relocated to Comment [2] said that she did not object to the addition of the words "For example." But another member said he did not see that the words would add anything to the concept of the sentence.

The member who had proposed the addition of the words "For example" pointed out the text of Rule 2.1 itself has correlative language regarding a lawyer advising a client about dispute resolution methods that are alternatives to litigation, which language contains the directive "should": "[T]he lawyer should advise the client of alternative forms of dispute resolution . . . ." But, she said, the foundation for that directive "should" is missing in the case at hand, involving advice about the adverse effect of divorce proceedings on children.

A member suggested, as an alternative to the proposal, that the following sentence be added to either to the end of Comment [2] of Rule 2.1 or to the end of Comment [5] of that rule: "Without limiting other occasions when a lawyer may advise a client regarding the interests of other persons, a lawyer may advise a client that parental conflict can have an adverse effect on minor children." He explained that the specific purpose of the formulation was to make it clear that advisement about the effects of adverse impacts on children in divorce proceedings was just one kind of advice that might be given in one circumstance, and that there is a general principle that lawyers can advise clients that other persons might be affected by courses of action the clients intend to take. The language that was set forth in the pending motion was seemingly more limiting and exclusive.

That proposal generated neither support nor comment.

The member who had proposed that the language of the pending motion be moved to Comment [2] of Rule 2.1, as the second sentence of that comment, renewed that motion.

The member who had requested that the text be amended by the addition of the prefatory phase "For example," reiterated that request, noting that it would make clear that the intention is to apply a general concept to a particular example.

But, upon a vote of twelve in favor and six opposed, the Committee determined to suggest to the Court that a new, second sentence be added to Comment [2] of Rule 2.1 reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

* * * * * *Secretary's Note of Subsequent Action* * * * * *

By email action initiated by the Chair after this forty-fifth meeting of the Committee, the Committee determined to place the proposed added sentence as the third, rather than the second, sentence of Comment [2] of Rule 2.1, with the word "lawyer" being substituted for the word "attorney." As thus changed, the Committee's proposal to the Court would be that Rule 2.1, Comment [2], read in its entirety as follows:

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. In a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Without conducting a hearing on the proposal, the Court adopted it, effective December 1, 2016.

* * * * * *End Secretary's Note* * * * * *

IV. *Relocation of Rules Governing Contingent Fees.*

At the Chair's request, member Michael H. Berger reported that he and the Chair, as the chairs of the Standing Committee on the Rules of Civil Procedure and of this Committee, respectively, had asked the Court to reallocate responsibility for the Colorado Rules Governing Contingent Fees, found in Chapter 23.3 of the Colorado Rules of Civil Procedure, from the Standing Committee on the Rules of Civil Procedure to this Committee. Berger reported to this Committee that he has been told by a justice of the Supreme Court that such reallocation will be done.

V. *Report Regarding Civil Rules Subcommittee Consideration of Rule on Judicial Expectations for Professionalism.*

The Chair directed the Committee's attention to Item № 7 on the agenda for the meeting and to pages 24 through 29 of the materials provided to the Committee for its forty-fourth meeting, on July 22, 2016. The item relates to a proposal to add a Section 1-27 to Rule 121 of the Colorado Rules of Civil Procedure; the text of the proposal is found in the material the Chair provided for that forty-fourth

meeting of the Committee, beginning at page 24 of those materials. The Chair asked member John R. Webb to tell the Committee about the proposal.

Webb said the proposal might be characterized by the rubric "professionalism." The proposal has been taken up by the Standing Committee on the Rules of Civil Procedure. Webb said the members of that committee were presently split on the proposal, judges favoring it and lawyers not liking it, but, despite that split, the committee is proceeding with consideration of the proposal, sending it to a subcommittee for consideration. At the first meeting of that subcommittee, the same split emerged, judges — and representatives from the Office of Attorney Regulation Counsel favoring the proposal — and lawyers not liking it. Among the matters being considered by the subcommittee are the proper location for the proposal, alternatives to placement in the C.R.P.C. including, among others, the Colorado Rules of Professional Conduct.

VI. *Amendment to Rule 1.6.*

On behalf of David Stark, the chair of the Committee's subcommittee that is considering a proposal from Colorado Attorney General Cynthia Coffman for the addition of a comment to Rule 1.6, the Chair provided a status report on the work of the subcommittee. The proposed comment, or possibly new rule text, would provide that the total amount of fees and costs incurred by a public entity on a particular legal matter is not "information relating to the representation of a client" that is protected by Rule 1.6(a) from disclosure by a lawyer representing the public entity. The Chair reported that the subcommittee has had a number of productive meetings; that the members are split regarding whether to recommend a new comment or rule amendment as sought by the Attorney General; and that it is likely that the subcommittee will present the Committee, at a subsequent meeting, with majority and minority reports expressing the members' competing views.

VII. *Provisions for Flat Fee Agreements.*

The Chair invited member Nancy L. Cohen to report to the Committee on the activities of the subcommittee of the Committee that has been studying the question of whether provision should be made in the Rules for flat fee agreements.[5]

Cohen reported that the subcommittee proposes the addition of a new paragraph (h) to Rule 1.5 on that topic, reading as follows:

> (h) Notwithstanding anything to the contrary in Rule 1.5(b) lawyers may enter into flat fee agreements.
>
> (1) If a lawyer receives in advance a flat fee or any portion thereof, the lawyer's flat fee agreement shall be in writing and shall contain the following:
>
> (a) A description of the services the lawyer agrees to perform;
>
> (b) A statement of the amount to be paid to the lawyer for the services to be performed;

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5. Previous consideration by the Committee of the matter of flat fees for legal services can be found in these minutes of the Committee:

> Fortieth meeting, 6/5/2015, Item IV, p. 6 *et seq.*
> Forty-first meeting, 10/16/2015, Item IV, p. 5 *et seq.*
> Forty-second meeting, 1/29/2016, Item V, p. 8 *et seq.*
> Forty-third meeting, 4/29/2016. Item 3, p. 2 *et seq.*
> Forty-fourth meeting, 7/22/2016, Item III, p. 2 *et seq.*

—Secretary

STANDING COMMITTEE 011

(c) A description of when or how portions of the flat fee are deemed earned by the lawyer;

(d) The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before all of the specified legal services have been performed.

(2) A "flat fee agreement" refers to an agreement for specific legal services by a lawyer under which the client agrees to pay a fixed amount for the legal service to be performed by the lawyer, regardless of the time or effort involved or the result obtained.[6]

Cohen said the subcommittee had first thought of adding the substance of the proposal to Rule 1.5(f) but found that there would be too much placed in that paragraph if that were done; so, the subcommittee proposes placement of the flat fee concept in its own paragraph within that rule.

In addition to the addition of paragraph (h) to Rule 1.5, the subcommittee proposes making changes to a number of the existing comments to Rule 1.5,[7] including deletion of the term "lump-sum"

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6. *See* p. 68 of the materials the Chair provided to the Committee for this meeting

—*Secretary*

7. The subcommittee's proposal would—

   A. Add a new, fifth sentence to Comment [2] of Rule 1.5, reading, "When using a flat fee a lawyer must provide a written flat fee agreement for all funds received in advance pursuant to paragraph (h)."

   B. Add a new, second sentence to Comment [11] of the rule, reading, "In flat fee agreements, the lawyer must describe when or how portions of the flat fee are earned under paragraph (f)(3) unless none of the fee is earned until all of the services have been provided."

   C. Amend Comment [12] of the rule as follows:

   [12] Advances of unearned fees~~, including "lump-sum" fees and "flat fees,"~~ are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by ~~Rule 1.5(b)~~ ***paragraph (b). Paragraph (h) requires advanced payment under a flat fee agreement to be in writing.*** See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

   [*Secretary's Note:* The foregoing corrects a reference to "Paragraph (f)" that was contained in the proposal as stated on page 68 of the materials provided to the Committee for the meeting to "Paragraph (h)." Cohen pointed out the need for that correction in the course of her presentation of the proposal.]

   D. Amend Comments [14] through [16] as follows, including to delete references to "lump-sum fees":

   [14] Alternatively, the lawyer and client may agree to an advance ~~lump-sum or~~ flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the ~~lump-sum or~~ flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

(continued...)

STANDING COMMITTEE 012

with reference to fees. And the subcommittee drafted a form of flat fee agreement — Cohen noted that she had previously expressed her own concern about such an undertaking. If the lawyer does not enter into a written flat fee agreement, then, upon non-completion of the undertaking, the lawyer must refund all of the fee; if the written agreement provides for an alternative handling of the fee in the event of non-completion, then the lawyer must comply with the agreement in that event.

The subcommittee proposes five alternative versions of what would be Rule 1.5((h)(1)(e), covering the situation where the lawyer's flat fee agreement does not comply with the terms of the proposed rule, four of which versions are set forth on page 69 of the materials provided to the Committee for the meeting and a fifth which was developed subsequently to the drafting of that proposal. The five alternatives are summarized in the footnote accompanying this text.[8]

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7. (...continued)

> [15] The portions of the ~~advance lump sum or~~ *advanced* flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. ~~See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).~~
>
> [16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a ~~lump-sum~~ *flat* fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted ~~(see § 38, Comment g)~~. A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

—*Secretary*

8. The first four alternatives for a Rule 1.5(h)(1)(e), set forth below, are found on page 69 of the materials provided to the Committee for the meeting; the fifth was subsequently developed:

- № 1: Make no provision, omitting such a paragraph altogether;
- № 2: "If a flat fee agreement is not in substantial compliance this Rule then it is unenforceable."
- № 3: "If a flat fee agreement is not in substantial compliance this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action."
- № 4: "If a flat fee agreement is not in substantial compliance with the Flat Fee Agreement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action."
- № 5: "If a dispute arises about whether the lawyer has earned all or part of a flat fee, the portion of the flat fee in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the flat fee as to which the interests are not in dispute."

STANDING COMMITTEE 013

A member of the subcommittee added that the proposal now refers to a "flat fee agreement" rather than merely characterizing the matter as an "arrangement."[9]

Another member of the subcommittee pointed to the opening phrase of the proposal: "Notwithstanding anything to the contrary in Rule 1.5(b), lawyers may enter into flat fee agreements." But, the member countered, there is nothing contained in Rule 1.5(b) as presently stated that is inconsistent with flat fee agreements, so the opening, conditional phrase is misleading. The present rule's inconsistency lies in its linkage of the requirement for a writing regarding the engagement — the requirement that there be a written communication to the client stating the basis or rate of the fee and expenses — to the situation where "the lawyer has not regularly represented the client." It is not, the member emphasized, controversial that lawyers may charge flat fees, although many lawyers are not aware of that.

A member asked whether, therefore, the opening phrase, "Notwithstanding anything to the contrary in Rule 1.5(b)," could simply be deleted, to leave the sentence reading, "Lawyers may enter into flat fee agreements." The member also proposed amending the prefatory language in proposed Rule 1.5(h)(1) to read, "If a lawyer receives in advance a flat fee or any portion thereof, the basis or rate of fee and expenses shall be shall be communicated to the client in a writing that shall contain the following: . . . ."

That member also suggested that the order of paragraphs (h)(1) and(h)(2) be reversed, so that the proposed definition of "flat fee agreement" now found in paragraph (h)(2) would be moved to the front of the paragraph. Cohen said the subcommittee had considered that or even putting the definition in Rule 1.0 with other definitions.

The member also suggested switching the term from "flat fee agreement" to "flat fee," with the subcommittee's proposed definition of "flat fee agreement" being used for the shortened term and with the word "agreement" being omitted from the term as stated within quotation marks in that definition but being retained in the body of the definition. Her concern was that Rule 1.5(h) as proposed, using the defined term "flat fee agreement," would imply to lawyers that the "agreement" as thus defined could constitute the entire expression of the agreement for the provision of legal services between the lawyer and the client, although it would in fact only cover the fee aspect of that larger agreement and would omit other provisions that are often necessary in the client-lawyer agreement.

In short, the member would narrow the terminology to "flat fee" and narrow the extent of the model form of agreement that would be included with this Rule 1.5(h) to just that provision within the full agreement between a lawyer and a client that deals with the flat fee, implying that there should be more to the full agreement than just a provision for the fee.

In response, Cohen said the text could be amplified to recognize that there are other provisions that a lawyer may wish to include in a full expression of the agreement with the client for legal services. That should not, she said, be controversial.

A member spoke in agreement with this, stating that defining a "flat fee" is sufficient for the proposal's purposes; it need not define "flat fee agreement." But the member wondered whether the proposal is robust enough to encompass a tiered flat-fee agreement, such as $X for the filing of a

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9. The Committee considered the terminology "flat fee arrangement" and "flat fee agreement" at some length at its forty-fourth meeting, on July 22, 2016, determining then to use the word "agreement" instead of "arrangement."
—Secretary

STANDING COMMITTEE 014

complaint, $Y more for the discovery process, and $Z more for a trial. Cohen responded that the proposed text is sufficient to cover all of that. The member said that what confused him was the word "effort" in the definitional phrase "regardless of the time or effort involved or the result obtained" — he was not confused by the reference to "time" but by the reference to "effort."

To that, a member of the subcommittee said the word "effort" had been lifted from the contingency fee rules, for parallelism.

Cohen said that both time and effort are at issue: A skilled lawyer familiar with a field of law might be able to accomplish a matter in much shorter time but to the same effect as one less competent. So it is appropriate to include both concepts in the definition.

As to the initial clause, "Notwithstanding anything to the contrary . . . ," Cohen agreed with the previous comment and found it to be unnecessary.

The member who had made the suggestion that the term be shortened to "flat fee" pointed out that elimination of the word "agreement" in that phrase would permit omission of any reference to an "agreement" elsewhere in the proposal. She added that she was aware that some members were of the view that Rule 1.5 should openly recognize that lawyers necessarily have agreements — contracts — with their clients, whether written or unwritten, expressed or implied.

A member who had not previously spoken to the proposal agreed with its requirement that the agreement for a flat fee be stated in writing if any part of the fee is to be paid in advance of service. Lawyers should not be misled into believing that there need be no agreement for that and thus no need for a writing. He thus approved of the requirement that, if any part of the fee is paid in advance of service, the agreement for the flat fee "shall be in writing and shall contain . . . ." Cohen said she agreed with that.

Another member, who had been on the subcommittee but had not previously spoken to the proposal, asked whether, if the representation were terminated before completion of the services, the client would pay for the services actually rendered at an hourly rate for the time accrued in performing those services. In her view, the rule should make it clear that the fees accrued on the basis of time in that situation could not exceed the agreed-upon flat fee for those services. She noted that there might be cases in which the lawyer would find that the flat fee arrangement gave a lower fee than would otherwise have been earned on a per-time basis. All agreed, she said, that this was an omission in the proposal that should be rectified.

Cohen said the subcommittee had not considered the alternative of proposing that no change be made to the Rules to deal with flat fees — the subcommittee felt that the "ship had sailed" on that matter, so that some provision would be added.

Cohen agreed that the language could be changed from "flat fee agreement" to "flat fee for legal services."

A member noted that some useful commentary about Rule 1.5(b) could get lost in this revision if care were not taken, such as the matter of timing of the required communication about the basis or rate of fees and expenses, applicable in all cases whether or not involving flat fees. If this proposal is to be a statement of how the requirement of Rule 1.5(b) — that the basis or rate of fee and expenses is to be stated in writing in connection with an engagement for a client with whom there has not been a regular representation — is to be satisfied in the case of a flat fee, then that must be carefully done. In short, the

STANDING COMMITTEE 015

proposed addition of Rule 1.5(h) must be clear that it applies only to the flat fee and does not alter the existing requirements of Rule 1.5(b), which are of general application.

To that, Cohen said that, if there is to be a new application of proposed Rule 1.5(h) upon each new engagement for an existing client — one who has been regularly represented by the lawyer — under flat fee agreements, then that requirement should be expressed in the added text. Looking at the second sentence of existing Rule 1.5(b) — "Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing" — that sentence continues to apply to a flat fee agreement; the lawyer cannot change the flat fee structure, after commencement of the representation, except pursuant to a clear agreement with the client that provides for such change.

A member noted that the matter is not unlike the question of what services an hourly fee covers — what services the lawyer has undertaken to provide and the client has undertaken to pay for. In a water law case, she added, the scope of services is often in question. The scope of services can likewise be a concern in a flat fee structure.

A member who had not previously spoken to the proposal said he had little experience with flat fees but was concerned about the injection of the flat fee concept into Rule 1.5 as the proposal would do, concerned about the implications of such specificity about flat fees on the nature of the agreement that the lawyer must express in the different situation of an hourly fee or other fee structure. Lawyers are familiar with legal service agreements — and he stressed that they are indeed agreements — that can be several pages long and cover such details of the client-lawyer engagement as who is burdened with keeping copies of documents and for how long, what personnel will be utilized to perform the services, and, more fundamentally, what are the services that are to be performed and for whom are they to be performed: who is the client? The proposal seems to create a stepchild agreement, implying that the lawyer can in other engagements forego stating the usual details of well-crafted engagement agreements, as the rule would imply that "agreements" are needed only if the lawyer is using a flat fee structure — with those agreements needing to be in writing only if any portion of the agreed flat fee were to be taken in advance of performance of the services.

In short, this member added, the discussion has been too focused on the flat-fee aspect of the lawyer's agreement with the client; Rule 1.5 should recognize the complexity of the client-lawyer relationship — in particular the scope of the legal services that are to be provided by the lawyer and the identity of the client or clients for whom they will be provided. He suggested that this proposal be scrapped and an effort be made to change Rule 1.5 to deal more fully and appropriately with the entire agreement that lies, in fact and law, between the lawyer and the client.

Another member who had not previously spoken to the proposal concurred with those remarks, pointing out that, despite the present Rule's studied avoidance of the term "agreement" or "contract," a lawyer has a contract with the client for the rendering of services, whether expressed or implied, oral or in writing. There is a contract that Professor Corbin would recognize and that is susceptible of analysis under familiar principles of contract law. In particular, there is some agreement, expressed or implied, about what services are to be provided and for whom, although the scope of those services may be left to contention if not clearly expressed at the outset.

Cohen acknowledged that the text of Colorado's Rule 1.5(b) — "When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation" — is an anomaly among the states. But, she added, too many states have many and complex rules governing what must be included in the lawyer's agreement with the client, rules that may lead to discipline if the lawyer does not comply with them. She asked whether lawyers are to become like doctors, with lengthy

STANDING COMMITTEE 016

agreements filled with protective provisions. And, she added, if the rule is amended to require complexity in agreements for legal services, that will magnify the cost of obtaining those services.

A member pointed out that this question has come before the Committee on the inquiry of Steven Jacobson, as chair of the Attorney Regulation Committee.[10] That committee, Jacobson had noted in his letter of inquiry, sees many problems arising because lawyers cannot write effective flat fee agreements. And the inquiry came after the issuance of the *Gilbert*[11] case, in which, the member said, the Supreme Court specifically asked this Committee for a rule governing flat fees. If this Committee were to determine that there should be no rule covering flat fees and the possibility of termination of the relationship before completion of the contemplated services, *Gilbert* would remain the authority for the matter — and it does not provide satisfactory answers.

To those comments, Cohen replied that it had become clear to her, from the Committee's discussion, that the Committee thinks there should a rule speaking to flat fees, and she liked the changes that had been proposed during the course of the discussion.

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10. The letter from Steven K. Jacobson, chair of the Supreme Court Attorney Advisory Committee, to Marcy G. Glenn was included in the materials the Chair provided for the fortieth meeting of the Committee, on June 6, 2015, beginning at p. 152 of those materials. The letter included the following:

> The ARC believes that minimal standards would require all fee agreements to include provisions addressing the following (some of which are already in various rules or established by case law):
>
> a. The base and rate of the fee.
>
> b. That fixed/flat fees agreements must specify the benefits conferred on the client or specify the legal services performed in order for the fees to be earned.
>
> c. The prohibition of the earning of fees deemed to be engagement or signing fees in circumstances where the lawyer is being hired to represent the client on an already identified matter versus being available for matters to be identified in the future.
>
> d. That unearned non-fixed fees will be held in trust until such time as they are considered earned pursuant to a described billing period.
>
> e. That unearned fixed/flat fees will be held in trust until such time as the occurrence of benchmarks/milestones relating to the nature of the case involved. These benchmarks, might include for example, the movement from one stage of legal proceedings to another.
>
> f. Provisions for the refunding of unearned fees, including a clear statement that a fee agreement may not contain provisions providing for nonrefundable fees and nonrefundable retainers.
>
> g. Provisions detailing the client's and lawyer's rights to terminate the representation and a statement addressing the basis and rate at which any fixed/flat fees held in trust will be distributed. (See Matter of Gilbert, --- P.3d ----, 2015 WL 1608818, 2015 CO 22, Colo., April 06, 2015 (NO. 13SA254).
>
> h. Provisions addressing if, how and when a lawyer may change the fee during the course of the representation.
>
> i. Provisions addressing how expenses incurred during the representation will be handled.
>
> j. Provisions relating to how fees and communications will be handled when the fee is to be paid by a person other than the client.
>
> k. Provisions addressing ownership of "the file".
>
> —*Secretary*

11. *In re Gilbert*, 346 P.3d 1018 (Colo. 2015).

STANDING COMMITTEE 017

The Chair suggested that the available options included adding text regarding flat fees or considering fuller text that recognized the existence of an "agreement" between the lawyer and the client and made for a fuller overhaul of Rule 1.5(b). But those options would leave unconsidered Jacobson's broader inquiry from the Advisory Committee, which remains on the table and refers to more than just flat fees.

Cohen responded that her sense was that the subcommittee should draft a form of flat fee agreement for the Committee to review.

The chair commented that no member appeared to want the Committee to take no action on the flat fee matter. Two members spoke to contradict her by noting that at least one member — not them — had expressed the view that there should be no rule amendment dealing with flat fees. Cohen responded that she had always understood the Committee at large wanted a draft for consideration.

The Chair asked that the Committee be prepared to continue the conversation at its next meeting.

A member noted that one of the Committee members who had an extensive practice in the field of criminal defense had been on the subcommittee and had provided valuable input on the question in prior meetings but was not present at this meeting. A member of the subcommittee added that the member to whom reference had just been made had been active in the subcommittee's deliberations.

Another member of the subcommittee noted that yet another member of that subcommittee, who handled small claims matters, had also been valuable to the subcommittee's deliberations but also was not present at this meeting to speak to the matter.

Yet another member said he sees lawyers who handle flat fee billing arrangements correctly and those who do not. He, too, thought it would be useful for the Committee to continue its consideration when these absent members could be present to provide their input.

Cohen suggested that the Committee could refine a proposed Rule 1.5(h) and circulate it among the criminal defense bar and other practitioners who commonly employ flat fee billing arrangements for their reviews, before the Committee finalized and forwarded a proposal to the Court. The submittal to those groups and practitioners might contain the proposal and provide, as alternatives, amendments such as had been proposed at this meeting or that there be no rule.

A member who had not previously spoken to the proposal reminded the Committee that, while the proposal has merit, Cohen had pointed out the flipside: A specific rule could be the basis for discipline. He suggested, as an alternative, flipping that structure upside down by defining *inappropriate* flat fee arrangements and providing that a lawyer could be disciplined for employing such arrangements. He added that the contingency fee provisions of C.R.C.P. 23.3 are incorporated into the Rules of Professional Conduct by Rule 1.5(c) and thus can serve as a basis for discipline if violated.

To that, Cohen responded that the subcommittee had felt that the matters contained in its proposal were matters that should be *included* in agreements for flat fees; it was for that reason, and to enhance flexibility in that context, that the subcommittee included alternatives. Most of the subcommittee members had not favored the third and fourth alternatives for noncompliant arrangements — refunding all fees upon termination of services before completion, under a noncompliant arrangement — viewing that drastic result as inequitable. She said that left the first (no provision addressing noncompliance), second (a noncompliant flat fee agreement is "unenforceable"), and fifth (disputed fees shall be kept separate until the dispute is resolved) alternatives.

A member who had been a member of the subcommittee pointedly expressed his belief that this Committee would never achieve consensus on what should happen in the case of a noncompliant flat fee agreement.

Another member said she liked the fifth alternative, and she asked whether it would be included among the formally presented alternatives. Cohen and her co-chair, James S. Sudler, responded that it would be included.

In response to the suggestion that the proposal be altered to a list of what is inappropriate for flat fees, a member noted that lawyers are already subject to discipline if they use fee arrangements that violate the strictures of Rule 1.5. What they need, he said, is both an affirmative rule and a form for such arrangements — a form that is not offered as a complete form for the agreement for legal services between a lawyer and a client but only for the flat fee portion of such an agreement. The Rule and its accompanying form can make it clear that the form is not intended to be a full expression of the client-lawyer agreement for professional services.

The member continued by saying that, when the Court developed the contingency fee rules of Chapter 23.3, C.R.C.P, it considered the public's interest when it recognized a need for properly constructed contingent fee agreements. His feeling is that the Court has, likewise in this matter of flat fees, done the same thing. For that reason, the subcommittee tracked the contingent fee rules in drafting this proposal. It is now essential that the Committee tweak the proposal and provide alternatives for handling noncompliant arrangements; he noted that the contingency fee rules provide for noncompliant agreements. This member would send the proposal back to the subcommittee for further work in light of the discussion at this meeting.

A member interjected that the Committee has before it the idea of circulating this work product, with some refinement, to the criminal defense bar and other practitioners who use flat fee arrangements. Another member's proposal to send the matter to the Colorado Bar Association Ethics Committee was rejected for fear that it would take too long to receive a response.

A member who was not a member of the subcommittee opened his comment by noting that his thought might be outlandish. But, following on the references to the contingency fee rules, he pointed out that Colorado is one of the few jurisdictions that does not require lawyers to have fee agreements with their clients for legal services. As has been noted a number of times, our Rule 1.5(b) requires only that "the basis or rate of the fee and expenses . . . be communicated to the client, in writing," and it requires even that only when the lawyer has not "regularly represented the client." The Rules do not state what ordinarily would be included in a fee agreement, as Rule 23.3 does for the special case of the contingent fee. The member proposed that the subcommittee give a comprehensive review of how fees may be calculated, including the possibility of abandoning our Rule 1.5(b) and adopting the American Bar Association model rule.[12] He added that earlier references to multi-page engagement agreements fortified his idea that we need to provide for such agreements, but our rules presently give no guidance to their content and contain no forms. In his experience as a lawyer defending lawyers, many malpractice

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12. Rule 1.5(b) of the American Bar Association Model Rules of Professional Conduct reads—

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

—*Secretary*

STANDING COMMITTEE 019

actions have arisen in the context of inadequate engagement agreements, failing to cover matters such as who shall be responsible for retaining documents generated in the course of the representation.

To that, a member challenged the view that the ABA version of Rule 1.5 contains a requirement for a written agreement, requires anything beyond the statement of the basis or rate of fees and expenses and, she noted, the scope of the engagement. The member responded that he sees, in the ABA model text, an innuendo of a fuller agreement than is implied by the Colorado text.

The Chair proposed that those members who would consider a fuller statement, within Rule 1.5, of the minimum content of a proper agreement between lawyer and client for legal services get together and make such a proposal to the Committee for it to consider at its next meeting. She suggested that they consider rules in other jurisdictions that may have done that. But, for now, she asked that the Committee continue, at least, consideration of additional Rule text governing flat fees.

VIII. *Adjournment; Next Scheduled Meeting.*

The Chair determined to defer the new business that had been identified in the agenda for the meeting. She said that the next meeting would be on February 24, 2017, with January 20, 2017, being an alternative date. She would communicate the selected date by email to the Committee.

The meeting adjourned at approximately 12:05 p.m. The next scheduled meeting of the Committee will be on Friday, February 24, 2017, beginning at 9:00 a.m., in the Supreme Court Conference Room unless otherwise announced.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]

These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

Standing Committee on Rules of Professional Conduct

Submitted Minutes of Meeting of the Full Committee
On February 24, 2017
(Forty-Sixth Meeting of the Full Committee)

The forty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, February 24, 2017, by chair Marcy Glenn. The meeting was held at the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Marcy G. Glenn, were Justices Márquez and Coats and members Judge Michael Berger, Gary Blum, Nancy Cohen, Cynthia Covell, Jim Coyle, Tom Downey, John Haried, Dave Little, Cecil Morris, Dick Reeve, Alec Rothrock, Matt Samuelson, Marcus Squarrell, Jamie Sudler, and Eli Wald. Also present were J.J. Wallace, Supreme Court Staff Attorney, and guests Lindy Frohlich (by phone), Stephanie Scoville, David Blake, Douglas Wilson, Frances Smylie Brown, Oscar Cobos, Jacki Cooper Melmed, and Margaret Funk.

Present by conference telephone were members Federico Alvarez, Judge Ruthanne Polidori, Lisa Wayne, and Tuck Young.

Judge Bill Lucero, Boston Stanton, David Stark, Anthony Van Westrum, Eli Wald, and Judge John Webb were excused.

1. *Introductions.*

The Chair explained the absences of Judge Webb (due to an accident) and Tony Van Westrum (weather issues) and welcomed guests Lindy Frohlich, Director, Office of Alternate Defense Counsel (by phone); Stephanie Scoville, Senior Assistant Attorney General; David Blake, Chief Deputy Attorney General; Douglas Wilson, State Public Defender; Frances Smylie Brown, General Counsel, Office of State Public Defender; Oscar Cobos, Jacki Cooper Melmed (Counsel to the Governor), and Margaret Funk (Office of Attorney Regulation Counsel).

2. *Meeting materials; Minutes of November 4, 2016 meeting.*

The minutes of the November 4, 2016 meeting were not available and the Chair tabled approval of the minutes.

3. *Agenda Item 6(a) – ABA Rule 8.4(g)(prohibiting engaging in conduct that the lawyer knows or reasonably should know is harassment or discrimination).*

A subcommittee was formed, to be chaired by Judge Webb. The Committee agreed to solicit subcommittee participation from non-members, including those who have already sent

comments and statements of interest. Notice of the formation of the subcommittee will be posted on the CBA Diversity Listserve.

4. *Agenda Item 2 (Report from Rule 1.6 Subcommittee regarding Attorney General Coffman's proposed amendments)*

Because subcommittee chair Dave Stark was unavoidably out of town, subcommittee member Jamie Sudler reported on the Colorado Attorney General's request in March 2016 for a comment (and, subsequently, for a rule change) excepting from the Rule 1.6 confidentiality requirement the aggregate amount of legal fees or costs incurred by a public entity on a particular matter. This request was also supported by an attorney who typically represents the press. Sudler summarized the reasons the Attorney General's office believes this rule or comment change should be made and the subcommittee majority's reasons for not recommending any change.

Sudler explained that the subcommittee considered who is or is not a "public" lawyer and who is or is not a "public" client, and the possible conflicts between the Rules of Professional Conduct and the Colorado Open Records Act ("CORA"). The subcommittee does not believe there is a conflict, for reasons explained in the majority report. The subcommittee discussed whether there should be a distinction between the obligation of a "public" lawyer, such as a member of the Attorney General's office, and a private lawyer who represents a public entity, such as a town attorney. Sudler noted that the rule change would be made to Rule 1.6(b), which provides for permissive, not mandatory, disclosure of information otherwise protected by Rule 1.6(b).

The minority report notes the importance of transparency in government, and asserts that public clients do not expect information about aggregate legal fees and costs to be kept confidential, and that case law has authorized disclosure of fees.

The majority report disagrees for the following reasons: (1) Rule 1.6 covers information relating to fees, and the majority found unpersuasive the case law allowing fees to be disclosed under certain circumstances; (2) neither the ABA nor any state has such an exception; (3) a client should have the opportunity to consent (or not) to such disclosure; (4) Rule 1.6 does not distinguish between public and private lawyers, and, in the context of the proposed rule change, it is not clear who is a "public" or a "private" lawyer.

David Blake presented the Attorney General's view, reading a statement regarding the Attorney General's dual commitment to transparency in government and to legal ethics. He opined that the specific concerns of the majority could have been addressed had the subcommittee supported the concept of a rule change or comment. He has represented the Attorney General's office for over six years with regard to transparency issues and CORA requests. He presented the history of past and present releases of such information by the Attorney General's office, and pointed out the Rules' recognition of the unique nature of government practice, as recognized by the Preamble to the Rules at Section 18. The Attorney General's office strives to balance the legal obligation of transparency of "all public records" and the lawyer's ethical obligations. He noted that courts generally strike a balance that favors transparency, and that CORA does not distinguish between public and private lawyers. He stated that while the subcommittee majority placed confidentiality above transparency, the Attorney General is seeking a more balanced and

less absolutist approach. The public and the press want to know how tax dollars are being spent. The Attorney General has never sought release of detailed expenditures, just the ability to release the total expenditures for a particular representation. The majority position results in less transparency.

The Chair stated that the majority of the members of the subcommittee were not members of the Standing Committee on the Rules of Professional Conduct. She recognized their hard work and many drafts, even though they did not reach agreement.

A member gave the example of the Office of Respondent Parent Counsel (ORPC) and asked Mr. Blake whether the aggregate amount spent in representation of an individual respondent parent – a private citizen - should be disclosed.

Mr. Blake responded that the proposed rule change would allow this disclosure unless a CORA disclosure exception would apply.

Public Defender Doug Wilson provided a history of the rule change request, explaining that a bill was introduced in the legislature three years ago that would have applied CORA to the Public Defender's Office and the Office of Alternate Defense Counsel with the goal of requiring disclosure of amounts spent on representation of individual clients. He noted that the bill would have applied only to these agencies, out of all of the agencies that represent indigent clients at public expense, and that the bill failed, but was brought back again last year. Mr. Wilson asserted that the majority position is the law, that the Rule 1.6 obligation extends to people, and therefore should extend to public agencies that represent individual people.

A member inquired whether this proposed amendment would require the judiciary to maintain time records of its work on a particular case, so the public could know how much time was invested in a particular case.

CORA is not applicable to judicial agencies. Mr. Blake stated that he did not believe a rule change or comment would compel a change in practice by the judiciary. The Chair noted that Rule 1.6 applies to lawyers representing clients, not to the judiciary.

A member spoke in favor of the majority recommendation, based on her 13 years representing criminal defendants, both in the Public Defender's Office and in private practice. The member stated that the proposed rule change is targeted at poor people and people of color. They are the people who are represented at taxpayer expense. They have the least voice in the system, and the Public Defender's Office and the Office of Alternate Defense Counsel are their voices. The member also noted that private clients would never countenance release of such information by their lawyers. The member expressed the view that the effort to amend the rule was really an effort to find a way to cut funding for the Offices of Public Defender and Alternate Defense Counsel.

Another member who represents municipal governments that often get CORA requests stated that governments have public budgets for legal expenses, which are available to the press and taxpayers. Drilling down to individual matters of representation disadvantages the poor, who

have a constitutional right to counsel, and CORA requests should be made to the agencies, not their counsel.

A member of the subcommittee noted that Rule 1.6 is geared to protection of the client. The client can always consent to release of the information. The issue here is whether the lawyer should be able to release the information without client consent.

A member of the Committee commended the subcommittee for its well-written reports, and asked if fee-related information is "information related to the representation" under Rule 1.6. The member noted that the "transparency" issue is an issue between the public and the governmental agency, not the lawyers for the agency. The member expressed concern about allowing lawyers to release information without client consent, stating that Rule 1.6 is very clear.

Mr. Blake stated that the Attorney General's office has historically released information about the aggregate amount of fees billed to a client on a particular matter (such as implementation of a gun control law), and that "aggregate billing" on a matter is not closely "related to the representation" and therefore not necessarily within the ambit of Rule 1.6. He noted that the process required to obtain client consent is cumbersome. He noted that the Attorney General's office also represents "people" and that the rule amendment is not about the Public Defender's Office or any other agency in particular. He noted that the Attorney General's office does not believe it may redirect a CORA request to the appropriate agency, and that a legislative effort to allow this failed.

Ms. Melmed noted that in the case of the gun law, the Governor's Office consented to the Attorney General's disclosure of fee-related information.

Mr. Blake noted that the CORA timelines are very tight and it is not always possible to get consent within the time frame for response. CORA requests are generally for specific information, and it is not responsive to direct the inquirer to the agency's budget.

A Committee member stated that Rule 1.6 reflects a value judgment made by the Supreme Court when the Rules of Professional Conduct were adopted. The member questioned whether Rule 1.6 may simply be too broad. He stated that protecting all "information relating to the representation" may go too far, and may be a standard that is impossible to meet. The member noted the importance of transparency in government, and does not believe that an aggregate fee is constitutionally protected or that its disclosure would encroach upon the attorney-client relationship. The member is less concerned about the need for Colorado to be consistent with the Model Rules, and suggests that Attorney General's inquiry should go to the ABA. The member believes the Attorney General's proposal has merit, and would support it if the ambiguities could be resolved.

Another member stated that the rule change goes too far. A public agency tasked with representing private individuals is in a unique situation, and is unlike other public agencies. The member noted further that the Public Defender (or Alternate Defense Counsel) doesn't control the litigation – the District Attorney's office does. Defense attorneys must expend resources to defend the charges brought by the District Attorney. The rule change could open the door to

public outcry over expenditures made to provide legal services to people who are legally entitled to counsel, either as a constitutional matter or as a social decision. The rule change might be a different question when an agency's client is not a private individual as is the client of the Office of the Public Defender, Office of Alternate Defense Counsel, or the Office of Respondent Parents' Counsel.

Another member, who has served as both a public defender and assistant attorney general, stated that we should remember the role of lawyers, who must be independent and circumspect in all dealings with clients. The member likes Rule 1.6 and its clear statement that information relating to the representation is confidential. Confidentiality is the basis of the attorney-client relationship. The member pointed to the unsuccessful effort of insurance companies to audit legal bills pertaining to representation of their insureds. The insurance industry initially wanted to audit aggregate billing, and then drilled down to individual itemized billings. The member does not support an intrusion on the attorney-client relationship, including a change to Rule 1.6, and strongly supports the majority.

A Committee member stated that this is a political issue masquerading as an ethical issue. An attorney should not be constrained in representing a client in a sphere where the public may have an interest in the outcome of the representation, but this is what a rule change would do. We as lawyers have the same obligation to every client. Rule 1.6 should not be changed. The member strongly supports the majority.

Another member also supports the majority. The proposed change to Rule 1.6 would give lawyers discretion that should reside with the client regarding release of information.

The Chair called for a vote on the proposed amendment to Rule 1.6. The amendment is to add the following exception to Rule 1.6(b): *"(9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client."* The Chair noted her intention to send both the majority and minority reports to the Supreme Court, notwithstanding the outcome of the vote, because a lot of work has gone into considering this issue. The Court should have the benefit of this work, regardless of the outcome of the vote.

All Committee members (those present in person and those present by telephone) voted against the amendment. None voted for the amendment.

The Chair thanked the guests for their input and participation in this project.

5. *Agenda Item 3. Report from Fee Subcommittee.*

Nancy Cohen reported that the Fee Subcommittee has drafted what it believes the Committee directed, including proposed Alternative 5, as included in the packet. Another subcommittee meeting is needed to address Alternative 5. The subcommittee welcomes any input other Committee members wish to offer.

6. *Agenda Item 4. Report from Civil Rules Committee Subcommittee on Judicial Expectations Amendments to CRCP.*

Judge Berger reported that the proposal was withdrawn because the CBA and the DBA did not support it. A CBA/DBA joint committee is working on a revised proposal, but it has not been released. That committee will be meeting on March 8, 2017.

7. *Agenda Item 5. U.S. District Court Local Rule Amendments.*

The Chair reviewed the new rules, effective December 1, 2016. The federal district court in Colorado has historically adopted the Colorado Rules of Professional Conduct, but has carved out certain rules it believes should not be applied in federal court. The new amendments are noteworthy in that they no longer carve out Colorado Rules 4.4(b) (duty to notify sender of receipt of inadvertently sent document) and Colorado Rule 6.5 (regarding nonprofit and court-annexed limited legal services programs). The rules and comments regarding unbundled legal services and marijuana remain carved out.

8. *Agenda Item 6(b). Pretexting – The Sequel.*

A *Denver Post* article inaccurately reported that a complaint had been made to the committee, and nothing had been done. The Chair wrote to correct the inaccuracies and that *Post* corrected only the inaccuracy about the body to which the complaint was made. A Committee member reported that he had met with a District Attorney group following and he expects the group to request the Committee to again consider a rule amendment that would except "pretexting" for law enforcement purposes from the prohibition on deceptive conduct in Rule 8.4(c). So far, however, nothing has been received.

9. *Agenda Item 6(c). Potential Contingent Fee Rule Amendments.*

The Chair reported that the Supreme Court had transferred responsibility for proposing amendments to the contingent fee rules to this Committee. Next steps may include cleaning up inconsistencies in language and considering whether those rules should be located in the Rules of Professional Conduct or elsewhere. The matter was tabled.

10. *Agenda Item 6(d). Potential amendments to require engagement agreements.*

Item tabled, as Tony Van Westrum was not at the meeting, and Dave Little had departed by the time this agenda item was reached.

11. *Agenda Item 6(e). Housekeeping Amendments.*

Members voted to recommend two corrections to the Supreme Court: (1) renumber current Comment [14] to Rule 1.2 to make clear that it is a Colorado-unique comment; and (2) correct Comment [12] to Rule 1.5 to refer to Rule 1.15B(a)(1) instead of to Rule 1.15. A member noted that there may also be a mistake in Rule 5.4. The committee will wait until it has accumulated a number of minor changes and corrections before submitting recommended changes to the Supreme Court.

Next meeting date: June 16, 2017.

Meeting adjourned at 11:05 a.m.

Cynthia Covell, acting secretary

[These submitted minutes have not yet been approved by the Committee.]

HOLLAND&HART LLP

Marcy G. Glenn
Phone 303-295-8320
Fax 303-975-5475
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March 17, 2017

VIA U.S. MAIL AND EMAIL

The Honorable Nathan B. Coats
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

The Honorable Monica Márquez
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

Re: Considered, But Rejected, Potential Amendments to Colo.RPC 1.6 and/or Its Comments, Concerning Disclosure of Aggregate Fee Amendment by Public Lawyers

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed are the following materials, which relate to the Standing Committee's consideration of potential amendments to Rule 1.6 of the Colorado Rules of Professional Conduct or the comments to that rule, to address the disclosure of aggregate fee information for representation by government lawyers:

1. Majority Report of the Rule 1.6 Subcommittee (the Subcommittee), distributed for discussion at the Standing Committee's February 24, 2017 meeting (Enclosure 1).

2. Minority Report of the Subcommittee, distributed for discussion at the February 24 meeting (Enclosure 2).

3. Submitted, but not yet approved, minutes of the February 24 meeting (Enclosure 3), summarizing the Committee's discussion of the proposed amendments.

Attorney General Cynthia H. Coffman proposed the amendments to Rule 1.6 and/or its comments, and she designated several assistant attorneys general to serve on the Subcommittee; those Subcommittee members authored the Minority Report.

The enclosed materials document the intense study the Subcommittee undertook. Ultimately, a large majority recommended against making any amendments; a small minority recommended either of the two most recent amendments proposed by the Attorney General. The Majority and Minority Reports set forth those groups' respective views.

The Standing Committee discussed the proposed amendments at length at the February 24 meeting. The 19 members in attendance voted unanimously against recommending

any of the changes proposed in the Minority Report.[1] However, in light of the substantial work devoted to consideration of the potential amendments, and the fact that they were proposed by the Attorney General, the Standing Committee is sharing its work product with the Court, for the Court to review and use as it deems appropriate. The attached documents are lengthy and, for the Court's convenience, I am sending both hard and electronic copies of this letter and attachments.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko
Enclosures
cc: Attorney General Cynthia H. Coffman
Members of the Standing Committee and the Subcommittee (with enclosures)

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[1] The representatives of the Attorney General's Office who authored the Minority Report are not members of the Standing Committee and, therefore, did not vote on whether to recommend the proposed changes to the Court.

HOLLAND&HART LLP

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mglenn@hollandhart.com

March 17, 2017

Cynthia H. Coffman
Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203

Re: Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct

Dear Attorney General Coffman:

I write to you as Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee).

As I'm certain that David Blake and Stephanie Scoville have reported to you, the Standing Committee, at its February 24, 2017 meeting, voted against recommending to the Supreme Court any change to Rule 1.6 or its comment to require or permit government attorneys to disclose aggregate fee information. For your information, I enclose my March 17, 2017 letter to Justices Coats and Márquez, the Standing Committee's liaison justices, which advises the Court of the Standing Committee's vote against recommending any change and provides the Majority and Minority Reports.

I thank you for raising this issue and for designating David and Stephanie to work on the subcommittee that studied the issue in depth and ultimately prepared the Majority and Minority Reports. David and Stephanie ably represented your office and contributed greatly to the richness of discussion at both the subcommittee and full Standing Committee levels.

At the February 24 meeting, I mentioned to David and Stephanie that I would welcome having a lawyer from your office join the Standing Committee as a regular member. If you agree that would be beneficial, please provide me the name and resumé of the lawyer whom you would like to recommend, and I will forward that person's name to the Supreme Court.

Again, Attorney General Coffman, I appreciate your interest in the Rule 1.6 issue and welcome your office's further participation in the work of the Standing Committee.

Very truly yours,

Marcy G. Glenn
of Holland & Hart LLP

cc: The Honorable Nathan B. Coats
The Honorable Monica Márquez
Stephanie L. Scoville, Esq.
David C. Blake, Esq.
(w/enclosure)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Estate of Hensley by and through Wilson v. Community Health Association of Spokane (CHAS), Wash.App. Div. 3, April 11, 2017

137 S.Ct. 855
Supreme Court of the United States

Miguel Angel **PEÑA–RODRIGUEZ**, Petitioner
v.
COLORADO.

No. 15–606.
|
Argued Oct. 11, 2016.
|
Decided March 6, 2017.

Synopsis
Background: Defendant was convicted in the District Court, Arapahoe County, John L. Wheeler, J., of unlawful sexual contact and harassment. Following denial of his motion for new trial based on alleged juror misconduct, defendant appealed. The Court of Appeals, John R. Webb, J., —— P.3d ——, 2012 WL 5457362, affirmed. Certiorari review was granted. The Colorado Supreme Court, Nancy E. Rice, J., 350 P.3d 287, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee, abrogating *Commonwealth v. Steele*, 599 Pa. 341, 961 A.2d 786; *U.S. v. Benally*, 546 F.3d 1230; *Williams v. Price*, 343 F.3d 223.

Reversed and remanded.

Justice Thomas filed dissenting opinion.

Justice Alito filed dissenting opinion in which Chief Justice Roberts and Justice Thomas joined.

West Headnotes (14)

[1] **Constitutional Law**
Sixth Amendment

By operation of the Fourteenth Amendment, the right to a jury trial in criminal cases is applicable to the States. U.S.C.A. Const. Art. 3, § 2, cl. 3; U.S.C.A. Const.Amends. 6, 14.

Cases that cite this headnote

[2] **Criminal Law**
Statements, Affidavits, and Testimony of Jurors

A general rule, often referred to as the "no-impeachment rule," gives substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.

1 Cases that cite this headnote

[3] **Constitutional Law**
Fifteenth Amendment

Constitutional Law
Race, national origin, or ethnicity

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons, and this imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. U.S.C.A. Const.Amends. 13–15.

1 Cases that cite this headnote

[4] **Constitutional Law**
Life

The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official

STANDING COMMITTEE 032

sources in the States. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[5] **Constitutional Law**
Particular Issues and Applications
Constitutional Law
Race, national origin, or ethnicity

The duty to confront racial animus in the justice system is not the legislature's alone; time and again, the Supreme Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Race, national origin, or ethnicity

The Fourteenth Amendment prohibits the exclusion of jurors on the basis of race. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Constitutional Law**
Race, national origin, or ethnicity

In an effort to ensure that individuals who sit on juries are free of racial bias, the Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Jury**
Nature and functions in general

Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice, and the jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice.

Cases that cite this headnote

[9] **Jury**
Competence for Trial of Cause

Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State.

Cases that cite this headnote

[10] **Criminal Law**
Objections and disposition thereof

Jurors are presumed to follow their oath.

Cases that cite this headnote

[11] **Criminal Law**
Misconduct of jurors, in general
Jury
Competence for Trial of Cause

Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee; abrogating *Commonwealth v. Steele*, 599 Pa. 341, 961 A.2d 786; *U.S. v. Benally*, 546 F.3d 1230; *Williams v. Price*, 343 F.3d 223. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

5 Cases that cite this headnote

[12] **Criminal Law**
Misconduct of jurors, in general

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry; for the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and

STANDING COMMITTEE 033

impartiality of the jury's deliberations and resulting verdict. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

Cases that cite this headnote

[13] **Criminal Law**
Misconduct of jurors, in general

To qualify for setting aside the no-impeachment bar to allow further judicial inquiry, a juror's statement indicating racial bias must tend to show that racial animus was a significant motivating factor in the juror's vote to convict; whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Criminal Law**
Misconduct of jurors, in general

The practical mechanics of acquiring and presenting evidence, with respect to setting aside the no-impeachment bar to allow further judicial inquiry into a juror's statement indicating racial bias, will be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

Cases that cite this headnote

West Codenotes

Limited on Constitutional Grounds
Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

***857** *Syllabus* [*]

A Colorado jury convicted petitioner **Peña–Rodriguez** of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H.C. The court acknowledged H.C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H.C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90, and *Warger v. Shauers*, 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422, both of which rejected constitutional challenges to the federal no-impeachment ***858** rule as applied to evidence of juror misconduct or bias.

Held : Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. 863 – 871.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives during deliberations. An alternative approach, later referred to as the federal approach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule, appearing open to the Iowa rule in *United States v. Reid*, 12 How. 361, 13 L.Ed. 1023, and *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917, but rejecting that approach in *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300.

STANDING COMMITTEE 034

The common-law development of the rule reached a milestone in 1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. 863 – 865.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States v. Reid, supra,* at 366; *McDonald v. Pless, supra,* at 269, 35 S.Ct. 783. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner*, where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483 U.S., at 127, 107 S.Ct. 2739. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: members of the venire can be examined for impartiality during *voir dire* ; juror misconduct may be observed the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a prodefendant bias during *voir dire,* the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald*, that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." ***859** 574 U.S., at ——— – ———, n. 3, 135 S.Ct., at 529, n. 3. *Reid, McDonald,* and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. 864 – 867.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder v. West Virginia,* 100 U.S. 303, 305–309, 25 L.Ed. 664; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g., Neal v. Delaware,* 103 U.S. 370, 26 L.Ed. 567; ruled that no litigant may exclude a prospective juror based on race, see, *e.g., Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; and held that defendants may at times be entitled to ask about racial bias during *voir dire,* see, *e.g., Ham v. South Carolina,* 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411. Pp. 867 – 868.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald, Tanner,* or *Warger*, implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury

STANDING COMMITTEE 035

verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. 868 – 869.

(e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of ***860** professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, free from bias of any kind. Pp. 869 – 871.

350 P.3d 287, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

[1] In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See The Federalist No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, § 2, cl. 3; Amdt. 6. ***861** By operation of the Fourteenth Amendment, it is applicable to the States. *Duncan v. Louisiana*, 391 U.S. 145, 149–150, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

[2] Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict

STANDING COMMITTEE 036

finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

I

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel **Peña–Rodriguez**, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. The girls told their father and identified the man as an employee of the racetrack. The police located and arrested petitioner. Each girl separately identified petitioner as the man who had assaulted her.

The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." App. 14. The court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. *Id.*, at 34. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. When the jury was discharged, the court gave them this instruction, as mandated by Colorado law:

> "The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision.... If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me." *Id.*, at 85–86.

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors.

***862** The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H.C. According to the two jurors, H.C. told the other jurors that he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.*, at 110. The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, " 'I think he did it because he's Mexican and Mexican men take whatever they want.' " *Id.*, at 109. According to the jurors, H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*, at 110. Finally, the jurors recounted that Juror H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was " 'an illegal.' " *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H.C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id.*, at 90. Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Fed. Rule Evid. 606(b). The Colorado Rule reads as follows:

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment,

STANDING COMMITTEE 037

a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Colo. Rule Evid. 606(b) (2016).

The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. A divided panel of the Colorado Court of Appeals affirmed petitioner's conviction, agreeing that H.C.'s alleged statements did not fall within an exception to Rule 606(b) and so were inadmissible to undermine the validity of the verdict. —— P.3d ——, 2012 WL 5457362.

The Colorado Supreme Court affirmed by a vote of 4 to 3. 350 P.3d 287 (2015). The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. See *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *Warger v. Shauers*, 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014). After reviewing those precedents, the court could find no "dividing line between different *types* of juror bias or misconduct," and thus no basis for permitting impeachment of the verdicts in petitioner's trial, notwithstanding H.C.'s apparent racial bias. 350 P.3d, at 293. This Court ***863** granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. 578 U.S. ——, 136 S.Ct. 1513, 194 L.Ed.2d 602 (2016).

Juror H.C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. See, *e.g., Hernandez v. New York*, 500 U.S. 352, 355, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. See, *e.g., ibid.*; *Fisher v. University of Tex. at Austin*, 570 U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013); *Rosales-Lopez v. United States*, 451 U.S. 182, 189–190, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion). Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

II

A

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. See *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866). Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. See *Warger, supra*, at ——, 135 S.Ct., at 526. Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule. In *United States v. Reid*, 12 How. 361, 13 L.Ed.

STANDING COMMITTEE 038

1023 (1852), the Court appeared open to the admission of juror testimony that the jurors had consulted newspapers during deliberations, but in the end it barred the evidence because the newspapers "had not the slightest influence" on the verdict. *Id.*, at 366. The *Reid* Court warned that juror testimony "ought always to be received with great caution." *Ibid.* Yet it added an important admonition: "cases might arise in which it would be impossible to refuse" juror testimony "without violating the plainest principles of justice." *Ibid.*

In a following case the Court required the admission of juror affidavits stating that the jury consulted information that ***864** was not in evidence, including a prejudicial newspaper article. *Mattox v. United States*, 146 U.S. 140, 151, 13 S.Ct. 50, 36 L.Ed. 917 (1892). The Court suggested, furthermore, that the admission of juror testimony might be governed by a more flexible rule, one permitting jury testimony even where it did not involve consultation of prejudicial extraneous information. *Id.*, at 148–149, 13 S.Ct. 50; see also *Hyde v. United States*, 225 U.S. 347, 382–384, 32 S.Ct. 793, 56 L.Ed. 1114 (1912) (stating that the more flexible Iowa rule "should apply," but excluding evidence that the jury reached the verdict by trading certain defendants' acquittals for others' convictions).

Later, however, the Court rejected the more lenient Iowa rule. In *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), the Court affirmed the exclusion of juror testimony about objective events in the jury room. There, the jury allegedly had calculated a damages award by averaging the numerical submissions of each member. *Id.*, at 265–266, 35 S.Ct. 783. As the Court explained, admitting that evidence would have "dangerous consequences": "no verdict would be safe" and the practice would "open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268, 35 S.Ct. 783 (internal quotation marks omitted). Yet the Court reiterated its admonition from *Reid*, again cautioning that the no-impeachment rule might recognize exceptions "in the gravest and most important cases" where exclusion of juror affidavits might well violate "the plainest principles of justice." 238 U.S., at 269, 35 S.Ct. 783 (quoting *Reid, supra*, at 366; internal quotation marks omitted).

The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress, like the *McDonald* Court, rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

The version of the rule that Congress adopted was "no accident." *Warger*, 574 U.S., at ——, 135 S.Ct., at 527. The Advisory Committee at first drafted a rule reflecting the Iowa approach, prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict. The Department of Justice, however, expressed concern over the preliminary rule. The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 265 (1972). The Court adopted this second version and transmitted it to Congress.

The House favored the Iowa approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts. S.Rep. No. 93–1277, pp. 13–14 (1974). Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The substance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form. See 574 U.S., at ——, 135 S.Ct. 521.

The current version of Rule 606(b) states as follows:

> "(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's ***865** vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> "(2) *Exceptions.* A juror may testify about whether:
>
> "(A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> "(B) an outside influence was improperly brought to bear on any juror; or

STANDING COMMITTEE 039

"(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

B

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. Within both classifications there is a diversity of approaches. Nine jurisdictions that follow the Federal Rule have codified exceptions other than those listed in Federal Rule 606(b). See Appendix, *infra*. At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. *Ibid.* According to the parties and *amici*, only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias. See *Commonwealth v. Steele*, 599 Pa. 341, 377–379, 961 A.2d 786, 807–808 (2008).

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further comment. Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. See *United States v. Villar*, 586 F.3d 76, 87–88 (C.A.1 2009) (holding the Constitution demands a racial-bias exception); *United States v. Henley*, 238 F.3d 1111, 1119–1121 (C.A.9 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158–1160 (C.A.7 1987) (observing that in some cases fundamental fairness could require an exception). One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. See *United States v. Benally*, 546 F.3d 1230, 1240–1241 (C.A.10 2008). Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. See *Williams v. Price*, 343 F.3d 223, 237–239 (C.A.3 2003) (Alito, J.). And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception. See *Martinez v. Food City, Inc.*, 658 F.2d 369, 373–374 (C.A.5 1981).

C

In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most ***866** important cases." *Reid*, 12 How., at 366; *McDonald*, 238 U.S., at 269, 35 S.Ct. 783. Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. *Id.*, at 125, 107 S.Ct. 2739. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." *Id.*, at 127, 107 S.Ct. 2739. The *Tanner* Court echoed *McDonald* 's concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." 483 U.S., at 120, 107 S.Ct. 2739 (quoting *McDonald, supra*, at 267–268, 35 S.Ct. 783). The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." 483 U.S., at 120–121, 107 S.Ct. 2739.

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset

STANDING COMMITTEE 040

of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. *Id.*, at 127, 107 S.Ct. 2739. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger*, 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422. The Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. *Warger* involved a civil case where, after the verdict was entered, the losing party sought to proffer evidence that the jury forewoman had failed to disclose prodefendant bias during *voir dire*. As in *Tanner*, the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 574 U.S., at ——, 135 S.Ct., at 529.

In *Warger*, however, the Court did reiterate that the no-impeachment rule may admit exceptions. As in *Reid* and *McDonald*, the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U.S., at ———, n. 3, 135 S.Ct., at 529, n. 3. "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Ibid.*

The recognition in *Warger* that there may be extreme cases where the jury trial ***867** right requires an exception to the no-impeachment rule must be interpreted in context as a guarded, cautious statement. This caution is warranted to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect. Today, however, the Court faces the question that *Reid*, *McDonald*, and *Warger* left open. The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

III

[3] It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

[4] "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." Forman, Juries and Race in the Nineteenth Century, 113 Yale L.J. 895, 909–910 (2004). To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants charged with killing African–Americans. All 500 were acquitted. *Id.*, at 916. The stark and unapologetic nature of race-motivated outcomes challenged the American belief that "the jury was a bulwark of liberty," *id.*, at 909, and prompted Congress to pass legislation to integrate the jury system and to bar persons from eligibility for jury service if they had conspired to deny the civil rights of African–Americans, *id.*, at 920–930. Members of Congress stressed that the legislation was necessary to preserve the right to a fair trial and to guarantee the equal protection of the laws. *Ibid.*

[5] **[6]** **[7]** The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the

STANDING COMMITTEE 041

Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303, 305–309, 25 L.Ed. 664 (1880). The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. See, *e.g.*, *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1881); *Hollins v. Oklahoma*, 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (*per curiam*); *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Edmonson v.* ***868** *Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); *Rosales–Lopez*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22; *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

[8] **[9]** The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Strauder, supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); cf. *Aldridge v. United States*, 283 U.S. 308, 315, 51 S.Ct. 470, 75 L.Ed. 1054 (1931); ***Buck v. Davis***, *ante*, at 22.

IV

A

This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

[10] Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, cf. *Penry v. Johnson*, 532 U.S. 782, 799, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear ... that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S., at 120, 107 S.Ct. 2739.

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. ***869** For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. See *Rosales–Lopez, supra*; *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). Generic questions about juror

STANDING COMMITTEE 042

impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales–Lopez, supra,* at 195, 101 S.Ct. 1629 (Rehnquist, J., concurring in result).

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

B

[11] For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

[12] **[13]** Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

[14] The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. See 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6076, pp. 580–583 (2d ed. 2007) (Wright); see also Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques § 13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

***870** That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, *e.g.,* Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office of Jury Comm'r, Trial Juror's Handbook (Dec. 2015) ("You are not required to speak with anyone once the trial is over.... If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court ... immediately"); N.J. Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H.C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, *e.g.*, *Villar*, 586 F.3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle v. United States*, 65 A.3d 1144, 1147 (D.C.2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F.3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H.C. that exhibited racial bias.

While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

C

As the preceding discussion makes clear, the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

The experience of these jurisdictions, and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. See 27 Wright 575–578 (noting a divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct). The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. Compare, ***871** *e.g.*, *Shillcutt*, 827 F.2d, at 1159 (inquiring whether racial bias "pervaded the jury room"), with, *e.g.*, *Henley*, 238 F.3d, at 1120 ("One racist juror would be enough").

D

It is proper to observe as well that there are standard and existing processes designed to prevent racial bias in jury deliberations. The advantages of careful *voir dire* have already been noted. And other safeguards deserve mention.

Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e.g.*, 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 10:01, p. 22 (6th ed. 2008) ("Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way"). Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues. See, *e.g.*, *id.*, § 20:01, at 841 ("It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

Probing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise. These dynamics can help ensure that the exception is limited to rare cases.

* * *

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both

STANDING COMMITTEE 044

the jury system and the free society that sustains our Constitution.

The judgment of the Supreme Court of Colorado is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury's guilty verdict with juror testimony about a juror's alleged racial bias, notwithstanding a state procedural rule forbidding such testimony. I agree with Justice ALITO that the Court's decision is incompatible with the text of the Amendment it purports to interpret and with our precedents. I write separately to explain that the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.

I

The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," ***872** to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, *e.g., Apprendi v. New Jersey*, 530 U.S. 466, 500, and n. 1, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (THOMAS, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States § 1773, pp. 652–653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); cf. 5 St. G. Tucker, Blackstone's Commentaries 349, n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result the Court today reaches. *Apprendi, supra,* at 500, n. 1, 120 S.Ct. 2348

The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, *e.g.*, 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England § 234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth"). Impartial jurors could "have no interest of their own affected, and no personal bias, or prepossession, in favor [of] or against either party." *Pettis v. Warren*, 1 Kirby 426, 427 (Conn.Super.1788).

II

The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, *ibid.*, the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex v. Almon*, 5 Burr. 2687, 98 Eng. Rep. 411 (K.B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B.). [1]

At the time of the founding, the States took mixed approaches to this issue. See *Cluggage v. Swan*, 4 Binn. 150, 156 (Pa.1811) (opinion of Yeates, J.) ("The opinions of *American* judges ... have greatly differed on the point in question"); *Bishop v. Georgia*, 9 Ga. 121, 126 (1850) (describing the common law in 1776 on this question as "in a *transition* state"). Many States followed ***873** Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, *e.g., Brewster v. Thompson*, 1 N.J.L. 32 (1790) (*per curiam*); *Robbins v. Windover*, 2 Tyl. 11, 14 (Vt.1802); *Taylor v. Giger*, 3 Ky. 586, 597–598 (1808); *Price v. McIlvain*, 2 Tread. 503, 504 (S.C. 1815); *Tyler v. Stevens*, 4 N.H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct

STANDING COMMITTEE 045

of the jury ... and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, *e.g.*, *Crawford v. State*, 10 Tenn. 60, 68 (1821); *Cochran v. Street*, 1 Va. 79, 81 (1792). And others initially permitted such evidence but quickly reversed course. Compare, *e.g.*, *Smith v. Cheetham*, 3 Cai. R. 57, 59–60 (N.Y.1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana v. Tucker*, 4 Johns. 487, 488–489 (N.Y.1809) (*per curiam*) (overturning *Cheetham*); compare also *Bradley's Lessee v. Bradley*, 4 Dall. 112, 1 L.Ed. 763 (1792) (permitting juror affidavits), with, *e.g.*, *Cluggage, supra*, at 156–158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge v. Northrop*, 1 Root 522 (Conn.1793) (admitting juror testimony), with *State v. Freeman*, 5 Conn. 348, 350–352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").

By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge–Jury Relations in Early–Nineteenth Century America, 71 Notre Dame L. Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at Common Law § 2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury § 408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, *e.g.*, *Bull v. Commonwealth*, 55 Va. 613, 627–628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker v. Town Council of South Kingstown*, 5 R.I. 558, 560 (1859) (collecting cases); *State v. Coupenhaver*, 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict"); *Peck v. Brewer*, 48 Ill. 54, 63 (1868) ("So far back as ... 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron v. Gallupe*, 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of ... jurors as to what transpired in the jury room"); *Withers v. Fiscus*, 40 Ind. 131, 131–132 (1872) ("In the United States it seems to be settled, notwithstanding a few adjudications to the contrary ..., that such affidavits cannot be received"). [2]

***874** The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," *ante*, at 863, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story § 1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Bourne diene v. Bush*, 553 U.S. 723, 832–833, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting).

* * *

Perhaps good reasons exist to curtail or abandon the no-impeachment rule. Some States have done so, see Appendix to majority opinion, *ante*, and others have not. Ultimately, that question is not for us to decide. It should be left to the political process described by Justice ALITO. See *post*, at 876 – 878 (dissenting opinion). In its attempt to stimulate a "thoughtful, rational dialogue" on race relations, *ante*, at 871, the Court today ends the political process and imposes a uniform, national rule. The Constitution does not require such a rule. Neither should we.

I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples.

STANDING COMMITTEE 046

See *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in ***875** court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution. This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding.

The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias [1]—is uniquely harmful to our criminal justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

I

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they pre-date the ratification of the Constitution. They are typically traced back to *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785), in which Lord Mansfield declined to consider an affidavit from two jurors who claimed that the jury had reached its verdict by lot. See *Warger v. Shauers*, 574 U.S. ——, ——, 135 S.Ct. 521, 525–526, 190 L.Ed.2d 422 (2014). Lord Mansfield's approach "soon took root in the United States," *ibid.*, and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); see 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 431 (2d ed. 2007) (Wright & Gold) (noting that the Mansfield approach "came to be accepted in almost all states").

STANDING COMMITTEE 047

In *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), this Court adopted a strict no-impeachment rule for ***876** cases in federal court. *McDonald* involved allegations that the jury had entered a quotient verdict —that is, that it had calculated a damages award by taking the average of the jurors' suggestions. *Id.*, at 265–266, 35 S.Ct. 783. The Court held that evidence of this misconduct could not be used. *Id.*, at 269, 35 S.Ct. 783. It applied what it said was "unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." *Ibid.* The Court recognized that the defendant had a powerful interest in demonstrating that the jury had "adopted an arbitrary and unjust method in arriving at their verdict." *Id.*, at 267, 35 S.Ct. 783. "But," the Court warned, "let it once be established that verdicts ... can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *Ibid.* This would lead to "harass[ment]" of jurors and "the destruction of all frankness and freedom of discussion and conference." *Id.*, at 267–268, 35 S.Ct. 783. Ultimately, even though the no-impeachment rule "may often exclude the only possible evidence of misconduct," relaxing the rule "would open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268, 35 S.Ct. 783 (internal quotation marks omitted).

The firm no-impeachment approach taken in *McDonald* came to be known as "the federal rule." This approach categorically bars testimony about jury deliberations, except where it is offered to demonstrate that the jury was subjected to an extraneous influence (for example, an attempt to bribe a juror). *Warger, supra,* at 876, 135 S.Ct., at 526; *Tanner, supra,* at 117, 107 S.Ct. 2739;[2] see 27 Wright & Gold § 6071, at 432–433.

Some jurisdictions, notably Iowa, adopted a more permissive rule. Under the Iowa rule, jurors were generally permitted to testify about any subject except their "subjective intentions and thought processes in reaching a verdict." *Warger, supra,* at 864, 135 S.Ct., at 526. Accordingly, the Iowa rule allowed jurors to "testify as to events or conditions which might have improperly influenced the verdict, even if these took place during deliberations within the jury room." 27 Wright & Gold § 6071, at 432.

Debate between proponents of the federal rule and the Iowa rule emerged during the framing and adoption of Federal Rule of Evidence 606(b). Both sides had their supporters. The contending arguments were heard and considered, and in the end the strict federal approach was retained.

An early draft of the Advisory Committee on the Federal Rules of Evidence included a version of the Iowa rule, 51 F.R.D. 315, 387–388 (1971). That draft was forcefully criticized, however,[3] and the ***877** Committee ultimately produced a revised draft that retained the well-established federal approach. *Tanner, supra,* at 122, 107 S.Ct. 2739; see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates 73 (Oct. 1971). Expressly repudiating the Iowa rule, the new draft provided that jurors generally could not testify "as to any matter or statement occurring during the course of the jury's deliberations." *Ibid.* This new version was approved by the Judicial Conference and sent to this Court, which adopted the rule and referred it to Congress. 56 F.R.D. 183, 265–266 (1972).

Initially, the House rejected this Court's version of Rule 606(b) and instead reverted to the earlier (and narrower) Advisory Committee draft. *Tanner, supra,* at 123, 107 S.Ct. 2739; see H.R.Rep. No. 93–650, pp. 9–10 (1973) (criticizing the Supreme Court draft for preventing jurors from testifying about "quotient verdict[s]" and other "irregularities which occurred in the jury room"). In the Senate, however, the Judiciary Committee favored this Court's rule. The Committee Report observed that the House draft broke with "long-accepted Federal law" by allowing verdicts to be "challenge[d] on the basis of what happened during the jury's internal deliberations." S.Rep. No. 93–1277, p. 13 (1974) (S. Rep.). In the view of the Senate Committee, the House rule would have "permit[ted] the harassment of former jurors" as well as "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.*, at 14. This result would have undermined the finality of verdicts, violated "common fairness," and prevented jurors from "function[ing] effectively." *Ibid.* The Senate rejected the House version of the rule and returned to the Court's rule. A Conference Committee adopted the Senate version, see H.R. Conf. Rep. No. 93–1597, p. 8 (1974), and this version was passed by both Houses and was signed into law by the President.

As this summary shows, the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned democratic rulemaking. The "distinguished, Supreme Court-appointed" members of the Advisory Committee went through a 7–year drafting process, "produced two well-circulated drafts," and "considered numerous comments from persons involved in nearly every area of court-related law." Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L.J. 125 (1973). The work of the Committee was considered and approved by the experienced appellate and trial judges serving on the Judicial Conference and by our predecessors on this Court. After that, the matter went to Congress, which "specifically understood, considered, and rejected a version of [the rule] that would have allowed jurors to testify on juror conduct during deliberations." *Tanner*, 483 U.S., at 125, 107 S.Ct. 2739. The judgment of all these participants in the process, which was informed by their assessment of an empirical issue, *i.e.*, the effect that the competing Iowa rule would have had on the jury system, is entitled to great respect.

Colorado considered this same question, made the same judgment as the participants in the federal process, and adopted a very similar rule. In doing so, it joined ***878** the overwhelming majority of States. *Ante*, at 864 – 865. In the great majority of jurisdictions, strong no-impeachment rules continue to be "viewed as both promoting the finality of verdicts and insulating the jury from outside influences." *Warger*, 574 U.S., at ——, 135 S.Ct., at 526.

II

A

Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. 483 U.S., at 109–110, 112–113, 107 S.Ct. 2739. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks ... causing them to sleep through the afternoons." *Id.*, at 113, 107 S.Ct. 2739. The second added that jurors also smoked marijuana and ingested cocaine during the trial. *Id.*, at 115–116, 107 S.Ct. 2739. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b). *Id.*, at 127, 107 S.Ct. 2739.

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." *Id.*, at 119, 107 S.Ct. 2739. While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear ... that the jury system could survive such efforts to perfect it." *Id.*, at 120, 107 S.Ct. 2739. Allowing such post-verdict inquiries would "seriously disrupt the finality of the process." *Ibid.* It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.*, at 120–121, 107 S.Ct. 2739.

The *Tanner* petitioners, of course, had a Sixth Amendment right "to 'a tribunal both impartial and mentally competent to afford a hearing.' " *Id.*, at 126, 107 S.Ct. 2739 (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)). The question, however, was whether they also had a right to an evidentiary hearing featuring "one particular kind of evidence inadmissible under the Federal Rules." 483 U.S., at 126–127, 107 S.Ct. 2739. Turning to that question, the Court noted again that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.*, at 127, 107 S.Ct. 2739. By contrast, "[p]etitioners' Sixth Amendment interests in an unimpaired jury ... [were] protected by several aspects of the trial process." *Ibid.*

The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire*." *Ibid.* Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." *Ibid.* Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Ibid.* And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* These "other sources of protection of petitioners' right to a competent

STANDING COMMITTEE 049

jury" convinced the Court that the juror testimony was properly excluded. *Ibid.*

Warger involved a negligence suit arising from a motorcycle crash. 574 U.S., at ——, 135 S.Ct., at 524. During *voir dire,* ***879** the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. *Id.,* at ——, 135 S.Ct., at 524–525. After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. *Ibid.*

In seeking to use this testimony to overturn the jury's verdict, the plaintiff's primary contention was that Rule 606(b) does not apply to evidence concerning a juror's alleged misrepresentations during *voir dire*. If otherwise interpreted, the plaintiff maintained, the rule would threaten his right to trial by an impartial jury.[4] The Court disagreed, in part because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.,* at ——, 135 S.Ct., at 529. The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: pre-verdict reports by the jurors and non-juror evidence. 574 U.S., at ——, 135 S.Ct., at 529.

Tanner and *Warger* fit neatly into this Court's broader jurisprudence concerning the constitutionality of evidence rules. As the Court has explained, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks and alteration omitted). Thus, evidence rules of this sort have been invalidated only if they "serve no legitimate purpose or ... are disproportionate to the ends that they are asserted to promote." *Id.,* at 326, 126 S.Ct. 1727. *Tanner* and *Warger* recognized that Rule 606(b) serves vital purposes and does not impose a disproportionate burden on the jury trial right.

Today, for the first time, the Court creates a constitutional exception to no-impeachment rules. Specifically, the Court holds that no-impeachment rules violate the Sixth Amendment to the extent that they preclude courts from considering evidence of a juror's racially biased comments. *Ante,* at 869. The Court attempts to distinguish *Tanner* and *Warger*, but its efforts fail.

Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

B

As noted above, *Tanner* identified four "aspects of the trial process" that protect a defendant's Sixth Amendment rights: (1) *voir dire* ; (2) observation by the court, counsel, and court personnel; (3) pre-verdict reports by the jurors; and (4) non-juror evidence. ***880** 483 U.S., at 127, 107 S.Ct. 2739.[5] Although the Court insists that that these mechanisms "may be compromised" in cases involving allegations of racial bias, it addresses only two of them and fails to make a sustained argument about either. *Ante,* at 868 – 869.

1

First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because pointed questioning about racial attitudes may highlight racial issues and thereby exacerbate prejudice. *Ibid.* It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors[6] in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors.[7] Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions.[8] And of course, if an attorney

STANDING COMMITTEE 050

is concerned that a juror is concealing bias, a peremptory strike may be used. [9]

***881** The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it. See *Turner v. Murray*, 476 U.S. 28, 36–37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Rosales–Lopez v. United States*, 451 U.S. 182, 192, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion); *Ristaino v. Ross*, 424 U.S. 589, 597, n. 9, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). If *voir dire* were not useful in identifying racial prejudice, those decisions would be pointless. Cf. *Turner*, *supra*, at 36, 106 S.Ct. 1683 (plurality opinion) (noting "the ease with which [the] risk [of racial bias] could have been minimized" through *voir dire*). Even the majority recognizes the "advantages of careful *voir dire* " as a "proces[s] designed to prevent racial bias in jury deliberations." *Ante*, at 871. And reported decisions substantiate that *voir dire* can be effective in this regard. *E.g.*, *Brewer v. Marshall*, 119 F.3d 993, 995–996 (C.A.1 1997); *United States v. Hasting*, 739 F.2d 1269, 1271 (C.A.7 1984); *People v. Harlan*, 8 P.3d 448, 500 (Colo.2000); see Brief for Respondent 23–24, n. 7 (listing additional cases). Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.

In any event, the critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard. [10]

2

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." ***882** *Ante*, at 869. This is so, we are told, because it is difficult to "call [another juror] a bigot." *Ibid.* Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. See, *e.g.*, *United States v. McClinton*, 135 F.3d 1178, 1184–1185 (C.A.7 1998); *United States v. Heller*, 785 F.2d 1524, 1525–1529 (C.A.11 1986); *Tavares v. Holbrook*, 779 F.2d 1, 1–3 (C.A.1 1985) (Breyer, J.); see Brief for Respondent 31–32, n. 10; Brief for United States as *Amicus Curiae* 31. And the Court marshals no evidence that such pre-deliberation reporting is rarer than the post-verdict variety.

Even if there is something to the distinction that the Court makes between pre- and post-verdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because post-verdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is initially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, co-workers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*. Indeed, the majority itself uses hedged language and appears to recognize that this "pragmatic" argument is something of a makeweight. *Ante*, at 868 – 869 (noting that the argument is "not dispositive"); *ante*, at 869 (stating that the operation of the safeguards "may be compromised, or they may prove insufficient").

III

STANDING COMMITTEE 051

A

The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. What the Sixth Amendment protects is the right to an "impartial jury." Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." 350 P.3d 287, 293 (2015). [11]

***883** Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias. The Court points to a line of cases holding that, in some narrow circumstances, the Constitution requires trial courts to conduct *voir dire* on the subject of race. Those decisions, however, were not based on a ranking of types of partiality but on the Court's conclusion that in certain cases racial bias was especially likely. See *Turner*, 476 U.S., at 38, n. 12, 106 S.Ct. 1683 (plurality opinion) (requiring *voir dire* on the subject of race where there is "a particularly compelling need to inquire into racial prejudice" because of a qualitatively higher "risk of racial bias"); *Ristaino*, 424 U.S., at 596, 96 S.Ct. 1017 (explaining that the requirement applies only if there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]"). [12] Thus, this line of cases does not advance the majority's argument.

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." *Ante*, at 868. But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. The Court's efforts to reconcile its decision with *McDonald*, *Tanner*, and *Warger* illustrate the problem. The Court writes that the misconduct in those cases, while "troubling and unacceptable," was "anomalous." *Ante*, at 868. By contrast, racial bias, the Court says, is a "familiar and recurring evil" that causes "systemic injury to the administration of justice." *Ante*, at 868.

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

This disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

B

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin [13] or religion [14]—would merit equal treatment. So, I think, would ***884** bias based on sex, *United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), or the exercise of the First Amendment right to freedom of expression or association. See *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

Attempting to limit the damage worked by its decision, the Court says that only "clear" expressions of bias must be admitted, *ante*, at 883, but judging whether a statement is sufficiently "clear" will often not be easy. Suppose that the allegedly biased juror in this case never made reference to **Peña–Rodriguez's** race or national origin but said that

STANDING COMMITTEE 052

he had a lot of experience with "this macho type" and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that "this macho type" was meant to refer to Mexican or Hispanic men. Many other similarly suggestive statements can easily be imagined, and under today's decision it will be difficult for judges to discern the dividing line between those that are "clear[ly]" based on racial or ethnic bias and those that are at least somewhat ambiguous.

IV

Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank discussion in the jury room." 483 U.S., at 120–121, 107 S.Ct. 2739; see also *McDonald*, 238 U.S., at 267–268, 35 S.Ct. 783 (warning that the use of juror testimony about misconduct during deliberations would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference"). Or, as the Senate Report put it: "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep., at 14.

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion. [15]

***885** Where post-verdict approaches are permitted or occur, there is almost certain to be an increase in harassment, arm-twisting, and outright coercion. See *McDonald*, *supra*, at 267, 35 S.Ct. 783; S. Rep., at 14 (explaining that a laxer rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors"); 350 P.3d, at 293. As one treatise explains, "[a] juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know." 3 C. Mueller & L. Kirkpatrick, Federal Evidence § 6:16, p. 75 (4th ed. 2013).

The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." S. Rep., at 14. And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process." *Tanner*, *supra*, at 120, 107 S.Ct. 2739. This threatens to "degrad[e] the prominence of the trial itself" and to send the message that juror misconduct need not be dealt with promptly. *Engle v. Isaac*, 456 U.S. 107, 127, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). See H.R. Conf. Rep. No. 93–1597, at 8 ("The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations").

The Court itself acknowledges that strict no-impeachment rules "promot[e] full and vigorous discussion," protect jurors from "be[ing] harassed or annoyed by litigants seeking to challenge the verdict," and "giv[e] stability and finality to verdicts." *Ante*, at 865. By the majority's own logic, then, imposing exceptions on no-impeachment rules will tend to defeat full and vigorous discussion, expose jurors to harassment, and deprive verdicts of stability.

The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." *Ante*, at 870. One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

In short, the majority barely bothers to engage with the policy issues implicated by no-impeachment rules. But

STANDING COMMITTEE 053

even if it had carefully grappled with those issues, it still would have no basis for exalting its own judgment over that of the many expert policymakers who have endorsed broad no-impeachment rules.

V

The Court's decision is well-intentioned. It seeks to remedy a flaw in the jury trial system, but as this Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it. *Tanner*, 483 U.S., at 120, 107 S.Ct. 2739.

I respectfully dissent.

***886** APPENDIX

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N.D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum. Supp. 2016) (juror communication with nonjuror); see also 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 447, and n. 66 (2d ed. 2007); *id.*, at 451, and n. 70; *id.*, at 452, and n. 72.

Judicially Recognized Exceptions for Evidence of Racial Bias

See *State v. Santiago*, 245 Conn. 301, 323–340, 715 A.2d 1, 14–22 (1998); *Kittle v. United States*, 65 A.3d 1144, 1154–1156 (D.C.2013); *Fisher v. State*, 690 A.2d 917, 919–921, and n. 4 (Del.1996) (Appendix to opinion), *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 357–358 (Fla.1995); *Spencer v. State*, 260 Ga. 640, 643–644, 398 S.E.2d 179, 184–185 (1990); *State v. Jackson*, 81 Hawai'i 39, 48–49, 912 P.2d 71, 80–81 (1996); *Commonwealth v. Laguer*, 410 Mass. 89, 97–98, 571 N.E.2d 371, 376 (1991); *State v. Callender*, 297 N.W.2d 744, 746 (Minn.1980); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87–90 (Mo.2010); *State v. Levitt*, 36 N.J. 266, 271–273, 176 A.2d 465, 467–468 (1961); *People v. Rukaj*, 123 App.Div.2d 277, 280–281, 506 N.Y.S.2d 677, 679–680 (1986); *State v. Hidanovic*, 2008 ND 66, ¶¶ 21–26, 747 N.W.2d 463, 472–474; *State v. Brown*, 62 A.3d 1099, 1110 (R.I.2013); *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995); *Seattle v. Jackson*, 70 Wash.2d 733, 738, 425 P.2d 385, 389 (1967); *After Hour Welding, Inc. v. Laneil Management Co.*, 108 Wis.2d 734, 739–740, 324 N.W.2d 686, 690 (1982).

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only "with great caution." *McDonald v. Pless*, 238 U.S. 264, 268, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); see, *e.g.*, *Dent v. The Hundred of Hertford*, 2 Salk. 645, 91 Eng. Rep. 546 (K.B. 1696); *Philips v. Fowler*, Barnes. 441, 94 Eng. Rep. 994 (K.B. 1735). But "previous to our Revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since." 3 T. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal 1429 (1855).

2 Although two States declined to follow the rule in the mid–19th century, see *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866); *Perry v. Bailey*, 12 Kan. 539, 544–545 (1874), "most of the state courts" had already "committed themselves upon the subject," 8 Wigmore § 2354, at 702.

STANDING COMMITTEE 054

1 The bias at issue in this case was a "bias against Mexican men." App. 160. This might be described as bias based on national origin or ethnicity. Cf. *Hernandez v. New York,* 500 U.S. 352, 355, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion); *Hernandez v. Texas,* 347 U.S. 475, 479, 74 S.Ct. 667, 98 L.Ed. 866 (1954). However, no party has suggested that these distinctions make a substantive difference in this case.

2 As this Court has explained, the extraneous influence exception "do[es] not detract from, but rather harmonize[s] with, the weighty government interest in insulating the jury's deliberative process." *Tanner,* 483 U.S., at 120, 107 S.Ct. 2739. The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference. *Ibid.*

3 In particular, the Justice Department observed that "[s]trong policy considerations continue to support" the federal approach and that "[r]ecent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict." Letter from R. Kliendienst, Deputy Attorney General, to Judge A. Maris (Aug. 9, 1971), 117 Cong. Rec. 33648, 33655 (1971). And Senator McClellan, an influential member of the Senate Judiciary Committee, insisted that the "mischief in this Rule ought to be plain for all to see" and that it would be impossible "to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations." Letter from Sen. J. McClellan to Judge A. Maris (Aug. 12, 1971), *id.,* at 33642, 33645.

4 Although *Warger* was a civil case, we wrote that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." 574 U.S., at ——, 135 S.Ct., at 528.

5 The majority opinion in this case identifies a fifth mechanism: jury instructions. It observes that, by explaining the jurors' responsibilities, appropriate jury instructions can promote "[p]robing and thoughtful deliberation," which in turn "improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases." *Ante,* at 871. This mechanism, like those listed in *Tanner,* can help to prevent bias from infecting a verdict.

6 Both of those techniques were used in this case for other purposes. App. 13–14; Tr. 56–78 (Feb. 23, 2010, morning session).

7 See *People v. Harlan,* 8 P.3d 448, 500 (Colo.2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire"); *Brewer* v. *Marshall,* 119 F.3d 993, 996 (C.A.1 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin"); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 22.3(a), p. 92 (4th ed.2015) (noting that "[j]udges commonly allow jurors to approach the bench and discuss sensitive matters there" and are also free to conduct "in chambers discussions").

8 See, *e.g.,* J. Gobert, E. Kreitzberg, & C. Rose, Jury Selection: The Law, Art, and Science of Selecting a Jury § 7:41, pp. 357–358 (3d ed. 2014) (explaining that "the issue should be approached more indirectly" and suggesting the use of "[o]pen-ended questions" on subjects like "the composition of the neighborhood in which the juror lives, the juror's relationship with co-workers or neighbors of different races, or the juror's past experiences with persons of other races"); W. Jordan, Jury Selection § 8.11, p. 237 (1980) (explaining that "the whole matter of prejudice" should be approached "delicately and cautiously" and giving an example of an indirect question that avoids the word "prejudice"); R. Wenke, The Art of Selecting a Jury 67 (1979) (discussing questions that could identify biased jurors when "your client is a member of a minority group"); *id.,* at 66 (suggesting that instead of "asking a juror if he is 'prejudiced' " the attorney should "inquire about his 'feeling,' 'belief' or 'opinion' "); 2 National Jury Project, Inc., Jurywork: Systematic Techniques § 17.23 (E. Krauss ed., 2d ed. 2010) (listing sample questions about racial prejudice); A. Grine & E. Coward, Raising Issues of Race in North Carolina Criminal Cases, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (as last visited Mar. 3, 2017); *id.,* at 8–15 to 8–17 (suggesting additional strategies and providing sample questions); T. Mauet, Trial Techniques 44 (8th ed. 2010) (suggesting that "likely beliefs and attitudes are more accurately learned through indirection"); J. Lieberman & B. Sales, Scientific Jury Selection 114–115 (2007) (discussing research suggesting that "participants were more likely to admit they were unable to abide by legal due process guarantees when asked open-ended questions that did not direct their responses").

9 To the extent race does become salient during *voir dire,* there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases. See, *e.g.,* Lee, A New Approach to *Voir Dire* on Racial Bias, 5 U.C. Irvine L. Rev. 843, 861 (2015) ("A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way"). See also Sommers & Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7

Psychology, Pub. Pol'y, & L. 201, 222 (2001); Sommers & Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L.Rev. 997, 1013–1014, 1027 (2003); Schuller, Kazoleas, & Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 Law & Human Behavior 320, 326 (2009); Cohn, Bucolo, Pride, & Somers, Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. Applied Soc. Psychology 1953, 1964–1965 (2009).

10 It is worth noting that, even if *voir dire* were entirely ineffective at detecting racial bias (a proposition no one defends), that still would not suffice to distinguish this case from *Warger v. Shauers,* 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014). After all, the allegation in *Warger* was that the foreperson had entirely circumvented *voir dire* by lying in order to shield her bias. The Court, nevertheless, concluded that even where "jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured" through other means. *Id.,* at ——, 135 S.Ct., at 529.

11 The majority's reliance on footnote 3 of *Warger*, *ante,* at 866 – 867, is unavailing. In that footnote, the Court noted that some "cases of juror bias" might be "so extreme" as to prompt the Court to "*consider* whether the usual safeguards are or are not sufficient to protect the integrity of the process." 574 U.S., at 866, n. 3, 135 S.Ct., at 529, n. 3 (emphasis added). Considering this question is very different from adopting a constitutionally based exception to long-established no-impeachment rules.

12 In addition, those cases did not involve a challenge to a long-established evidence rule. As such, they offer little guidance in performing the analysis required by this case.

13 See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

14 See, *e.g., United States v. Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); *Burlington Northern R. Co. v. Ford,* 504 U.S. 648, 651, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992); *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (*per curiam*).

15 The majority's emphasis on the unique harms of racial bias will not succeed at cabining the novel exception to no-impeachment rules, but it may succeed at putting other kinds of rules under threat. For example, the majority approvingly refers to the widespread rules limiting attorneys' contact with jurors. *Ante,* at 883. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias. For instance, what will happen when a lawyer obtains clear evidence of racist statements by contacting jurors in violation of a local rule? (Something similar happened in *Tanner.* 483 U.S., at 126, 107 S.Ct. 2739.) It remains to be seen whether rules of this type—or other rules which exclude probative evidence, such as evidentiary privileges—will be allowed to stand in the way of the "imperative to purge racial prejudice from the administration of justice." *Ante,* at 867.

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

REPORT AND RECOMMENDATIONS CONCERNING THE AMERICAN BAR ASSOCIATION ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT

December 30, 2005

> 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.

The Standing Committee recommends adoption of New Model Rule 3.4 with changes to reflect the prohibition in criminal cases on advising a witness to refrain from giving information relating to the matter. The Committee also recommends adoption of the Comment to the New Model Rule, with the amendments to Paragraphs [3] and [4] as set forth above.

Rule 3.5 - Impartiality and Decorum of the Tribunal

Current Colorado Rule 3.5 and its Comment are identical to the Prior Model Rule and Comment. New Model Rule 3.5 narrows the prohibition against ex parte communications with a tribunal to the time "during the proceeding." It also recognizes an exception for communications permitted by "court order," and adds a new section (c) concerning communications with a juror or prospective juror after discharge of the jury. The ABA revised the Comment to expand upon these new provisions in the New Model Rule, and to clarify that the preexisting duty to refrain from conduct intended to disrupt a tribunal applies to depositions.

The Ad Hoc Committee recommended a change to New Model Rule 3.5(c) to impose additional restrictions upon lawyers' contacts with jurors. The Standing Committee agrees that additional restrictions upon juror contacts are necessary but does not agree with the language proposed by the Ad Hoc Committee. The Standing Committee recommends adoption of a new section (c)(4) that would prohibit communications with a juror or prospective juror after discharge of the jury if "the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts."

The Standing Committee debated at length whether *Stewart v. Rice*, 47 P.3d 316 (Colo. 2002), requires additional prohibitory provisions in Rule 3.5. Dictum in that case may stand for the proposition that it is unethical for a lawyer to communicate (directly or through an agent) with a juror, for the purpose of obtaining evidence to impeach a jury's verdict where the evidence obtained is not admissible under C.R.E. 606(b). A minority of the Standing Committee recommended a new section (c)(5) that would prohibit juror communications where "the communication is for the purpose of soliciting juror testimony, affidavits, or statements to impeach the verdict without a basis under Rule 606(b) of the Colorado Rules of Evidence." A different minority suggested that in addition to, or in lieu of, proposed section (c)(5), quoted above, a new section (c)(6) should prohibit juror communications when "the lawyer or the lawyer's

agent does not inform the juror, at the onset of the communication, that any information provided by the juror may be presented to the court for purposes of setting aside the jury's verdict."

The majority of the Standing Committee rejected both of these minority proposals for several reasons. *First*, it will be difficult, if not impossible, to determine at the outset whether the purpose of the lawyer's communication was to obtain evidence that would be admissible under C.R.E. 606(b) or whether the lawyer was engaging in juror harassment to seek to uncover inadmissible information. *Second*, the Court has rejected an outright ban on juror communications, based on the belief that there is value to communications between lawyers and jurors. (Other courts, including the United States District Court for the District of Colorado, have prohibited all juror contacts without a court order.) Yet, a requirement of a disclaimer, as in proposed section (c)(6), will effectively quash juror communications and is tantamount to a rule that such communications may not occur without a specific court order. If the Court decides to ban juror contacts, then it should enact that ban directly, rather than indirectly through a disclaimer requirement.

The Standing Committee recommends adoption of New Model Rule 3.5 with the addition of a new section (c)(4) as set forth above. The Committee recommends adoption of the Comment in its entirety.

From the Supreme Court's website, posted on June 6, 2017:

Proposed Rule Changes

Notice of Public Hearing and Request for Comments

Rules Governing Professional Conduct, Rule 8.4

Deadline for Comments: September 8, 2017 at 5:00 p.m.

Hearing to be held on September 21, 2017 at 1:30 p.m.

The Colorado Supreme Court will conduct a hearing on a proposed rule change to the Colorado Rules of Professional Conduct, Rule 8.4. The hearing will occur on September 21, 2017 at 1:30 p.m. in the Colorado Supreme Court Courtroom, 2 East 14th Avenue, 4th Floor, Denver, Colorado 80203.

The Court also requests written public comments by any interested person on the proposed rule change. Written comments should be submitted to Cheryl Stevens, Chief Deputy Clerk of the Supreme Court. Comments may be mailed or delivered to 2 East 14th Avenue, Denver, CO 80203 or emailed to cheryl.stevens@judicial.state.co.us ***no later than*** **5:00 p.m. on September 8, 2017**. Persons wishing to participate at the hearing should notify Ms. Stevens ***no later than*** **Monday, September 18th at 5 p.m.**. The Clerk of the Court will post written comments on the Colorado Supreme Court's website.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (b) [NO CHANGE]

(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;

(d) – (h) [NO CHANGE]

COMMENT

[NO CHANGE]

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (b) [NO CHANGE]

(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;

(d) – (h) [NO CHANGE]

COMMENT

[NO CHANGE]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

The Chair noted that the Court adopted the minority report to the Committee's proposal to amend Rule 1.5(b) to deal with mid-stream modifications to lawyers' fee agreements. She noted that the Court's deletion of Comment [3A] is not obvious from the presentation of the Court's action on its website,[15] which reports that there are no changes to Comments [1] through [3] and no changes to Comments [4] through [18] and thereby merely implies that Comment [3A] has been deleted. But the Chair confirmed that the Court *did* delete Comment [3A] in its entirety, and another member added that Westlaw has reported the amendments to reflect that deletion.

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

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

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

At the Chair's request, and in the absence of the designated subcommittee's chair, Judge Webb, Alexander Rothrock reported to the Committee on the subcommittee's further consideration of the interplay between amended Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC") and Rule 3.5 of the Colorado Rules of Professional Conduct ("CRPC"), which had first been discussed by the full Committee at its Twenty-Ninth Meeting, on January 1, 2011.[16]

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

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

Rothrock then recounted the Committee's deliberations, at its Twenty-Ninth Meeting, about lawyers' *ex parte* communications with judges under CRPC Rule 3.5 and judges' *ex parte* communications with lawyers under CJC Rule 2.9.[17] At that meeting, the Committee had been informed that, although the Code of Judicial Conduct permits judges to engage in certain *ex parte* communications with lawyers, there is no corresponding provision in the Rules of Professional Conduct permitting lawyers to participate in those same communications. But, at its Twenty-Ninth Meeting, the Committee had rejected the proposal of the subcommittee that language matching CJC Rule 2.9 be added to CRPC Rule 3.5(b).

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

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

17. CJC Rule 2.9 provides in part as follows:

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

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

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

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

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

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

3. The subcommittee would revise Comment [2] to CRPC Rule 3.5 to refer both to CJC Rule 2.9(A)(1)[18] and to CJC Rule 2.9(A)(4)[19] as examples of *ex parte* communications that are permitted to the judge and thus are permitted also to the lawyer under CRPC Rule 3.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A member who represents lawyers in discipline cases described one such case that he was currently involved in. A young lawyer had been party to an *ex parte* communication initiated by a judge

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

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

A member noted that every lawyer has an obligation, under CRPC Rule 8.3(b), to report judges' misconduct to "the appropriate authority." In her view, the Committee should not propose a rule that addresses an egregious situation but does not provide an answer to the general circumstance. As the rule now reads, it permits *ex parte* communications that are "authorized by law or court order";[20] thus, because the Code of Judicial Conduct is such a "law," CRPC Rule 3.5 as currently stated already permits to the lawyer all of the communications that CJC Rule 2.9 permits to the judge. Given that this is model language from the Model Rules of Professional Conduct, she cautioned that the Committee should not willy-nilly amend the provision.

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

Another member said he was equally uncomfortable with telling the judge to stop, But, he noted, if we don't impose that obligation on the lawyer, we are left with only the reporting duty of CRPC

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

Rule 8.3(b). He recalled a case from years ago involving a judge who regularly gave a district attorney a ride to the courthouse and who, on one occasion, gave the district attorney advice on how to handle a case. The district attorney did report the judge under the applicable ethics rule and the particular case was assigned to a different judge. This member summarized that example as follows: Either you cut off the judge in mid-sentence, or you report him pursuant to CRPC Rule 8.3(b); cutting him off in mid-sentence is the easier thing to do, and that is what the subcommittee is proposing.

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

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

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

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

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

Another member noted that the full Committee needed to provide the subcommittee with some direction. He commented that everyone seems to accept the concept that *ex parte* communications about "procedural" matters are okay, such as the setting of dates for hearings, while all substantiative *ex parte* communications should be proscribed. He ask why we could not simply work that procedural / substantive distinction into the words of CRPC Rule 3.5.

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

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

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

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

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

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

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

A member asked whether the text of CJC Rule 2.9(A)(1) was the model language that was promulgated by the ABA. The member who had participated in that process was not sure whether it was identical; he thought that there may have been public comment in the Colorado process seeking a broadening of the judge's authority for *ex parte* communications.[21]

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

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

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

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

A member noted that the reference in CRPC Rule 4.2[22] to a lawyer's *ex parte* communications with a represented party is parallel to the principle in CRPC Rule 3.5. Under CRPC Rule 4.2, the lawyer must not engage in such a communication unless specifically permitted to do so, and the comment makes clear that the lawyer must "immediately terminate" a communication that has begun if he learns that it is proscribed under the rule. The member admitted that there might be differences between communications with someone else's client and communications with a judge, but he saw parallels as well.

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

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

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

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

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

> (b) [A lawyer shall not] communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order~~, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct~~;

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22. Rule 4.2 reads in part as follows:

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

Comment [3] provides—

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

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

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

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

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

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

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

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

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

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

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

STANDING COMMITTEE 073

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The motion was approved.

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

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

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

For the subcommittee that has been tasked with considering the request of the Intellectual Property Section of the Colorado Bar Association that the ethics rules regarding honesty be modified to accommodate "pretexting" to determine whether trademark rights were being violated, Thomas Downey reported that the subcommittee had met twice, at one of which meeting guests from the Intellectual Property Section were in attendance. The subcommittee is getting organized and getting a sense of "the lay of the land," including an understanding of the *Pautler*[23] case and the various rules — in addition to Rule 8.4(c) regarding honesty and Rule 4.2 and Rule 4.3 regarding contact with persons represented by other counsel and with unrepresented persons — that might be applicable to the issue. With regard to Rule 8.4(c) and the strong language found in *Pautler*,[24] Downey said the subcommittee was discussing what, if anything might be done to provide an exception for pretexting. He noted that the subcommittee has sought input from several Federal agencies, from the U.S. Attorney's office, and from the Colorado Attorney General's Office.

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

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

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

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

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

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

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

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

A member commented that Rule 8.4(c) extends all of the ethics rules' proscriptions to a lawyer's use of an agent.[25] But, he said, in practice lawyers have for many years use private investigators "in circumstances that the Rules don't really allow."

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

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

VI. *Adjournment; Next Scheduled Meeting.*

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

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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

[These minutes are as approved by the Committee at its Thirty-First Meeting, on January 6, 2012.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

The thirty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:09 a.m. on Friday, January 6, 2012, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *New Member.*

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

II. *Court Adoption of Rules Amendments.*

The Chair reported that the Colorado Supreme Court adopted an amendment to C.R.C.P. 251.5(b), effective June 16, 2011, making that provision parallel to Rule 8.4(b) in establishing, as grounds for discipline, "[a]ny criminal act [by an attorney[26]] that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." The Committee had recommended that amendment to the Court by action taken at its twenty-eighth meeting, held on August 19, 2010, and the Advisory Committee of the Office of Attorney Regulation had joined in its recommendation.

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

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

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

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

—Secretary

ENCLOSURE 4

STANDING COMMITTEE 079

meeting, on January 1, 2011, and was continued at its thirtieth meeting, on May 6, 2011.[27] The Chair commented that she would not impose any time restriction on the Committee's discussion but that it was time for the Committee to come to a decision on the matter.

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

At its thirtieth meeting on May 6, 2011, the Committee had considered a draft that would revise both Rule 3.5 and its comment; the Committee had returned the matter to the subcommittee with instructions to retain its proposed text for the body of Rule 3.5[28] but to modify the comments Rule 3.5 to—

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

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

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.[29]

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

> [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, ~~unless authorized to do so by law or court order~~, ***subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the***

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

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

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

> A lawyer shall not:
>
> (a) . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, ***or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct. . . .***

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

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

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

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

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

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

A member who has experience as a judge said her view was that, if a lawyer needed to get in touch with her, he could do so by an email that copied all counsel, all of whom could then participate in the resulting telephone conversation. In her view, the subcommittee's proposal accommodated that solution.

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

Rothrock interjected that he thought the subcommittee' proposal unwittingly solved the problem by its statement of the two exceptions to *ex parte* communications: authorization by law and initiation by the judge. The CAPP rules would provide the authorization by law. And the principle stated in Comment [2] — that "[a] judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice" — would provide the initiation required of the judge. Rothrock added that, in his view, the proposal opens communication with the judiciary rather than, as had been suggested, further closing the judges off "from society."

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

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

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

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

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

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

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

Downey began by reminding the Committee that the pretexting subcommittee had been formed at the twenty-ninth meeting, on January 21, 2011 and that it had provided an interim report to the

Committee at the thirtieth meeting, on May 6, 2011. He reported that the subcommittee had met a number of times over the entire year of its existence, and he noted that the names of the participants can be found in the first footnote of the subcommittee's report that had been provided to the Committee in advance of this meeting. He thanked those participants for their incredibly hard work.

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

> direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:
>
> (1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (B) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or
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> (2)(A) [*sic*] the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.[30]

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

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

> [2A] "Covert activity" means an effort to obtain information through the use of misrepresentations or other subterfuge. Whether covert activity is "lawful' will be determined with reference to substantive law, such as search and seizure. However, a lawyer will not be subject to discipline if the lawyer provided direction, advice, or supervision as to the covert activity based on the lawyer's objectively reasonable, good faith belief that the activity was lawful, even if the covert activity is later determined to have been unlawful. The objective reasonableness and good faith of the lawyer's conduct is also determined with reference to substantive law. *See, e.g., Davis v. United States*,_ U.S._, 131 S. Ct. 2419, 2429 (2011); *United States v. Leon*, 468 U.S. 897, 918-22 (1984).
>
> [2B] A lawyer may not participate directly in covert activity. However, Rule 8.4(c) does not limit the application of Rule 1.2(d) (allowing a lawyer to discuss the legal consequences of any proposed criminal or fraudulent conduct with a client or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law).
>
> [2C] A lawyer whose conduct falls within the exception to Rule 8.4(c) does not violate Rule 8.4(a)(knowingly assist or induce another to violate these rules). In all other respects, the lawyer's conduct must comply with these rules. For example, a lawyer who directs, advises, or supervises others in covert activity directed at a person or organization the lawyer knows to be represented in the matter that is the subject of the covert activity may violate Rule 4.2. Further, if a lawyer who has directed, advised, or supervised a person engaging in covert activity learns that such person's conduct has exceeded the limitation in Rule 8.4(c)(1)(A), the lawyer may violate Rule 5.3 by failing to take reasonable remedial action.

of existing Rule 8.4(c) should be limited to government lawyers or, perhaps, even to just criminal prosecutions.

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

Scoville said that the lawyer with an intellectual property practice typically sees a need for pretexting in trademark enforcement cases, and he recalled that the catalyst for the Committee's consideration of pretexting was an inquiry from the Intellectual Property Law Section of the Colorado Bar Association.[31] The intellectual property bar, he said, believes that a lawyer's use of investigators, under proper supervision, is necessary and appropriate to determine whether trademark infringements are occurring. The use of investigators in such cases is a perennial topic at continuing legal education seminars on trademark law, with the tension between the requirement that there be an adequate pre-filing investigation to support an infringement complaint and the limitations imposed by Rule 8.4(c). Many lawyers are of the view, he said, that they may engage investigators to act simply like potential customers, not using complex ruses. But that view is jeopardized by the literal wording of Rule 8.4(c) and by the supreme court's *Pautler*[32] decision; the latter stops a lot of intellectual property lawyers from employing investigators, figuring that, if stopping an axe murderer were not sufficient grounds for an exception to Rule 8.4(c), then working up a proper trademark infringement case would not suffice.

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

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

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

32. 47 P.3d 1175 (Colo. 2002). "[Rule 8.4(c)] and its commentary are devoid of any exception."

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

Id. 47 P.3d at 1182.

counsel.[33] In a case involving pretexting to determine whether blacks were subjected to prepayment obligations that were not imposed on whites, the court took a similar view of the low-level employees who were the targets of the pretexting, finding them to be represented by their company's lawyer for purposes of Rule 4.2.

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

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

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

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

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

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

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

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

conduct amounting to those activities proscribed by Rule 8.4(c). They believe that clarity on the matter would be useful for lawyers engaged in law enforcement.

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

At Downey's request, Rothrock reviewed the treatment of pretexting under similar ethics rules in other states, referring the members to the chart of cases that was included in the materials for the meeting. A seminal case is that of *Apple Corps Limited v. International Collectors Society*,[34] in which defendants, in an effort to fend off citation for contempt of a consent decree regarding use of likenesses of the Beatles, had sought sanctions for plaintiffs' lawyers alleged misconduct in

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

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

> The attorney disciplinary rules prohibit an attorney from engaging in deceitful conduct. RPC 8.4(c) states that an attorney may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." RPC 8.4(c) is not by its terms limited only to material representations. It applies to lawyers not only when they are acting as lawyers but also when they are acting otherwise than in a lawyerly capacity. See David B. Isbell & Lucantonia N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers; An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 816 (1995). However, RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes. *Id.* at 812, 816–18.
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> Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. *Id.* at 792–94. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. *Id.* at 794–795, 800 . . . . The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. . . .
>
> Courts which have addressed the issue have approved of attorneys' use of undercover investigators who pose as interested tenants to detect housing discrimination or as prospective employees to detect employment discrimination. See Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 799; Richardson v. Howard, 712 F.2d 319, 321–22 (7th Cir.1983) (observing that the evidence provided by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to

34. 15 F. Supp 2d 456 (D.N.J. 1998).

defeat racial discrimination); see also Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir.1990); Wharton v. Knefel, 562 F.2d 550, 554 n. 18 (8th Cir.1977); Hamilton v. Miller, 477 F.2d 908, 909 n. 1 (10th Cir.1973).

Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling ICS directly and attempting to order the Sell–Off Stamps. If Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business.

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

As stated by Mr. Isbell and Professor Salvi:

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

Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 817. Accordingly, Plaintiffs' counsel and investigators did not violate RPC 8.4(c).[35]

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

Rothrock noted that, in 2003, Virginia simply modified Rule 8.4(c) to limit its proscriptions to "conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law*," language that is similar to that used in Rule 8.4(b) and, now, in Colorado C.R.C.P. 251.5(b) regarding a criminal act by a lawyer "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Virginia solution has also been adopted in North Dakota and Oregon. The theory, Rothrock explained, is that a lawyer's use of an investigator for

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

undercover activity that involves some deception does not reflect adversely on the lawyer's fitness to practice law; but, he said, the subcommittee dismissed that approach as being too subtle, too uncertain, to be a satisfactory solution.

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

> (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

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

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

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

Downey pointed the members to Part III, captioned "Preliminary Considerations," of the subcommittee's report, contained in the meeting materials. That part manifests that the subcommittee's principal focus to date has been the *Pautler* decision, and its conclusion is that the decision is not a barrier to modification of the rules governing pretexting because the supreme court can by its own amendment of the rules of professional conduct that it promulgates, "overrule" the *Pautler* opinion. Downey pointed out that the court recognized, in footnote 4 of the *Pautler* opinion, that Oregon and Utah permitted governmental deception.[36] Downey commented that, each time he re-reads *Pautler*, he sees that the court was careful to state that it was dealing with the text of Rule 8.4(c) that provided no exceptions to its mandate, in contrast to the text of the rule in some other states, and thereby indicated that it was aware that the text could be modified to permit what was previously prohibited. Downey said the subcommittee sees the *Pautler* decision as a reason for any change to be stated specifically.

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

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

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

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

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

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

While saying he would not get into the details of the subcommittee's proposal, Downey outlined it as adding two exceptions to the existing, proscriptive text of Rule 8.4(c). [See the proposed text of the exceptions on page 5 of these minutes.] For lawyers in private practice, the exception extends only to matters of "background, identification, purpose, or similar information." For government lawyers, the exception includes covert action that is within the scope of the lawyer's duties in the enforcement of law and is purposed to "gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering." By the comments that the subcommittee proposes,[37] it would be made clear that the lawyer may not himself engage in "covert activity" and that conduct that is covered by one of the proposed exceptions to Rule 8.4(c) would not be violative of the proscriptions of Rule 8.4(a) against knowingly assisting or inducing another to violate the Rules of Professional Conduct or doing so oneself through the acts of another.

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

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

The Chair opened the discussion with a question to Downey and the subcommittee participants: Did the subcommittee receive the views of the criminal defense bar? She noted that the chart showing activity in other states was useful, but it only shows where action has been taken to permit some

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

exceptions to the strict proscriptions of Rule 8.4(c) — she wondered whether there were examples of states considering, but then rejecting, change, deciding instead not to accommodate any kind of deception.

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

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

A member commented that there were three possible scenarios: (1) The lawyer directly engages in covert activity; the proposal would continue the prohibition of direct covert activity. (2) the lawyer engages an investigator — is that "direct participation"? The member was not sure but noted the question can be resolve by stating that the client, rather than the lawyer, may make the engagement with the investigator and by stating that the lawyer can suggest such an engagement to the client pursuant to Rule 1.2(d).[38] (3) The lawyer may use or submit evidence that has been obtained by deceptive means by the client or a third person, pursuant to Rule 3.8, which proscribes the use of evidence known to the lawyer to be false but does not proscribe the use of truthful evidence obtained by deception by the client or another person.

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

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

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

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

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38. Rule 1.2(d) states—

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

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

Kirsch noted that, for a Federal lawyer, there was a problem with the proposition that a lawyer might currently be precluded from advising a client to do something the client might lawfully do. The Federal agencies that the Federal lawyer represents are not his clients — he has no supervisory control over those agencies; he cannot make them do anything or refrain from doing anything, although, Kirsch noted, the lawyer can refuse to take their case. Accordingly, in Kirsch's view, Rule 1.2(d) is not apposite. Further, for most investigations to be productive, there must be more than the asking of some questions. There is a building of scenarios, the funding of drug purchases; there is more to it than just telling a "client" to go make an investigation.

Another member who had not previously spoken cautioned that the discussion was conflating rules of evidence with rules of professional conduct. Rule 3.3(b),[39] previously alluded to, deals with taking reasonable remedial measures to adhere to the lawyer's duty to be candid with the court, including correcting errors that have already occurred in the proceeding. But the question before the subcommittee deals with conduct that, under Rule 3.3(d) would, presumably, be disclosed to the court, after which the subject evidence could be admitted. In most cases, by the time of trial — or in the course of the trial — the fact that undercover conduct occurred will necessarily have been disclosed to the court.

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

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

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

A member who had served on the subcommittee and who now characterized herself as a dissenter said she objected to the creation of any exceptions for lawyers in private practice, as distinguished from government lawyers. Although she was not in family law practice herself, she noted that those who are often "take on the mantle of their clients," and she commented that whether particular deception is "lawful" or is to expose threats to civil rights is often in the eyes of the beholder. In her view, Rule 8.4(c) should not be amended to permit any kind of deceptive conduct by lawyers in private practice; she noted that, in saying this, she was ordinarily opposed to variations in the rules that distinguish between

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39. Rule 3.3(b) reads—

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

government and private lawyers. In answer to a member's observation, this member said she was not satisfied that the proposal's requirement that the lawyer have a good faith belief in the efficacy of the covert activity would provide sufficient protection against inappropriate conduct. Lawyers, she said, would view the matter from their clients' perspectives.

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

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

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

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

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

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

Summarizing, the member again noted that this is a slippery slope, and she acknowledged that she felt pretty passionate about the matter. She said, "*Pautler* is clear." She knows, she said, that covert activity sometimes occurs and acknowledged that it can be "a necessary evil" in unusual circumstances. But it is the law enforcement officer who tells the confidential informant how to act, having learned that in school.

Another member suggested that it would be helpful to the Committee to have the defense bar weigh in on the proposal. He agreed that *Pautler* is certainly troublesome when applied to acceptable undercover law enforcement, which is "part and parcel" of law enforcement. He was not aware of any case that ruled against covert activity by the police, as distinguished from the prosecution. He noted that *Pautler* cited the case *People v. Reichman*,[40] a case involving alleged misconduct by the prosecution by the filing of a false indictment for the purpose of rehabilitating the credibility of an undercover officer in the drug-trafficking community. The member explained that the disciplinary case against the prosecutor in *Reichman* had been prosecuted by a special prosecutor, and he suggested that the subcommittee now solicit the views of that lawyer on its proposal. This member noted that he had once served as a prosecutor and knew, from that experience, that prosecutors in fact try to behave ethically and that they rely on "good faith" as a protection against ethical sanctions. He wondered whether *Reichman* would be decided, under the subcommittee's proposal, as it had been decided under the old Code of Professional Responsibility in 1991. *Pautler*, he said, is s strong statement in favor of honesty. The closer one gets to the border, as a lawyer, the more troubling it is. When you are advising an investigator as to the limits of his conduct, when do you become directly involved in that conduct? That can be

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40. 819 P.2d 1035 (Colo.1991). The *Pautler* court explained the *Reichman* decision as follows:

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

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

difficult to determine. The member also noted that, among the citations in *Pautler* is *Chancey*,[41] in which an Illinois disciplinary board reprimanded a prosecutor for dishonesty notwithstanding the purity of his motive in attempting to rescue his own child from a kidnapper.[42] *Pautler* used *Chancey* to stress that motive is not relevant in determining whether a violation of Rule 8.4(c), as written, has occurred. The member pointed out that *Pautler* itself involved a very serious circumstance, a confrontation with a murderer, and that the trial court had heard from other prosecutors who testified that they had personally told fugitives, on the telephone, that they would not prosecute if there was surrender. But the *Pautler* court distinguished those cases, pointing out that, if Pautler had handed the telephone to a policeman, the matter would not have led to discipline. But, instead, Pautler pretended to be a public defender and on the fugitive's side, and thereafter he did not disclose to the fugitive's lawyers, after the surrender, what Pautler had done, thereby damaging the relationship that those lawyers had as defense counsel for the surrendered fugitive.[43]

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

A member raised a couple of questions: First, is the difference between prohibited direct engagement in covert activity and permitted supervision of others' covert activity equal to the difference between instigating such activity and advising others who are already embarked on it? And, second, can

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

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

> In Chancey, a prosecutor with an impeccable reputation drafted a false appellate court order for the sole purpose of deceiving a dangerous felon who had abducted his own child and taken her abroad. Chancey signed a retired judge's name to the order. He never intended to file the order and did not file the order, nor was the order ultimately used to deceive the felon. Despite its non-use, and despite Chancey's undeniably worthy motive, the Illinois board reprimanded Chancey for his deceit. Rather than consider an exception in light of valid concerns over the safety of an abducted child, the board insisted on holding attorneys, especially prosecutors, to the letter of the Rules. Further, the board observed, and we agree, that motive evidence was only relevant in the punishment phase, as either a mitigating or aggravating factor.

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

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

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

Pautler, 47 P.3d at 1184.

state or federal public defenders engage in covert activity — which they might wish to do if they believe that the prosecution has already done so in their case — as "government lawyers"?

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

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

The chair noted that the motion to table was pending. Downey, however, said that he would like to hear Kirsch's comments, and he asked that the motion to table be withdrawn. The Chair noted that there was still a half-hour of scheduled meeting time remaining and ruled that she would consider the pending motion one that precluded a vote on the subcommittee proposal but would allow further discussion in the remaining meeting time. The movant commented that he did not believe there should be any consideration of specific text of any rule change but agreed that further general comment would be useful.

With that, Kirsch responded to the criminal defense lawyer's comments. He said that prosecutors are not commonly involved in micro-management of covert investigations; they are not usually sitting next to the wiretap monitor nor writing scripts for the deception. But more and more Federal agencies are writing policies that require their personnel to consult, "at the macro level," with the Justice Department before engaging in covert activities, the purpose being to determine whether the covert activity is properly engaged in and to ascertain how it might be done and what conduct should be avoided. Further, he said, the prosecution does want to have "clean hands"; it supports such agency consultation because it improves the investigatory process and assures the protection of constitutional rights of those who are investigated. If *Pautler* is read to mean the prosecutor cannot be involved at all in covert activities, then such activities will continue to occur regularly but they will occur without the useful guidance that prosecutors could provide but will choose not to provide because of the risk that their advising could subject them to a disciplinary prosecution by the Office of Attorney Regulation Counsel.

A member commented that defendants can engage in their own investigations without the need to go through lawyers. The public defender may be seen "as a cop," and, if you can misinform them as to your identity, that is a significant danger.

The chair asked the movant to augment the pending motion to table with words of guidance to the subcommittee. She asked in particular for coordination between the subcommittee and other members for the purpose of expanding the communities of interest from whom the subcommittee might seek input. In response, the movant renewed his motion to table, adding that the subcommittee be directed to contact additional communities of interest and then return to the Committee with further information. The movant added that the subcommittee was competent to determine which of such communities it would actually contact. Others added, as suggestions, the American Bar Association and its Center for Professional Responsibility, and the executive director of the Colorado Defense Bar Association

The motion to table was adopted.

The Chair thanked the guests for their participation.[44]

V. *Rule 3.3 and Statutory Privilege; Candor to the Court.*

At the Chair's request, Michael Berger advised the members of Opinion 123 that had been issued by the Colorado Bar Association Ethics Committee on June 18, 2011.[45] The opinion focuses on the requirement of Rule 3.3(a)(3) that, "if a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." At one end of the spectrum of possible remedial measures, Berger noted, is affirmative disclosure to the tribunal that the evidence was false. The rule itself specifies that the remediation duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." But, Berger noted, the rule does not explain whether disclosure is required in the face of applicable statutory privilege. Often, he explained, the lawyer will learn of the falsity of evidence from his client in a communication that is protected by the statutory attorney-client privilege.[46]

Berger explained that the CBA Ethics Committee determined that, "if all else fails," the lawyer must make disclosure to the court under the mandate of Rule 3.3(a)(3) even if doing so would require the disclosure of communications that are protected by the statutory attorney-client privilege. Such a disclosure must be limited only to that information that is necessary to remediate the falsity of the evidence, and the disclosure to the court must be made in a "extra-evidentiary" manner.

Berger said that he was not aware of any adverse reaction to the Ethics Committee's opinion; he was not sure whether the absence of reaction was due to the obscurity of the opinion or to its correctness. He noted that there is a surprising dearth of opinions or law on the question from other jurisdictions.

Berger asked whether clarification of the question by a modification of Rule 3.3 or its comments would be appropriate for this Committee to consider. He then said that, in his view, the Committee should not consider any change. The conflict between Rule 3.3(a)(3) and the statute governing privilege involves constitutional issues of the separation of powers. He was of the view that the court has ample authority to adopt rules protecting the integrity of court proceedings. But, he thought, it would be preferable to await resolution of the matter by adjudication in a case than by modification of the Rules of Professional Conduct. In the meantime, the Ethics Committee's Opinion 123 gives some guidance to practitioners, and he felt it unlikely that the Office of Attorney Regulation Counsel would prosecute a disciplinary case involving the conflict between rule and statute.

A member spoke, he said, as the devil's advocate. The Committee, could, he said, flag the issue by a proposal to the court and leave it to the court to let the Committee know whether it would adopt the proposal or reject it in favor of case adjudication.

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44. In addition to Matthew T. Kirsch and Adam L. Scoville, Amanda Rocque was present as a guest.

45. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/27384/CETH//.

46. Colo. Rev. Stat. Ann. § 13-90-107(b) provides—

(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

Another member noted that she, like others, had spent a good deal of time considering this issue when it was before the Ethics Committee; she concluded that Opinion 123 is correct, and she agreed with Berger that the Committee should not undertake to craft a rule on point. It would, she said, take the Committee years to get it right.

Berger added the observation that the CBA Ethics Committee opinion pointedly deals only with civil cases, not with criminal cases. The difficulties with covering criminal cases, with their overlay of constitutional principles establishing defendants' rights, are another reason why the Committee should not embark on the project.

By a vote, the Committee determined not to undertake a consideration of the conflict between Rule 3.3(a)(3) and the statutory attorney-client privilege.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, July 13, 2012, beginning at 9:00 a.m., at the offices of Holland & Hart LLP at 555 Seventeenth Street, Suite 3200.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-Second Meeting, on July 13, 2012.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

II. *Adoption of Rules Amendments.*

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

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

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

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

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

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

A lawyer shall not:

(a) . . .

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

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

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, ~~**unless authorized to do so by law or court order,**~~ ***subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. See also Cmt. [5], Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if "circumstances require it," "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication, "and "the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." Code of Jud. Conduct, Rule 2.9(A)(l). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(b)("A judge may . . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical***

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

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

STANDING COMMITTEE 099

advantage as a result of the ex parte communication[.]"). The second exception does not authorize the lawyer to initiate such a communication. A judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

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

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

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

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

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

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

STANDING COMMITTEE 100

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***;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is professional misconduct for a lawyer to:

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. *See* n. 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

14. 42 U.S.C.A. § 1983 provides—

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

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

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

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

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

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

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

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

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

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

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

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16. *See* n. 10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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21. C.R.P.C. 1.2(d) reads—

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

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

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

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

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

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

23. *See* n. 8.

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

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

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

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

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

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

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

The motion was seconded.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

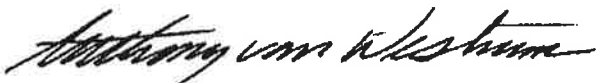
The motion that the Chair provide such a report to the Court was adopted.

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

IV *Adjournment; Next Scheduled Meeting.*

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

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

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

COLORADO SUPREME COURT 2 East 14th Avenue | Denver, CO 80203	
Original Proceeding Under C.A.R. 21	
In Re: Cynthia H. Coffman, in her official capacity as the Attorney General of Colorado, *Petitioner,* v. **Office of Attorney Regulation Counsel**, and **James C. Coyle**, in his official capacity as Colorado Supreme Court Attorney Regulation Counsel, *Proposed Respondents.*	▲ **COURT USE ONLY** ▲
CYNTHIA H. COFFMAN, Attorney General FREDERICK R. YARGER, Solicitor General* L. ANDREW COOPER, Deputy Attorney General* JAN M. ZAVISLAN, Senior Counsel* NOAH PATTERSON, Senior Assistant Att'y Gen.* MARK L. BOEHMER, Assistant Att'y Gen.* JOSEPH G. MICHAELS, Assistant Att'y Gen.* REBECCA M. TAYLOR, Assistant Att'y Gen.* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 10th Floor Denver, CO 80203 Telephone: (720) 508-6000 E-Mail: fred.yarger@coag.gov Reg. Nos.: 39479, 23036, 11636, 42339, 40352. 40403, 40645 *Counsel of Record *Attorneys for Petitioner*	Case No. 17 SA ____
PETITION FOR ORIGINAL WRIT UNDER C.A.R. 21	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 21 and C.A.R. 32.

Although C.A.R. 21 does not contain a word limit, I certify that this brief contains 8,700 words, below the 9,500-word limit set forth in C.A.R. 28(g)(1) for principal briefs.

/s/ Frederick R. Yarger

CONTENTS

STANDING COMMITTEE 123

STANDING COMMITTEE 124

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

STANDING COMMITTEE 126

TABLE OF AUTHORITIES

STANDING COMMITTEE 127

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STANDING COMMITTEE 128

TABLE OF AUTHORITIES

INTRODUCTION

Criminals and other law-breakers rarely acknowledge their illegal activity in public, and some of the worst offenders are masters of concealment. Consequently, undercover operations—in which government investigators adopt pretextual identities, engage confidential informants, and use other covert techniques to obtain evidence of wrongdoing—are a vital law-enforcement tool. The Colorado Attorney General's Office has long employed undercover investigators in both the civil and criminal contexts, and lawyers in the Office have supervised their work and provided critical legal advice to support their operations. This undercover work has been pivotal in cases ranging from consumer frauds to drug conspiracies.

Just a few months ago, however, the Attorney General was forced to abandon all of her pending undercover investigations. She took that drastic step based on the outcome of an ethics complaint lodged against one of Colorado's District Attorney's Offices, which until recently housed a unit of investigators targeting online sex crimes. The

undercover work of that unit, known as the Child Sex Offender Internet Investigations team or "CHEEZO," brought more than 900 online sex predators to justice.

The complaint involving the CHEEZO unit, filed by counsel for a convicted sex offender seeking to undermine his conviction, asserted that undercover investigations equate to the type of unethical behavior that is prohibited by the Colorado Rules of Professional Conduct. *Exhibit 1* at 4. And it claimed that government lawyers, even in the pursuit of legitimate law-enforcement activities, are categorically forbidden from "supervis[ing]" or "ratifying" the conduct of undercover investigators. *Id.*

The Colorado Office of Attorney Regulation Counsel ("ARC"), the Proposed Respondent here and the entity responsible for pursuing complaints of unethical attorney conduct, determined that the complaint's allegations were sufficient to trigger a formal investigation. *Exhibit 2* at 1. ARC expressed the view that a lawyer's supervision of an undercover investigation implicates Colo. RPC 5.3, which governs

attorney supervision of non-lawyer assistants, and Colo. RPC 8.4(c), which prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." ARC ultimately dismissed the complaint, but only after the District Attorney decided to "dissolve the investigative arm of the CHEEZO unit." *Exhibit 3* at 1–2.

This outcome carries significant ramifications for Colorado's law enforcement community, both state and federal, and for the public they are charged with protecting. CHEEZO itself, after being disassociated from the District Attorney's office, was reconstituted within a local sheriff's office. But the Attorney General cannot outsource her in-house investigators; hence her decision to terminate her investigators' undercover activities. And, in any event, the ethics rules impose obligations on lawyers regarding both in-house and external investigators, and Government lawyers regularly "supervise" undercover investigators, whether or not they work in-house. ARC's interpretation of the ethics rules therefore raises the possibility that an ethics complaint could be filed against any government lawyer in

Colorado who works closely with an undercover agent. This would call into question the lawyers' roles in those investigations and potentially deny counsel to investigators working on complicated cases that raise the kinds of legal challenges a prosecuting attorney can help predict and prevent.

The Attorney General holds deep respect for ARC and its staff. She has no doubt that ARC's work on the CHEEZO complaint was done in good faith and in pursuit of its mission of public service. But she disagrees with an interpretation of the Rules that would so dramatically hinder her office—and law enforcement offices across the State—in their legitimate and lawful pursuit of justice. According to her research, no government attorney anywhere in the country has been disciplined solely for supervising undercover investigators or for providing legal advice to ensure that undercover operations are conducted within the bounds of the law. She brings this original action because this Court is the only tribunal that can authoritatively

STANDING COMMITTEE 133

interpret Colorado's ethical rules to resolve this immensely important public issue.

For these reasons, and as explained fully below, the Attorney General petitions the Court under C.A.R. 21 and article VI, section 3 of the Colorado Constitution, for a writ of injunction.

FORMAL MATTERS REQUIRED BY C.A.R. 21

A. Identity of the Petitioner

Petitioner is Cynthia H. Coffman, in her official capacity as Attorney General of the State of Colorado. The Attorney General is a law enforcement agency with specific authority to enforce both civil and criminal laws throughout the State. *People v. Novotny*, 320 P.3d 1194, 1198 (Colo. 2014) ("The office of the state attorney general has been specifically included in a number of different statutory provisions defining the term 'law enforcement agency.'"); *accord, e.g.*, § 8-47-203.3(2), C.R.S. (2016) (identifying the Attorney General as a law enforcement agency); § 26-1-114(3)(a)(III)(B), C.R.S. (2016) (same); *see also* § 6-1-103, C.R.S. (2016) (enforcement of consumer protection laws);

STANDING COMMITTEE 134

§ 6-4-111, C.R.S. (2016) (antitrust enforcement); § 24-31-105, C.R.S. (2016) (criminal enforcement).

To fulfill her law enforcement duties, the Attorney General employs investigators which have, in the past, used undercover techniques to obtain evidence of illegal conduct. Attorneys within the Office of the Attorney General regularly supervised and provided advice to these investigators.

B. Identity of the Court Below

This is an original action filed under C.A.R. 21(a) seeking a writ of injunction. There is no relevant lower court proceeding.

C. Identity of the Proposed Respondent

Proposed Respondents are the Office of Attorney Regulation Counsel and James C. Coyle, in his official capacity as Supreme Court Attorney Regulation Counsel (collectively, "ARC"). ARC regulates and supervises the practice of law in Colorado. *Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 152 (Colo. 1993); § 12-5-101, C.R.S. (2016); § 12-14-117(4), C.R.S. (2016). This includes conducting

investigations into lawyer conduct. *Gleason v. Jud. Watch, Inc.*, 292 P.3d 1044, 1047 (Colo. App. 2012) (citing C.R.C.P. 251.1(a) & (c), 251.3(c)(3) & (4)). In this respect, ARC is tasked with ensuring that lawyers in Colorado "observe the highest standards of professional conduct," C.R.C.P. 251.1(a), requiring ARC to interpret Colorado's Rules of Professional Conduct and institute investigations and disciplinary proceedings based on ARC's interpretation of the Rules. C.R.C.P. 251.1(a) & (c). Because the scope of the Rules directly affects ARC's duties, powers, and responsibilities, ARC is the real party in interest in this case.

D. Actions Complained of and Relief Sought

The action complained of in this Petition is ARC's interpretation and application of Colorado Rules of Professional Conduct 5.3 and 8.4(c), which together prohibit lawyers from "supervis[ing]" nonlawyer assistants who "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." As part of its investigation into the complaint involving the CHEEZO unit, ARC has indicated that, in its view, these

rules apply to government lawyers who supervise investigators engaged in lawful undercover activities.

This interpretation and application of the Rules has caused the Attorney General an injury in fact to a legally protected interest. *See Hickenlooper v. Freedom from Religion Found.*, 338 P.3d 1002, 1006–07 (Colo. 2014) (explaining that an injury in fact to a legally protected interest establishes jurisdictional standing to bring suit). As a result of ARC's interpretation of Rules 5.3 and 8.4(c), the Attorney General has been forced to suspend her use of undercover investigations. Given the longstanding role that undercover investigations have played in the Attorney General's criminal and civil prosecutions, the position ARC adopted during the CHEEZO investigation has undercut her statutory law-enforcement mission.

The relief sought through this Petition is a court order enjoining ARC from proceeding against a government lawyer solely for supervising or providing legal advice to assist with a lawful undercover investigation.

E. Adequacy of Other Remedies and the Appropriateness of this Court's Exercise of Original Jurisdiction

This case concerns the Court's "exclusive jurisdiction over attorneys and [its] authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." *Crowe v. Tull*, 126 P.3d 196, 206 (Colo. 2005) (quoting *Colo. Sup. Ct. Grievance Comm*, 850 P.2d at 152). The Court has, on at least eleven past occasions, exercised original jurisdiction under C.A.R. 21 to interpret the Rules of Professional Conduct. *Fognani v. Young*, 115 P.3d 1268, 1271 (Colo. 2005) (interpreting Colo. RPC 3.7); *see* also *id.* at 1271 & n.1 (collecting similar original jurisdiction cases). Here, no other adequate forum or remedy is available to adjudicate the issue presented, and this case is within the narrow class of disputes appropriate for this Court's extraordinary original jurisdiction.

Adequacy of Alternative Forums or Remedies. There are three potential alternatives to this original jurisdiction case. None are adequate.

STANDING COMMITTEE 138

Filing suit in a district court would lead to years of delay and uncertainty before this Court could authoritatively interpret the relevant professional rules. Interim decisions of the lower courts would necessarily lack finality because this Court is the only tribunal with inherent authority to promulgate and interpret the Rules of Professional Conduct. *See Colo. Sup. Ct. Grievance Comm.*, 850 P.2d at 152–53 (explaining that "[i]n promulgating the Rules of Procedure to address attorney disciplinary proceedings, the Colorado Supreme Court did not provide for district courts to perform any role in the process"). In the meantime, the Attorney General's Office and other government law offices in the State—no matter the outcome in the lower courts—would continue to face significant uncertainty regarding their role in undercover operations.

The second alternative—an attorney discipline proceeding—is even more inadequate. In that setting, a government lawyer would have to be charged with violating ARC's interpretation of Rules 5.3 and 8.4(c) as part of an actual undercover investigation, subject herself to possible

discipline under the rules, and face damage to her professional reputation and a possible sanction against her license. *See* C.R.C.P. 251.27(a) (providing for appellate review in attorney discipline cases "in which public censure, a period of suspension, disbarment, or transfer to disability inactive status is ordered"). Following that course would be unfair not only to the lawyer, but to the target of the undercover investigation. And it would cast a cloud over a pending case—something this Court has used its original jurisdiction to avoid. *Cf. Fognani*, 115 P.3d at 1271 (explaining that a direct appeal of an attorney disqualification issue "would be inadequate" because it would hinder a party's ability to litigate a case).

Finally, this Court could decline to address the particular question presented here—*i.e.*, the proper interpretation of the ***current*** version of the Colorado Rules—and opt instead to change the Rules through formal rulemaking. It may do so based on the 2012 proposals offered by the Court's Standing Committee on the Rules of Professional Responsibility. *See* Below at 25–27. Many States have opted to follow a

similar course, and they have uniformly approved government lawyer involvement in undercover investigations. *See Addendum B.* The Oregon Supreme Court, for example, declined to create an "exception" to its professional rules for undercover investigations through litigation, holding that "any exception must await the full debate that is contemplated by the process for adopting and amending the Code." *In re Gatti*, 8 P.3d 966, 976 (Ore. 2000). Five years later, Oregon adopted just such an exception through rulemaking. *See Addendum B* at B-12–B-13.

Unlike *Gatti*, this Petition does not ask the Court to create an exception to Colorado's Rules of Professional Conduct. It asks instead for the Court to properly and authoritatively interpret the current version of the Rules, as other jurisdictions have done. Past efforts to amend the Colorado Rules have been unsuccessful, *see* below at 25–27, and further delay in resolving the issue presented in this Petition will continue to harm Colorado law enforcement agencies like the Attorney General's Office.

STANDING COMMITTEE 141

Appropriateness of Original Jurisdiction. As a separate matter, this is an appropriate case for the exercise of this Court's extraordinary original jurisdiction. This Court "generally elect[s] to hear C.A.R. 21 cases that raise issues of first impression and that are of significant public importance." *Dwyer v. State*, 357 P.3d 185, 187–88 (Colo. 2015) (quoting *In re Marriage of Wiggins*, 279 P.3d 1, 5 (Colo. 2012)). The issue here satisfies both criteria.

First, this Court has never before considered whether Colo. RPC 5.3 and 8.4(c) prohibit a government lawyer from supervising or providing legal advice to a lawful undercover investigation. *See Wiggins*, 279 P.3d at 5 (holding that where "court has never before considered" the scope of a rule of civil procedure, Rule 21 review was appropriate); *id.* (citing *Fognani*, a case involving a Rule of Professional Conduct, to explain that the Court uses its original jurisdiction to "review questions of rule interpretation"). There is no authoritative guidance on that question in Colorado.

STANDING COMMITTEE 142

Second, this case presents a significant question of "*publici juris*," that is, a question involving "public rights or interests as contradistinguished from matters of private or individual concern." *See People ex rel. Bentley v. McLees*, 38 P. 468, 470 (1894). ARC's interpretation of Rules 5.3 and 8.4(c) implicates the powers and responsibilities of duly elected state and local constitutional officers—namely, the Attorney General and Colorado's district attorneys—who rely on undercover investigations to pursue their public missions. Under ARC's interpretation of the ethical rules, their ability to supervise or provide advice to undercover investigators has been called into question.

F. List of Supporting Documents

- **Exhibit 1**: ARC Transmission of Complaint Letter to Jefferson County District Attorney (Nov. 18, 2015).
- **Exhibit 2**: ARC Letter to Jefferson County District Attorney (Mar. 25, 2016).
- **Exhibit 3**: ARC Letters Closing CHEEZO Investigation (Dec. 16, 2016).

- **Exhibit 4:** Response of the Jefferson County District Attorney to the Complaint Letter (Dec. 11, 2015).
- **Exhibit 5**: *The People of the State of Colorado v. Silva-Rayas*, No. 13 CA 0153 (Colo. App. 2014) (unpublished).
- **Exhibit 6**: Letter from the District Attorney for the 17th Judicial District Regarding the CHEEZO Complaint (Dec. 1, 2015).
- **Exhibit 7**: Letter from the District Attorney for the 18th Judicial District Regarding the CHEEZO Complaint (Dec. 11, 2015).
- **Exhibit 8**: Letter from the Chief of the Lakewood Police Department Regarding the CHEEZO Complaint (Dec. 2, 2015).
- **Exhibit 9**: Letter from the United States Attorney for the District of Colorado Regarding the CHEEZO Complaint (Dec. 4, 2015).
- **Exhibit 10**: Supplemental Report of the Pretexting Subcommittee (presented on July 13, 2012).
- **Exhibit 11**: Minutes of the July 13, 2012 Meeting of the Supreme Court Standing Committee on the Rules of Professional Conduct.
- **Addendum A to Petition**: Full Text of Colorado Rules of Professional Conduct 4.1, 5.3, and 8.4, Including Comments.

- **Addendum B to Petition**: Summary of Rules, Comments, and Ethics Opinions Approving Lawyer Supervision of Undercover Activities.

G. Issue Presented

Does a government lawyer violate Colo. RPC 5.3 and 8.4(c) by supervising or providing legal advice to a nonlawyer investigator who is pursuing a lawful undercover investigation?

FACTS NECESSARY TO UNDERSTAND THE ISSUE

I. ARC's interpretation of Rules 5.3 and 8.4(c) forced the Jefferson County District Attorney's Office to disassociate itself from a successful covert investigation unit.

For over ten years, and spanning two elected District Attorneys' administrations, CHEEZO operated within the Jefferson County District Attorney's Office. *Exhibit 4* at 3. The unit was formed to combat the specific threat posed by online sexual exploitation of children. Investigators in the unit, which ultimately reported to the District Attorney's Chief Investigator, employed widely accepted—and entirely lawful—methods to obtain evidence of wrongdoing. *Id.* at 3–4. For example, they would adopt assumed child identities to engage in online or telephone conversations with adult suspects. *Id.* at 3. If these investigative methods yielded evidence of a crime, the investigators would forward the case file to a prosecutor for review and the possible initiation of charges. *Id at 4.* During the time it was housed in the District Attorney's Office, the CHEEZO unit was responsible for more than 900 successful prosecutions of Internet sex predators. *See* Kieran

Nicholson, *Rules Complaint Leads JeffCo DA to Disband Child Sex Offender Internet Unit*, THE DENVER POST, Dec. 15, 2016, *available at* http://dpo.st/2p4NXmS.

Prosecutors in the District Attorney's Office never directly participated in these undercover investigations. *Exhibit 4* at 4. But as would any responsible prosecutor, they provided legal advice and direction to investigators. *Id.* For example, they would determine whether a particular investigation yielded probable cause to authorize the filing of charges or the issuance of a search or arrest warrant. *Id.* Or they would evaluate the constitutionality and legality of investigative methods, ensuring the integrity of evidence obtained in a particular case. *Id.*

Nothing about this arrangement was out of the ordinary. Civil and criminal prosecutors across the country routinely work with undercover investigators to pursue wrongdoers whose illegal conduct does not occur in plain sight. Indeed, prosecutors are ***encouraged*** to supervise undercover investigators. *E.g.*, *ABA Standards for Criminal Justice:*

Prosecutorial Investigations, Standard 2.3(e)(i)–(ii) (3d ed. 2014) (recommending that prosecutors review "the continued propriety of the operation and the legal sufficiency and quality of the evidence that is being produced" and "determine whether the operation's benefits continue to outweigh its risks and costs").

Nonetheless, in 2015, an attorney representing a convicted sex offender submitted a complaint to ARC, claiming that the Jefferson County District Attorney violated ethical rules by basing its prosecution of the offender on the work of the CHEEZO unit. *Exhibit* 1 at 3–5. The offender had already attempted to overturn his conviction by citing this ethical theory. But both the district court and the court of appeals rejected his arguments, concluding that the investigation was lawful and that the ethical rules do not provide a basis for the dismissal of criminal charges. *Exhibit 5* at 12.[1] Accordingly, the ethics complaint

[1] Presaging the need for this Court's review of the issue presented here, the court of appeals emphasized that it "does not have jurisdiction to enforce the Rules" because "[t]hat jurisdiction is reserved to the Colorado Supreme Court, its office of attorney regulation counsel, and the presiding disciplinary judge." *Exhibit 5* at 9.

targeted only the District Attorney's supervision of the CHEEZO unit, not the propriety of the undercover investigation itself. The complaint asserted that "it is unethical for lawyers to lie" and that "[t]he rules that apply to lawyers also effectively apply to those they supervise." *Exhibit 1* at 4.

ARC determined that "resolution of [the complaint] [would] require an investigation." *Exhibit 2* at 1. It further determined that the complaint "implicate[d] Colorado Rules of Professional Conduct 5.3 ... and 8.4(c)." *Id.* Rule 5.3 requires lawyers to supervise nonlawyer assistants in compliance with other ethical rules; Rule 8.4(c) defines "attorney misconduct" to include "dishonesty, fraud, deceit or misrepresentation." The determination to proceed with the investigation indicated that, in ARC's view, the complaint's allegations, "if proved, would constitute grounds for discipline." C.R.C.P. 251.9(b)(2).

Rather than subject himself or his staff to possible ethics liability, the District Attorney terminated the investigative arm of CHEEZO, which was later reconstituted within the Jefferson County Sheriff's

Office. Allison Sylte, *Sheriff's Office Taking Over Jeffco Internet Crime Unit*, 9NEWS.COM, Jan. 31, 2017, http://on9news.tv/2p3PMTZ. In a letter ending its investigation, ARC stated that it "decided to dismiss these matters" because the District Attorney "dissolve[d] the investigative arm of the CHEEZO unit." *Exhibit 3* at 1–2. But the letter also reiterated that "the First Judicial District's 'CHEEZO' unit raised concerns regarding whether the unit's operation constituted an ongoing violation of Colo. RPC 8.4(c)." *Id.*

II. In the wake of the CHEEZO complaint, the Attorney General's Office had no choice but to terminate its pending undercover investigations.

During the ARC investigation of CHEEZO, several law enforcement agencies in Colorado expressed serious concerns with an interpretation of the Rules of Professional Conduct that would hinder cooperation between prosecutors and undercover investigators. The District Attorney for the 17th Judicial District, for example, explained that "prosecutors are available for legal advice and often assist with the investigations that occur in [their] district[s]." *Exhibit 6.* The District

Attorney for the 18th Judicial District noted that one of his duties was to "provide advice and counsel to local law enforcement agencies regarding future and ongoing investigations." *Exhibit 7.* The Chief of the Lakewood Police Department cited the "valuable guidance" his department has received from prosecutors as part of "sensitive and complex investigations." *Exhibit 8.* And the United States Attorney explained that "Department of Justice policies actually ***require*** federal prosecutors to review and approve certain undercover activity by law enforcement agents," because "attorney review of such operations is essential to ensure compliance with law, protection of civil rights and ... public safety." *Exhibit 9* at 1 (emphasis in original).

The outcome of the CHEEZO complaint exacerbated these concerns. Rule 5.3's supervision obligations apply to both in-house and external nonlawyer investigators. Colo. RPC 5.3, cmt. 3 ("When using [outside investigators], 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."). Although ARC dropped its

investigation when CHEEZO was dissolved and later reconstituted outside the District Attorney's Office, ARC's position—that lawyer supervision of or legal advice to an undercover operation is unethical—necessarily implicates a prosecutor's role in an external undercover operation.

The Attorney General's Office is among the law enforcement agencies directly affected by ARC's interpretation and application of Rules 5.3 and 8.4(c). The Office has employed nonlawyer investigators for decades in both civil and criminal cases; currently, 32 investigators serve in the Office. Sometimes, to obtain evidence sufficient to expose and prosecute wrongdoing, the Attorney General's investigators have been required to go undercover. For example, civil investigators in the Office's Consumer Protection Section have posed as potential consumers to verify whether suspects were making illegal misrepresentations. Investigators in the Criminal Justice Section have used fictitious social media accounts, pretextual phone calls, and aliases. In some cases, the investigators have worked with outside agencies, such as police and

sheriffs' offices, the Federal Bureau of Investigation, and the federal Drug Enforcement Agency, to conduct and coordinate undercover operations.[2] Lawyers in the Attorney General's Office routinely advised these civil and criminal investigators, ensuring that their work complied with the constitution and other laws.

No undercover investigation carried out by the Attorney General's Office has ever been found to be improper, and while investigators in the Office use undercover techniques only rarely, those techniques can be critical in important cases. Yet, under the interpretation of Colo. RPC 5.3 and 8.4(c) that ARC adopted during the CHEEZO matter, undercover investigations in both the Consumer Protection and Criminal Justice Sections would "raise[ ] concerns regarding ... ongoing violation[s] of Colo. RPC 8.4(c)." *Exhibit 3* at 1–2. As a result, when she learned the outcome of the CHEEZO complaint, the Attorney General had no choice but to order her investigators to stop engaging in

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[2] The Attorney General also participates in multi-jurisdictional task force investigations involving, among other things, human trafficking, car theft, and drugs. Undercover activities can play a critical role in these investigations.

undercover operations. Her order will stand until the relevant rules are clarified.

III. Previous efforts to amend Colorado Rule of Professional Conduct 8.4(c) failed to provide the clarity that government lawyers in Colorado need.

The investigation into the CHEEZO complaint was not the first time that lawyers in Colorado have raised concerns about an interpretation of the Rules that would preclude lawyer supervision of undercover investigations. In 2011, the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct created a subcommittee to consider whether Colo. RPC 8.4(c) should be amended to explicitly address the issue.

After eighteen months of work, a majority of the "Pretexting Subcommittee" recommended an amendment to Colo. RPC 8.4(c) adding the following italicized language:

> 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*
> ....

Exhibit 10 at 9 (italics in original). The amendment was meant to clarify, not alter, the substance of the Rules. In delivering the majority report, the chair of the subcommittee explained that "the majority of the subcommittee believes that the conduct its proposal would sanction is not really within the proscriptions of [current] Rule 8.4(c)." *Exhibit 11* at 5. Instead, the proposed amendment would "provide clear guidance for [lawyer] conduct" and avoid the undesirable effects of the Rules' current ambiguity—namely, "lawyers choos[ing] not to know what their investigators are actually doing in the field." *Id.* Representatives from the Colorado Attorney General's Office, the U.S. Attorney's Office, and the federal Department of Housing and Urban Development all testified in support of the majority's recommendation. *Id.* at 8–9.

A minority of the subcommittee recommended two alternatives: (1) an amendment limited to lawyers "representing the government" or (2) the status quo. *Exhibit 10* at 31–40. But even in presenting these

alternatives, a representative of the minority "recognized that there is case law supporting [government lawyer supervision of undercover investigations]" and acknowledged that "constitutional guarantees" that apply to "prosecutors and others in law enforcement" ensure that governmental undercover investigations respect individual rights. *Exhibit 11* at 6.

After extensive discussion, the Standing Committee voted to make no proposal to this Court. *Id.* at 19. The Committee noted that taking no action "will certainly lend to the anxieties of [some] lawyers" but emphasized that "a substantial number of its members felt that [supervision of undercover investigations] is permitted under the current text of the rule." *Id.* at 21. Indeed, the Committee acknowledged that "covert investigations are ongoing, in both government and private proceedings." *Id.* at 21 n.25. In lieu of a formal proposal, the Committee provided this Court with meeting minutes reflecting discussion of the issue, as well as the majority and minority reports prepared by the Pretexting Subcommittee. *Id.* at 23. No action has been taken since.

ARGUMENT

I. Properly interpreted, the terms of Rule 8.4(c) authorize government lawyers to supervise legitimate and lawful undercover investigations.

Undercover investigation involves the use of false information, and "[Rule 8.4(c)] and its commentary are devoid of any exception." *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002). Thus, read in isolation, Rule 8.4(c)'s proscription against "conduct involving dishonesty, fraud, deceit or misrepresentation" appears to sweep broadly enough to include a government lawyer's supervision of an undercover investigation. Read closely and in context, however, Rule 8.4(c) does not sweep that broadly.[3]

A. The terms of Rule 8.4(c) target wrongdoing, not the kind of conduct that occurs during a lawful undercover investigation.

The four key terms in Rule 8.4(c) are all of a piece, and courts have recognized that the broadest of these—dishonesty—encompasses the others. *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) ("The most

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[3] The full text of Colorado Rules of Professional Conduct 4.1, 5.3, and 8.4, with their comments, is attached as Addendum A to this Petition.

general term in [the Rule] is 'dishonesty,' which encompasses fraudulent, deceitful, or misrepresentative behavior."); *see also Rogers v. Miss. Bar*, 731 So. 2d 1158, 1166 (Miss. 1999) (defining "dishonesty" to include "deceiving ... or defrauding," "deceit" to include "fraudulent ... misrepresentation," and "misrepresentation" to include a statement "made with intent to deceive"). Given the similarities among the terms, they must be read together. *See In re Shorter*, 570 A.2d at 767. "Under the well-worn canon of statutory construction *noscitur a sociis*, a word may be known by the company it keeps." *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P. 3d 1014, 1021–22 (Colo. 2014) (internal quotation marks omitted).

Thus, Rule 8.4(c) does not encompass every act that could, in the abstract, be described as "dishonesty." Instead, it includes only the type of conduct that, like fraud or deceit, implicates a lawyer's moral integrity: for example, conduct designed to cheat another person to gain a personal benefit. *See In re Conduct of Carpenter*, 95 P.3d 203, 208–09 (Ore. 2004) ("[C]onduct involving 'dishonesty' is conduct that indicates a

disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity ...." (internal quotation marks omitted)); *Fla. Bar v. Cueto*, 834 So.2d 152, 156 (Fla. 2002) (noting that the terms in the Rule are "not define[d]" but explaining that they involve "moral turpitude"); *Att'y Griev. Comm'n of Maryland v. Brown*, 725 A.2d 1069, 1080 (Md. App. 1999) (explaining that "dishonesty" in Rule 8.4(c) is conduct characterized by "untrustworthiness" and a "lack of integrity" (citing BLACK'S LAW DICTIONARY 468 (6th ed. 1990)). [4] Mere dissemblance in the course of a lawful covert investigation does not qualify.

For example, in *Gidatex v. Campaniello Imports, Ltd.*, private investigators used undercover techniques to gather evidence about a scheme involving the illegal use of a trademark. 82 F. Supp. 2d 119 (D.N.Y. 1999). Defendants sought exclusion of the evidence, but after

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[4] Quoting *In re Shorter*, Colorado's Office of the Presiding Disciplinary Judge has likewise concluded that the terms in Rule 8.4(c) focus on conduct implicating a lawyer's moral integrity. *People v. Katz,* 58 P.3d 1176, 1189 (Colo. OPDJ 2002) ("[D]ishonesty ... encompasses fraudulent, deceitful, or misrepresentative conduct evincing 'a lack of honesty or integrity in principle; a lack of fairness and straightforwardness ....'" (quoting *In re Shorter*)).

analyzing New York's version of Rule 8.4(c) the court concluded that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation." *Id.* at 122.

In another case involving an undercover investigation, *Apple Corps Ltd. v. International Collectors Society*, the court held that "a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed." 15 F. Supp. 2d 456, 475 (D.N.J. 1998). Quoting a leading article on the subject, co-authored by the former chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility, the court explained that Rule 8.4(c) "should apply only to grave misconduct." *Id.* at 476 (quoting David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, GEO. J. LEGAL ETHICS 791, 817 (1995)). The article itself elaborates that Rule 8.4(c)'s scope, given the specific terms it employs, is limited to "misrepresentations that manifest a degree of

wrongdoing on a par with dishonesty, fraud, and deceit." Isbell & Salvi, *supra*, at 817 (invoking the interpretive canon *noscitur a sociis*).

A number of other courts have similarly held that lawyer supervision of lawful undercover investigations complies with ethics rules.[5] And while some courts have come to a different conclusion, they have done so not when faced with the proper use of undercover investigative techniques but when faced with situations involving independent wrongdoing: for example, circumvention of normal discovery procedures or contact with persons represented by counsel in already-initiated court actions.[6] The Attorney General's extensive

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[5] *See, e.g., Turfgrass Group, Inc. v. Northeast La. Turf Farms, L.L.C.*, 2013 U.S. Dist. LEXIS 166570 (W.D. La. 2013); *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005); *cf. Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879 (N.D. Ill. 2002) (in a case involving racial discrimination in the sale of gasoline to consumers, citing *Gidatex* to reject a Rule 4.2 challenge to evidence obtained by undercover investigators).

[6] *See, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (finding unethical the use of an undercover investigation to obtain "information that could have been obtained properly through the use of formal discovery techniques"); *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074 (D. Colo. 2009) (finding improper a "surreptitiously recorded interview ... occurring on the day this action

research has not revealed a single case in which a government attorney has been disciplined merely for supervising or advising investigators engaged in a lawful undercover operation.

B. Reading Rule 8.4(c) to encompass any "falsity," including statements made during undercover operations, would lead to absurd results and would render another rule, Rule 4.1, superfluous.

In addition to a plain-text reading of the combined meaning of the Rule's terms, two additional lines of analysis compel the text of Rule 8.4(c) to be read to reach only wrongful conduct implicating a lawyer's moral integrity.

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was commenced"); *Allen v. Int'l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. 2006) (finding a violation of Rule 8.4(c) when investigators were used to "gather information from ... potential class members in a pending lawsuit"); *Disciplinary Counsel v. Brockler*, 48 N.E.3d 557, 560 (Ohio 2016) (finding that a prosecutor's investigation of witnesses in a pending murder case "prejudiced the administration of justice because it had the potential to induce false testimony"); *In re Curry*, 880 N.E.2d 388, 392 (Mass. 2008) ("With no motive other than his own financial gain ... [the lawyer] developed and participated in an elaborate subterfuge whose purpose was to induce or coerce [a] judge's former law clerk into making statements that the law clerk otherwise would not have made about the judge and her deliberative process ....").

First, when construing a legal provision, a court must avoid an interpretation that leads to illogical or absurd results. *People v. Cross*, 127 P.3d 71, 74 (Colo. 2006); *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000). A mechanical interpretation of Rule 8.4(c) that treats any falsity as misconduct, regardless of whether it reflects adversely on a lawyer's moral integrity and fitness to practice, would produce the kinds of irrational outcomes that cannot have been intended by the Rule's drafters.

Many courts have recognized the illogic in applying Rule 8.4(c) woodenly. "Common sense dictates that the prohibition on Rule 8.4(c) must be qualified in some way. Otherwise, the absurd result that would follow is that attorneys, by virtue of their professional license, could be subject to discipline for lying to anyone under any circumstance in any aspect of their lives." *In re Hurley*, 2008 Wisc. LEXIS 1181, at *18 (Wisc. Feb. 5, 2008). The Oregon Supreme Court, for example, has recognized that

> [n]ot every lawyer misstatement poses [a] risk [to the integrity of the legal profession]: telling the

> story of Santa Claus to children is an example. Instead, there must be a rational connection between the conduct that gives rise to an allegation of a rule violation and the purpose of the lawyer discipline system.

In re Conduct of Carpenter, 95 P.3d at 208. The Vermont Supreme Court agrees: "[c]learly [Rule 8.4(c)] does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement" *In re PRB Docket No. 2007-046*, 989 A.2d 523, 529 (Vt. 2009) (parenthetically quoting D.C. Bar Legal Ethics Comm. Op. 323 (2004)). Thus, "the literal application of the prohibition of RPC 8.4(c) to any 'misrepresentation' by a lawyer, regardless of its materiality, is not a supportable construction of the rule," and the Rule cannot be read to prohibit lawyer supervision of undercover investigations. *Apple Corps*, 15 F. Supp. 2d at 475.[7]

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[7] Recent amendments indicate a concern with an unbounded interpretation of Colorado Rule 8.4. In 2007, this Court revised the Rule's a catchall provision, subsection (h). The amendment limited the subsection to conduct that not only "reflects on the lawyer's fitness to practice law" but also "directly, intentionally, and wrongfully harms

Second, in addition to creating absurd results, a mechanical reading of Rule 8.4(c) would render another provision, Colo. RPC 4.1, superfluous. Rule 4.1(a) provides, "[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person." Rule 4.1(a) applies only where a lawyer acts in "the course of representing a client" and only to false statements of ***material*** facts. Rule 8.4(c), meanwhile, prohibits ***any*** misrepresentation, regardless of whether it was made in the course of representing a client and regardless of materiality. Thus, "[i]f the drafters of RPC 8.4(c) intended to prohibit automatically 'misrepresentations' in all circumstances, RPC 4.1(a) would be entirely superfluous." *Apple Corps*, 15 F. Supp. 2d at 476; *see also In re PRB*, 989 A.2d at 528 ("Our narrow interpretation of Rule 8.4(c) ensures that

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others." In recommending this revision, the Supreme Court Standing Committee on the Rules of Professional Conduct noted that "the current language is overbroad and provides unbridled and, hence, inappropriate discretion to the OARC." Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, *Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct*, 117–18 (Dec. 30, 2005).

Rule 4.1 is not reduced to mere surplusage."); Isbell & Salvi, *supra*, at 817 ("Rule 8.4(c)'s prohibition of misrepresentation, under [the doctrine against surplusage], must be interpreted as applying to misrepresentations that are not elsewhere covered by the *Model Rules*, which in this context means Rule 4.1(a). ... [T]he rule cannot apply to ***lesser*** misrepresentations than those prohibited by Rule 4.1(a) ... but rather must apply to ***graver*** ones." (emphasis in original)).

The most sensible reading of Rule 8.4(c)—which avoids both illogical results and reading out of the Rules an entire substantive provision—is that Rule 8.4(c) "does not apply to the kind of misrepresentation made by ... undercover investigators." Isbell & Salvi, *supra*, at 818.

C. The Rule's Comment and the ABA Standards for Imposing Lawyer Sanctions confirm the limited scope of Rule 8.4(c)'s text.

"The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule" and is "intended as [a] guide[ ] to interpretation." Colo. RPC, Scope ¶ 21. Comment 2 to Rule 8.4 confirms

that the Rule's proscriptions are limited to significant, morally reprehensible conduct, not every instance of technically dishonest behavior. Thus, only conduct that bears on a lawyer's "fitness for the practice of law" is covered:

> 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.***

(Emphasis added).

According to several courts and commentators, this language in the Comment—in addition to the text of the Rule itself—strongly indicates that Rule 8.4(c) does not prohibit lawyer supervision of lawful undercover operations. *In re PRB*, 989 A.2d at 528 (limiting Rule 8.4(c)

to conduct implicating a lawyer's fitness to practice law and reasoning that "the comment repeatedly stresses the importance of holding attorneys accountable for only those behaviors that reflect poorly on their fitness to practice"); Isbell and Salvi, *supra*, at 816 n.90 (citing the Comment to argue that Rule 8.4(c) "applies only to conduct of so grave a character as to call into question the lawyer's fitness to practice law"); *see also In re Conduct of Carpenter*, 95 P.3d at 208 (limiting 8.4(c) to conduct that "jeopardizes the public's interest in the integrity and trustworthiness of lawyers").

This reading harmonizes the Rule with another key source of interpretive authority, the ABA Standards for Imposing Lawyer Sanctions. This Court has "consistently recognized the ABA Standards ... as the guiding authority for selecting the appropriate sanction to impose for lawyer misconduct." *In re Roose*, 69 P.3d 43, 46–47 (Colo. 2003); *In re Attorney D.*, 57 P.3d 395, 399 (Colo. 2002). The relevant section of the Standards for purposes of Rule 8.4(c) is Standard 5.1, "Failure to Maintain Personal Integrity." That Standard applies to

"cases with conduct involving dishonesty, fraud, deceit, or misrepresentation." ABA Standard 5.1.

Standard 5.1 provides four alternative sanctions for violations of Rule 8.4(c). All of those sanctions specifically require an examination of the implications of the conduct for the lawyer's fitness to practice law:

> 5.11 Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct ... ; or
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation ***that seriously adversely reflects on the lawyer's fitness to practice.***
>
> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct ... that ***seriously adversely reflects on the lawyer's fitness to practice.***
>
> 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that ***adversely reflects on the lawyer's fitness to practice law.***
>
> 5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that ***reflects adversely on the lawyer's fitness to practice law.***

ABA Standard 5.1 (emphasis added). Thus, conduct is not eligible for sanction under Rule 8.4(c) unless it in some way reflects adversely on a lawyer's fitness to practice. Supervision of a lawful undercover operation does not qualify. *See In re PRB*, 989 A.2d at 528–30; Isbell and Salvi, *supra*, at 816–18.

II. Allowing government lawyers to supervise undercover investigations is consistent with the purposes and policies of the Rules of Professional Conduct.

"The Rules of Professional Conduct are rules of reason." Colo. RPC, Scope ¶ 14. They must therefore be read "with reference to the purposes of legal representation" and within the "larger legal context shaping the lawyer's role." *Id at 15*. Here, the "larger legal context" includes decades of authority recognizing that undercover operations are necessary to law enforcement, are entirely legal, and require lawyer supervision.

Over a half-century ago, the Supreme Court held that "in the detection of many types of crimes, the Government is entitled to use decoys and to conceal the identity of its agents." *Lewis v. United States*,

385 U.S. 206, 209 (1966). For its part, this Court has approved covert law enforcement activities for over 30 years, recognizing that "[m]any crimes ... could not otherwise be detected unless the government is permitted to engage in covert activity." *People in Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988). Covert investigations are even permissible as the basis for lawyer disciplinary actions. *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986) (approving the evidentiary use of secretly recorded conversations with a lawyer who offered to assist in organizing a prostitution ring). Commentators cite two primary reasons why covert investigations are in the public interest: utility and necessity. Kevin C. McMunigal, *A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions: Investigative Deceit*, 62 HASTINGS L.J. 1377, 1392 (2011) ("Investigative deception, in addition to being useful, is also often necessary in dealing with crimes and criminals. Prosecutors and police often need to use deceit to find the truth, because criminal activity tends to be clandestine."); Isbell & Salvi, *supra*, at 802 ("[T]he use of covert investigators and discrimination testers is an

indispensable means of detecting and proving violations that might otherwise escape discovery or proof.").

Given the lawfulness, utility, and necessity of undercover investigations, the consensus among commentators is that public policy supports lawyers supervising them.[8] "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

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[8] At least nineteen jurisdictions have specifically approved attorney supervision of undercover investigations, either directly or by adding an express "fitness to practice law" qualification to Rule 8.4(c). This guidance has taken the form of rule amendments, comment amendments, and ethics opinions. *See Addendum B.* The Attorney General is not aware of any jurisdiction in which a rule, comment, or ethics opinion has been issued to prohibit supervision of a lawful covert investigation by a government lawyer. Several ethics or advisory opinions have, however, concluded that a private lawyer's use of deception to obtain evidence would violate ethics rules in some circumstances. *See, e.g.*, Wash. State Bar Ass'n Advisory Op. 1415 (1991) (use of an actor to pose as a client to impeach expert witness); Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (Mar. 2009) (use of a third-party to "friend" a witness on Facebook to gain access to information on that account).

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." Colo. Bar Ass'n Ethics Comm., Rev. Formal Op. 96 at 1 (2012).[9] If lawyer involvement in undercover investigations were deemed a violation of ethics rules, covert investigations would not cease; the ethical prohibition "would simply discourage police from seeking prosecutorial involvement and advice during the investigative phase of a criminal case" and "discourage prosecutors from taking on and encouraging such supervision." McMunigal, *supra*, at 1395.

Indeed, the Colorado Standing Committee on the Rules of Professional Conduct cited this precise concern in contemplating an

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[9] *See also* Colo. Bar Ass'n Ethics Comm., Formal Op. 112 at 1 (2003) (explaining that although "surreptitious recording ... may involve an element of trickery or deceit," government attorneys should be allowed to use surreptitious recordings "for the purpose of gathering admissible evidence" because "attorney involvement in the process will best protect the rights of criminal defendants"); *but see* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 at 3 (2015) (opining, contrary to the conclusion in Opinion 112, that "a lawyer must never use deception to gain access to a restricted portion of a social media profile or website").

amendment to Rule 8.4(c) to address undercover investigations. In the view of many members of the Committee—and a majority of the subcommittee tasked with examining the need for an amendment—punishing government lawyers for working with their investigative partners would lead them to "distance[ ] themselves from the actual investigations" and would require them to "choose not to know what their investigators are actually doing in the field." *Exhibit 11 at 5.* As one law professor found after attending a number of American Bar Association Criminal Justice Section Roundtable Discussions in 2010, "[n]o one ..., whether prosecutor, defense lawyer, or judge, thought that less prosecutorial supervision of police is a good idea." McMunigal, *supra*, at 1395.

This is why the American Bar Association explicitly recognizes the ethical propriety of lawyers supervising covert investigations and, indeed, specifically recommends it. *See ABA Standards for Criminal Justice: Prosecutorial Investigations*, Standards 1.2 & 1.3. The ABA directs prosecutors to "provide legal advice to law enforcement agents

regarding the use of investigative techniques that law enforcement agents are authorized to use." *Id.*, Standard 1.3(g). "Police errors during an investigation ... can impair or entirely undermine a case." *Id.*, Commentary to Subdivision 1.3(b). Moreover, lawyer supervision protects the constitutional and other rights and privileges of the target of an investigation. *Id.*, Standards 1.2, 2.2, & 2.3. Given the pivotal role lawyers play in undercover operations, "[a] prosecutor would not be doing his job effectively if he or she refused to give an officer accurate legal advice to help the officer prepare to conduct a lawful covert operation or interrogation, especially when the entire case migh[t] rest on the admissibility of the evidence." H. Morley Swingle & Lane P. Thomasson, *Feature: Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (2013); *accord ABA Standards for Criminal Justice: Prosecutorial Investigations*, Standard 1.3, Commentary to Subdivision 1.3(g) (explaining that complying with ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve 'deceit'").

Covert activities will continue with or without attorney involvement. Forcing investigators and law enforcement to conduct these activities without attorney supervision, and forcing lawyers to willfully ignore those activities, is not in the public interest. In contrast, allowing attorneys to work in concert with investigators and law enforcement—as the text of Rule 8.4(c) authorizes—furthers the public policy of ensuring that covert investigations are conducted lawfully, that the justice system works effectively, and that the rights of suspects are honored.

III. *In re Pautler*, which sanctioned a prosecutor for misrepresentations made to a murder suspect seeking legal counsel, does not implicate supervision of undercover operations.

In considering whether to recommend a revision to Rule 8.4(c) to directly address undercover investigations, the Pretexting Subcommittee expressed "[p]articular concern" with *In re Pautler*, one of this Court's decisions construing the Rule. *Exhibit 10* at 7 (citing *In re Pautler*, 47 P.3d 1175 (Colo. 2002)). But while that decision uses

strict language to describe a lawyer's obligations under the Rule, it does not affect the issue presented in this case.

Pautler addressed a unique set of facts that is unlikely to recur: a prosecutor impersonating a public defender to bring about the peaceful surrender of a barricaded murder suspect. 47 P.3d at 1176–77. Despite the lawyer's "noble motive" and the impersonation's beneficial outcome, this Court held that "[p]urposeful 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." *Id.* at 1176, 1180.[10] This Court further explained that Rule 8.4(c) is "devoid of any exception." *Id.* at 1179. This broad language appears to suggest that lawyer supervision of a lawful undercover investigation would likewise be prohibited by the Rule. But, as the Pretexting Subcommittee

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[10] In rejecting a "noble motive" defense, the Court relied on *People v. Reichman*, 819 P.2d 1035 (Colo. 1991). *In re Pautler*, 47 P.3d at 1179–80. In *Reichman*, a district attorney was disciplined, not for being the head of a task force conducting an undercover drug trafficking investigation, 819 P.2d at 1036, but for deceiving the judicial system itself by filing false criminal charges against an undercover agent to enhance his covert identity. *Id.*

recognized, that reading of *Pautler* would be "anomalous." *Exhibit 10* at 18.

First and most importantly, the *Pautler* Court specifically cautioned that the issue of lawyer supervision of undercover investigations was "inapposite" to the question presented. 47 P.3d at 1179 & n.4 (citing Oregon and Utah as examples of States that allow attorney involvement in undercover investigations). Second, beyond that important caveat, *Pautler* also explained that the decision extended no further than the unique facts of the case. *Id.* at 1182 ("We limit our holding to the facts before us."). Emphasizing the narrowness of its holding, this Court listed the various reasons why, in its view, the misrepresentation at issue was unjustified under the circumstances. For example, at the time of the misrepresentation, "nothing indicated that any specific person's safety was in imminent danger," the attorney "had telephone numbers and a telephone and could have called a [public defender]," and the attorney could have "explor[ed] with [the suspect] the possibility that no attorney would be called until after he

STANDING COMMITTEE 178

surrendered." *Id.* at 1180. *Pautler* was thus about one particular fact pattern. Nothing about it suggests that the Court intended to consider, and opine on, attorney supervision or advice in an undercover operation, let alone entirely foreclose such activities.

The Minority Report of the Pretexting Subcommittee recognized the limited scope of *Pautler*'s holding while conceding the expansiveness of its dicta. Acknowledging that lawyers might have "legitimate angst over the breadth of RPC 8.4(c), especially in light of *Pautler*," the minority explained that "courts have long acknowledged ... that law enforcement officers may dissemble" and that "ruses are a sometimes necessary element of police work." *Exhibit 11* at 32 (quoting *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996)). And it emphasized "the absence of any R.P.C 8.4(c) case in Colorado involving a covert investigation." *Id.* at 38.

Thus, in addressing the issue presented by this case, this Court writes on a clean slate. It may fully consider the text of the Rule, the context in which it operates, the interpretive guidance contained in the

Comment to the Rule, and the purposes and policies that motivate the Rules in general. Nor does *Pautler* foreclose the conclusion of those lines of analysis: that lawyer supervision of undercover operations is permissible and consistent with a government attorney's ethical obligations.

CONCLUSION

The Attorney General requests that this Court accept jurisdiction over this matter; authoritatively construe Rules 5.3 and 8.4(c) not to implicate a government lawyer' supervision of, or advice to, lawful undercover investigations; and issue an injunction barring enforcement of the Colorado Rules of Professional Conduct in a manner inconsistent with the Court's opinion.

Respectfully submitted,

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/s/ Frederick R. Yarger

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CERTIFICATE OF SERVICE

I certify that I have served a true copy of this **Petition for Original Writ Under C.A.R. 21** on all parties via ICCES and hand-delivery at Denver, Colorado this 5th day of May 2017, addressed as follows:

James C. Coyle
Matthew Samuelson
Ralph L. Carr Judicial Center
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of Attorney Regulation Counsel
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Denver, CO 80203

/s/ Jennifer Duran

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 5, 2017 CASE NUMBER: 2017SA92
Office of Attorney Regulation Counsel –	
In Re: **Petitioner:** Cynthia H. Coffman, in her official capacity as the Attorney General of Colorado, **v.** **Respondents:** Office of Attorney Regulation Counsel and James C. Coyle, in his official capacity as Colorado Supreme Court Attorney Regulation Counsel.	Supreme Court Case No: 2017SA92
ORDER OF COURT	

Upon consideration of the Petition for Original Writ Under C.A.R. 21 filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition for Original Writ Under C.A.R. 21 shall be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that said Motion of First Judicial District Attorney's Office to File Amicus Curiae Brief in Support of Petitioners and said Motion for Leave to File Amicus Curiae Brief in Support of the Attorney General's Original Proceeding Under C.A.R. 21 are DENIED AS MOOT.

BY THE COURT, EN BANC, JUNE 5, 2017.

BFW ATTORNEYS
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April 7, 2017

Marcy G. Glenn, Esq.
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Re: Proposed Amendments to Colo. RPC 5.4

Dear Marcy,

In 2009, the Colorado Supreme Court adopted changes to Colo. RPC 5.4 and C.R.C.P. 265 based on recommendations made by this Committee and the Court's Civil Rules Committee. Rule Changes 2009(5) and 2009(6). Leaving aside C.R.C.P. 265, the main purpose of the revisions to Colo. RPC 5.4 was to clarify who was considered a "nonlawyer"—e.g., disbarred or suspended lawyers, lawyers on disability inactive status—for purposes of the prohibition in Colo. RPC 5.4(d) against nonlawyer law firm ownership. See Tab A, February 4, 2008 Memorandum signed by Committee Chairs Glenn and Laugesen within enclosed February 4, 2008 letter from Marcy G. Glenn, Esq. to Justices Michael L. Bender and Nathan B. Coats.

Recently I discovered that Colo. RPC 5.4(d) is missing a seven-word phrase that had been included in Colo. RPC 5.4(d) since the Court adopted the Rules of Professional Conduct in 1993, and has always been included in ABA Model Rule of Professional Conduct 5.4(d). All jurisdictions except the District of Columbia prohibit nonlawyer law firm ownership through rules similar or identical to ABA Model Rule 5.4(d).[1]

Specifically, until 2009, the phrase "authorized to practice law for a profit" appeared as follows in Colo. RPC 5.4(d):

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[1] (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ABA Model Rule 5.4(d) (emphasis added).

> A lawyer shall not practice with or in the form of a professional company or association, or limited liability company, *authorized to practice law for a profit,* except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court."

Colo. RPC 5.4(d) (2008) (emphasis added). C.R.C.P. 265, in turn, required all owners of law firm entities to be licensed attorneys or entities owned by licensed attorneys. C.R.C.P. 265, II, A, B (2008), Tab B.

The phrase "authorized to practice law for a profit" has the quite deliberate effect of *excluding* from Rule 5.4(d) lawyers who practice law in nonprofit civil rights or other advocacy organizations. See Tab C, 2013 New York State ethics opinion, which discusses this distinction in the context of a rule based on ABA Model Rule 5.4(d). In Colorado and nationally, many such organizations are owned in whole or in part by nonlawyers and employ lawyers to represent the organization or third parties in public policy litigation.

Current Colo. RPC 5.4(d) omits the qualifying phrase "authorized to practice law for a profit":

> (d) A lawyer shall not practice with or in the form of a professional company, if:
> (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or
> (2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

Colo. RPC 5.4(d) (2017). The absence of this phrase means that lawyers who practice law in a nonprofit civil rights or public policy advocacy organization in which a nonlawyer holds an ownership interest are in violation of Colo. RPC 5.4(d).

After reviewing your February 4, 2008 letter and its enclosures, and contacting fellow members of the joint subcommittee that studied and recommended the rule changes ultimately adopted, I am convinced that the omission of this phrase was an inadvertent scrivener's error.

There is an easy remedy. I propose that the Committee recommend that Colo. RPC 5.4(d) be amended to return the omitted phrase as follows:

> (d) A lawyer shall not practice with or in the form of a professional company <u>authorized to practice law for a profit</u>, if:

> (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or
> (2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

I propose further that the Committee recommend that Colo. RPC 5.4(e) be similarly amended:

> A lawyer shall not practice with or in the form of a professional company authorized to practice law for a profit except in compliance with C.R.C.P. 265.

Colo. RPC 5.4(e) is a non-ABA Model Rule provision that requires lawyers to abide by C.R.C.P. 265 if they practice law through a professional company. C.R.C.P. 265 does not appear to apply to lawyers who practice law in nonprofit organizations. See Tab C, C.R.C.P. 265. In addition, in the definition of "firm" or "law firm" in the Colorado Rules, lawyers who work for a "professional company" are treated as distinct from "lawyers employed in a legal services organization or the legal department of a corporation or other organization." Colo. RPC 1.0(c); *see also* Colo. RPC 1.0(g)(1) ("'Professional company' has the meaning ascribed to the term in C.R.C.P. 265."); *Annotated Model Rules of Professional Conduct* 576 (8th ed. 2015) ("legal service organization" in Rule 6.3 means "pro bono organization that provides legal services to economically disadvantaged clients").

I do not see a need to recommend the amendment of any Comments to Colo. RPC 5.4.

Thank you.

Very truly yours,

Alec

Alexander R. Rothrock

Enclosures

HOLLAND&HART LLP
THE LAW OUT WEST®

Marcy G. Glenn
Phone (303) 295-8320
Fax (303) 975-5475
mglenn@hollandhart.com

February 4, 2008

VIA HAND-DELIVERY

Honorable Michael L. Bender
Honorable Nathan B. Coats
Colorado Supreme Court
2 E. 14th Avenue, 4th Floor
Denver, CO 80203

Re: Proposed Amendments to CRPC 1.0 and 5.4

Dear Justices Bender and Coats:

The Court's Standing Committee on the Rules of Professional Conduct (the CRPC Standing Committee) recommends adoption of amendments to CRPC 1.0 and 5.4, consistent with proposed amendments to CRCP 265, which are being separately submitted by the Court's Standing Committee on the Rules of Civil Procedure (the Civil Rules Committee).

The proposed amendments were developed by a special joint subcommittee consisting of members appointed from both the CRPC Standing Committee and the Civil Rules Committee, and chaired by David W. Stark. The subcommittee considered whether the two standing committees should recommend amending CRCP 265 and, perhaps, one or more CRPC, to address the following issues: (1) CRCP 265's limitation on professional companies' activities to "the practice of law in Colorado"; (2) CRCP 265's insurance requirements; and (3) CRCP 265's application only to lawyers practicing in professional companies, but not as sole proprietorships or in general partnerships that are not professional companies. The subcommittee reported to both Committees, which approved the attached proposed amendments as well as the proposed amendments to CRCP 265.

The proposed amendments are summarized in the attached memorandum report, which I forward to you as the Liaison Justices to the CRPC Standing Committee, for you to forward to the full Court for consideration after advance publication and an opportunity for the submission of written comments.

HOLLAND&HART LLP
THE LAW OUT WEST

Sincerely,

Marcy G. Glenn
Chair

MGG:lmp
Enclosures: (1) Red-lined version of proposed amendments to CRPC 1.0 and 5.4
(2) Clean copy of proposed amendments to CRPC 1.0 and 5.4
(3) Memorandum from Marcy G. Glenn and Richard W. Laugesent concerning proposed amendments to CRCP 265 and CRPC 1.0 and 5.4
(4) Report of the CRCP 265 Joint Subcommittee (without original attachments)
(5) Strike-and-add copy of proposed amendments to CRCP 265, as separately submitted by the Civil Rules Committee
(6) Clean copy of proposed amendments to CRCP 265, as separately submitted by the Civil Rules Committee
(7) Disc containing clean and red-lined versions of CRPC 1.0 and 5.4 as Microsoft Word documents

cc: Standing CRCP Committee Members (w/enclosures (1)-(6)) (via e-mail)
Carol Haller, Office of State Court Administrator (w/enclosures) (via hand-delivery)
Richard W. Laugesen, Esq. (w/enclosures (1)-(6) (via e-mail)

TAB A

1

TAB A

Attachment D

Subcommittee Proposal for
Modifications to "Ethics 2000" Rules of Professional Conduct
As They Were Proposed to the Court December 2005

RULE 1.0: TERMINOLOGY

* * * *

(c) "Firm" or "law firm" denotes a ~~lawyer or lawyers in a law~~ partnership, professional ~~corporation~~ ***company***, ~~sole proprietorship,~~ or other ~~association~~ ***entity or a sole proprietorship*** ~~authorized to practice law~~ ***through which a lawyer or lawyers render legal services***; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

* * * *

(g) "Partner" denotes a member of a partnership, ~~a shareholder in a law firm organized as a professional corporation~~ ***an owner of a professional company***, or a member of an association authorized to practice law.

(g-1) "Professional company" has the meaning ascribed to the term in C.R.C.P. 265.

* * * * * * * * * *

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the ~~lawyers~~ ***lawyer's*** firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional ~~corporation, association, or limited liability company, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court~~ ***company, if***

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), and (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

* * * * * * * * * * *

Comment to RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional ~~legal corporation~~ ***company***, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the

relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

TAB A

TAB A

Proposal for
Modifications to Rules 1.0 and 5.4 of Professional Conduct

RULE 1.0: TERMINOLOGY

* * * *

(c) "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

* * * *

(g) "Partner" denotes a member of a partnership, an owner of a professional company, or a member of an association authorized to practice law.

(g-1) "Professional company" has the meaning ascribed to the term in C.R.C.P. 265.

* * * * * * * * * * *

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(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company, if

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), and (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

* * * * * * * * * *

Comment to RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional company, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

TAB A

3

TAB A

MEMORANDUM

February 4, 2008

TO: The Honorable Justices of the Colorado Supreme Court

FROM: Marcy G. Glenn
Richard W. Laugesen

RE: Recommended Amendments to CRCP 265 and CRPC 1.0 and 5.4

We submit this memorandum in our respective capacities as Chair of the Court's Standing Committee on the Colorado Rules of Civil Procedure (the Standing Rules Committee) and the Court's Standing Committee on the Colorado Rules of Professional Conduct (the CRPC Standing Committee), jointly referred to as "the two standing committees."

In early-2006, the two standing committees appointed subcommittees charged with coordinating with each other and considering whether the two standing committees should recommend amending CRCP 265 and, perhaps, one or more CRPC, to address the following issues:

(1) CRCP 265's limitation on professional companies' activities to "the practice of law in Colorado";

(2) CRCP 265's insurance requirements; and

(3) CRCP 265's application only to lawyers practicing in professional companies, but not as sole proprietorships or in general partnerships that are not professional companies.

In 2007, the Civil Rules Committee's subcommittee recommended amendments to CRCP 265, which the Civil Rules Committee approved for recommendation to the Court; and the CRPC Standing Committee's subcommittee recommended amendments to CRPC 1.0 and 5.4, which the CRPC Standing Committee approved for recommendation to the Court. This memorandum summarizes those recommendations.

Summary of nature of recommended amendments. The recommended amendments, if adopted, would accomplish the following:

(1) Broaden the permissible activities of a professional company beyond "the practice of law in Colorado," to accommodate lawyers who engage in mediation, service as expert witnesses, and other law-related services through their law firms;

(2) Ensure that lawyers practicing in professional companies and in either sole proprietorships or general partnerships are treated equally with one exception: attorneys practicing in a professional company would remain vicariously liable for actions, errors and omissions of other lawyers in the professional company, unless the professional company maintains specified minimal levels of liability insurance.

(3) Transfer various substantive requirements of professional companies from current CRCP 265 to CRPC 5.4, where those requirements would apply to all attorneys, whether practicing in professional companies, or in sole proprietorships or general partnerships.

(4) Amend CRPC 5.4 to clarify that a "nonlawyer" (who, under the recommended amendments to that rule, may not own an interest in a professional company, or direct or control a lawyer's professional judgment) includes disbarred lawyers, suspended lawyers who must petition for reinstatement, and certain lawyers on inactive status.

(5) Amend certain definitions in CRPC 1.0 to conform to the recommended amendments to CRPC 5.4.

The two standing committees do *not* recommend changing the requirement of maintenance of liability insurance by professional companies, nor the current amounts of such insurance.

Detailed analysis of recommended amendments. Attached to this memorandum are the following materials: (1) July 20, 2007 Report of the Rule 265 Subcommittee of the CRPC Standing Committee, without attachments, which explains the recommended amendments in detail; (2) clean versions of the proposed amendments to CRCP 265 and CRPC 1.0 and 5.4; and (3) redlined versions of CRCP 265 and CRPC 1.0 and 5.4, with the recommended changes to CRCP 265 annotated to explain the reasoning underlying the recommendations.

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TAB A

TAB A

Appendix to SCSCRPC Minutes of
Eighteenth Meeting, on July 20, 2007

REPORT OF THE RULE 265 SUBCOMMITTEE
TO THE
SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
JULY 20, 2007

Attached to this report are—

Attachment A: Extracts from Minutes of the Standing Committee regarding Rule 265
Attachment B: Subcommittee Proposal for Modifications to Rule 265
Attachment C: Comparison of Subcommittee Proposal to Current Rule 265, with Commentary
Attachment D: Comparison of Subcommittee Proposal to Current Rule 265

The Rule 265 Subcommittee was established by the Chair of the SCSCRPC following the thirteenth meeting of the Committee on March 3, 2006. The Subcommittee is chaired by David W. Stark, and its other members from the SCSCRPC are Michael H. Berger, Nancy L. Cohen, Thomas H. Downey, Jr., David C. Little, Alexander Rothrock, Anthony van Westrum, and Judge John Webb. In addition, James E. Bye, Charles Kall, and Robert R. Keatinge participated from the bar at large.

The Subcommittee was formed to review two aspects of current Rule 265, CRCP: (1) its limitation of the permitted activities of "professional companies" to "the practice of law" and (2) its provisions for the insurance coverage that must be maintained if the owners of professional companies are to avoid vicarious, joint and several, liability for the conduct of other lawyers practicing law through the professional company.

Attachment A to this report contains extracts from the minutes of the SCSCRPC wherein the members discussed the need to consider amendments to Rule 265 with respect to those aspects.

The Practice of Law

Rule 265.I.A.2 currently provides, "The professional company shall be established solely for the purpose of conducting the practice of law . . .," yet a large number of lawyers who are partners in professional companies provide services as neutrals in arbitrations, mediations, and other alternative dispute resolution processes; services as consulting experts and testimonial experts regarding legal and professional conduct topics; and other services that are not "the practice of law." Many have done so without awareness that those services may be technically beyond the scope of services that may be provided from within a "professional company" under current Rule 265. Others have done so with awareness of the issue but in hope that the disciplinary authorities would regard the issue as a technical "glitch" and would not pursue sanctions for their ostensibly impermissible activities. And Rule 265 creates an unjustified divide between the kinds of services that may be rendered by solo practitioners or by lawyers who are partners within law firms formed as general partnerships — and therefore are not subject to the Rule — and those that may be provided by lawyers who are owners or employees of "professional companies."

At the March 3, 2006 meeting of the SCSCRPC, David Little recounted the drafting history of Rule 265 and noted that,"In [his] view, the Court added [the existing limitation of activities to 'the practice of law'] principally as a definition, as a recognition that is what law firms do, and not as a conscious prohibition against activities that lawyers have traditionally provided but which are not "the practice of law."

From the commencement of its work, the Subcommittee was in agreement that Rule 265 did not need to restrict the activities of professional companies to the practice of law. Rather, the Subcommittee agreed, the kinds of activities that lawyers may engage in, whether from within professional companies or otherwise, are properly a subject for the Rules of Professional Conduct rather than Rule 265. Rule 265 need only deal with the liability undertaken by lawyers who practice through professional companies, providing that such liability will be joint and several unless insurance of the stated characteristics is maintained.

The Subcommittee also agreed that it need not consider whether lawyers should be permitted to provide ADR, expert witness, or other such services. Those matters are adequately provided for by what will be new Ethics 2000 Rule 2.4 (Lawyer Serving as Third-Party Neutral) and Rule 5.7 (Responsibilities Regarding Law-related Services), and by the other provisions of the Rules of Professional Conduct that deal with such related matters as the sharing of legal fees with nonlawyers.

Insurance

The second focus of the subcommittee's work concerned the aspects of Rule 265 that concern professional liability insurance. Under the current Rule, the owners of a professional company are shielded against vicarious, joint and several, liability for professional acts, errors, and omissions of the lawyers rendering legal services through that professional company only if the professional company maintains professional liability insurance coverage at the time the professional act giving rise to the liability claim is committed.

The Subcommittee members discussed at great length the concern that requiring coverage to exist at the time the act, error, or omission occurs, but not at the time at which a claim is made or reported, creates an illusion that the conduct for which liability is claimed would continue to be covered simply because it was covered at the time the conduct occurred. This concern emanated from the nature of the claims-made form of professional liability coverage. Professional liability policies are not issued on an occurrence-only basis. Rather, these policies require notice of a claim to be reported during the period of time the policy is in effect and also require that the conduct giving rise to the claim of liability have occurred during the policy period or during any endorsed extensions of that policy period (known as prior acts coverage).

In practice, it is common for an act, error, or omission to occur during a policy year but not be discovered or reported until several years later. When the claim is subsequently made, the policy under which coverage is sought is not the same policy as the one that existed when the conduct occurred; indeed, when the claim is subsequently made, there may be no insurance coverage at all. For the conduct to be covered, there must be a policy in place that cover the claim at the time the claim is reported.

The Subcommittee thoroughly discussed this conundrum and eventually concluded that the Rule should *not* be changed so as to require coverage to exist at the time the claim is reported. After extended discussion of potential claims and circumstances, the Subcommittee concluded that a change in the Rule to require coverage at the time the claim is reported created far more difficulty and greater inequities then are inherent in the present Rule. Not the least of these was the concern for lawyer mobility and the fragility of professional companies, which tend to expose lawyers to uninsured claims upon departing from existing professional companies without any means of ensuring professional coverage at the time, later, when a claim might be made. Since the entire focus of the insurance requirement of Rule 265 is on the vicarious liability of one lawyer for another's conduct and does not limit the acting lawyer's own, direct liability, the Subcommittee felt it was appropriate to leave the Rule in its present configuration.

Conforming Modifications to the Ethics 2000 Rules

As noted above, a guiding principle for the Subcommittee was that the Rules of Professional Conduct, and not Rule 265, should govern the conduct of lawyers. In general that is already the case, but current Rule 265 contains some specific conduct-related provisions, particularly those in Part II that limit the controlling persons of professional companies to licensed attorneys. The Subcommittee's solution was to propose the addition to Rule 5.4 of provisions (a) precluding nonlawyer ownership of professional companies and (b) precluding the control of lawyer's conduct within professional companies by nonlawyers (Rule 5.4(d)(2)). These provisions fit neatly in with the existing provisions of Rule 5.4, which govern the relationship between a lawyer and other persons that may restrict the lawyer's professional independence.

Use in modified Rule 5.4 of the term "professional company" required the addition of the term as a definition in Rule 1.0 and modification of the existing definitions of "firm" and "partner."

Commentary

Attachment C is a comparison of Rule 265, as the Subcommittee recommends it be modified, with the current Rule. The attachment contains provision-by-provision commentary outlining the reasons for specific changes.

TAB A

5

TAB A

PROPOSED AMENDMENT

Rule 265. Professional ~~Service~~ Companies

~~I.~~

~~A.~~ (a) **Rendering Legal Services Through a Professional Company.** ~~Attorneys who~~ One or more attorneys who are licensed to practice law in Colorado may ~~do so in the form of professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, or joint stock companies, herein collectively referred to as "professional companies," permitted by the laws of Colorado to conduct the practice of law~~ render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional ~~companies~~ company ~~are~~ is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct. ~~The provisions of this Rule shall apply to all professional companies having as shareholders, officers, directors, partners, employees, members, or managers one of more attorneys who engage in the practice of law in Colorado, whether such professional companies are formed under Colorado law or under laws of another state or jurisdiction. All professional companies conducting the practice of law in Colorado shall comply with the following requirements:~~

~~1.~~ (1) **Professional Company Name.** The name of the professional company shall ~~contain the words "professional company," "professional corporation," "limited liability company," "limited liability partnership," or "registered limited liability partnership" or abbreviations thereof such as "Prof. Co.," "Prof. Corp.," "P.C.," "L.L.C.," "L.L.P.," "or "R.L.L.P." that are authorized by the laws of the State of Colorado or the laws of the state or jurisdiction of organization. In addition, the name of the professional company shall always meet the ethical standards established by the Colorado Rules of Professional Conduct for the names of law firms.~~ comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

~~2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.~~

~~3. The professional company may exercise all of the powers and privileges conferred upon such types of entities by the laws of the State of Colorado or other state or jurisdiction of organization but only for the purpose of conducting the practice of law pursuant to this rule and the Colorado Rules of Professional Conduct.~~

~~4.~~ (2) **Owners' Liability for Professional Acts, Errors, or Omissions.** Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional comany, that each of them who is ~~The articles of incorporation, partnership agreement, operating agreement, or other governing document or agreement of the professional company shall provide, and each of the shareholders, partners, or members shall agree, that each of them who is a shareholder, partner, or member of the professional company~~ an owner at the time of the commission of any ~~professional~~ act, error, or omission ~~by any of the shareholders, officers, directors, partners, members, managers, or employees of the professional company shall be~~ in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally ~~liable~~ to the extent provided by this Rule ~~for the damages caused by~~ the liability of the professional company for such act, error, or omission; ~~provided, however, that the governing document or agreement may provide that any such shareholder, partner, or member~~ . Notwithstanding the preceding sentence, any owner who has not directly ~~and actively~~ participated in the act, error, or omission in the rendering of legal services for which liability is ~~claimed shall not be liable,~~ incurred by the professional company does not assume such liability, except as provided in ~~clause (e) of this~~ subsection I.A.4, ~~for any of the damages caused thereby, if~~ (a)(3)(D); if, at the time the act, error, or omission occurs the professional company has professional liability insurance ~~which meets~~ that meets the minimum requirements stated in subsection (a)(3).

(3) **Professional Liability Insurance Policy Requirements.** The professional liability insurance contemplated in subsection (a)(2) shall meet the following minimum ~~standards~~ requirements:

~~(a)~~ **(A) Professional Acts Coverage.** The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the ~~practice of law by attorneys employed by~~ rendering of legal services by any attorney through the professional company and against the ~~in their capacities as attorneys.~~

~~(b) Such insurance shall insure the professional company against~~ liability imimposed upon it ~~by law for damages~~ arising out of the ~~professional~~ acts, errors, and omissions of all ~~nonprofessional employees.~~ nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

~~(c)~~ **(B) Policy Language.** The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

~~(d)~~ **(C) Limits of Coverage.** The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys ~~employed by~~ who render legal services through the professional company; ~~and, if the policy provides~~ or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser of $300,000 multiplied by the number of attorneys ~~employed by~~ who render legal services through the professional company; ~~provided, however, that no professional company shall be required to carry total limits of insurance in excess of $500,000 for each claim or be required to carry an aggregate top limit of liability for all claims per year of more than~~ or $2,000,000.

~~(e)~~ **(D) Deductibles and Defense Costs.** The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. ~~In either or both such events, the~~ The liability assumed by ~~the shareholders, partners, or members~~ each owner of the professional company ~~shall include the amount of~~ who has not directly participated in the act, error or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damages or the sum of the following:

(I) such deductible or retained self-insurance; and

(II) ~~shall include~~ the ~~amount~~ amounts, if any, by which the payment of defense costs ~~may reduce~~ has reduced the insurance remaining available for the payment of ~~claims~~ damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by ~~this Rule if the ultimate liability for the claim exceeds the amount of insurance remaining to pay for it.~~ subsection (a)(3)(C).

~~(f)~~ **(E) Determination of Coverage.** ~~A professional~~ An act, error, or omission ~~is considered~~ in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this ~~subparagraph I.A.4~~ Rule if the policy ~~includes~~ or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the

aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

~~5.~~ **(F) Limitation of Vicarious Liability.** The liability assumed by the ~~shareholders, partners, or members~~ owners of a professional company under this Rule is limited to the liability of the professional company ~~pursuant to subparagraph I.A.4 is limited to liability for professional~~ for acts, errors, or omissions ~~which constitute the practice of law~~ incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable and shall not extend to ~~actions or undertakings that do not constitute the practice of law. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 may be pursued only by a citation brought under C.R.C.P. 106(a)(5) after entry of a judgment against~~ any other liability incurred by the professional company. Liability, if any, for any and all ~~actions or undertakings,~~ acts, errors, and omissions, other than ~~professional~~ acts, errors, or omissions, ~~shall be as generally~~ incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

~~B.~~ **(b) Compliance With Rules of Professional Conduct.** Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through ~~Each attorney practicing law in Colorado as a shareholder, director, officer, member, manager, partner, or employee of~~ a professional company, ~~whether formed under the laws of the State of Colorado or under the laws of any other state or jurisdiction, shall comply with the following standards of professional conduct: 1. No such attorney shall act or fail to act in a way which would violate any of~~ to comply with the Colorado Rules of Professional Conduct ~~adopted~~ promulgated by this Court. ~~The professional company shall also comply at all times with all standards of professional conduct established by this Court and with the provisions of this Rule. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is a shareholder, director, officer, member, manager, or partner of such professional company to practice law in Colorado in the form of a professional company.~~

~~2. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorneys employed by the professional company to conduct that attorney's practice in accordance with the Colorado Rules of Professional Conduct promulgated by this Court. Any attorney who by act or omission causes the professional company to act or fail to act in a way which violates such standards of~~

~~professional conduct or any provision of this Rule shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.~~

(c) Violation of Rule; Termination of Authority. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

~~II.~~

~~Any professional company established for the purpose of conducting the practice of law must comply with all of the following additional requirements:~~

~~A. Except as provided in paragraph II.B and II.C, all officers, directors, shareholders, partners, members, or managers of the professional company shall be individuals who are duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law either in the State of Colorado or in such other state or jurisdiction and who at all times own shares or other equity interests in the professional company in their own right. In addition, all other employees or representatives of the professional company who practice law shall be duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law in the State of Colorado or in such other state or jurisdiction.~~

~~B. A professional company may have one or more shareholders, partners, or members which are professional companies so long as each such shareholder, partner, or member is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.~~

~~C. A professional company may have directors, officers, or managers who do not have the qualifications described in paragraph II.A, but no director, officer, manager, or employee of a professional company who is not licensed to practice law either in the State of Colorado or elsewhere shall exercise any authority whatsoever over any of the professional company's activities related to the practice of law.~~

~~D. Provisions shall be made requiring any shareholder, partner, or other member who withdraws from or otherwise ceases to be eligible to be a shareholder, partner, or member of the professional company to dispose of all shares or other equity interests therein as soon as practicable either to the professional company or to any person having the qualifications described in paragraph II.A. Provisions may be~~

~~made for the redemption or disposition of shares or other equity interests over a reasonable period of time so long as the withdrawing shareholder, partner, or member does not exercise any management or professional function during such period of time.~~

~~E. A professional company may adopt retirement, pension, profit-sharing (whether cash or deferred), health and accident insurance, or welfare plans for all or some of its employees, including lay employees, provided that such plans do not require or result in the sharing of specific or identifiable fees with lay employees and provided that any payments made to lay employees or into any such plan on behalf of lay employees are based upon their compensation or length of service or both rather than upon the amount of fees or income received.~~

(d) Professional Company Constituencies. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "Professional Company" Defined. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

TAB A

TAB A

PROPOSED AMENDMENT

Rule 265. Professional Companies

(a) Rendering Legal Services Through a Professional Company. One or more attorneys who are licensed to practice law in Colorado may render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional company is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

(1) Professional Company Name. The name of the professional company shall comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

(2) Owners' Liability for Professional Acts, Errors, or Omissions. Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional comany, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally to the extent provided by this Rule, the liability of the professional company for such act, error, or omission. Notwithstanding the preceding sentence, any owner who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company does not assume such liability, except as provided in subsection (a)(3)(D), if, at the time the act, error, or omission occurs the professional company has professional liability insurance that meets the minimum requirements stated in subsection (a)(3).

(3) Professional Liability Insurance Policy Requirements. The professional liability insurance contemplated in subsection (a)(2) shall meet the following minimum requirements:

(A) Professional Acts Coverage. The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the rendering of legal services by any attorney through the professional company and against the liability imposed upon it arising out of the acts, errors, and omissions of all nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

(B) Policy Language. The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(C) Limits of Coverage. The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys who render legal services through the professional company or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser of $300,000 multiplied by the number of attorneys who render legal services through the professional company or $2,000,000.

(D) Deductibles and Defense Costs. The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. The liability assumed by each owner of the professional company who has not directly participated in the act, error or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damages or the sum of the following:

(I) such deductible or retained self-insurance; and

(II) the amounts, if any, by which the payment of defense costs has reduced the insurance remaining available for the payment of damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by subsection (a)(3)(C).

(E) Determination of Coverage. An act, error, or omission in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this Rule if the policy or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

(F) Limitation of Vicarious Liability. The liability assumed by the owners of a professional company under this Rule is limited to the liability of the professional company for acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable and shall not extend to any other liability incurred by the

professional company. Liability, if any, for any and all acts, errors, and omissions, other than acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

(b) Compliance With Rules of Professional Conduct. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through a professional company to comply with the Colorado Rules of Professional Conduct promulgated by this Court.

(c) Violation of Rule; Termination of Authority. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

(d) Professional Company Constituencies. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "Professional Company" Defined. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

CHAPTER 22. PROFESSIONAL SERVICE COMPANIES

Adopted Effective December 1, 1995

Including Amendments Received Through December 15, 2006

Research Note

Annotations for Colorado court rules are available in the Court Rules volumes in West's Colorado Revised Statutes Annotated, *and in the CO-RULES database on* Westlaw®. Westlaw *may also be used to search for specific terms in court rules or to update court rules. See also CO-RULES and CO-ORDERS Scope Screens for further information.*

Amendments to these rules are published, as received, in the P.2D *and* Colorado Reporter *advance sheets.*

Table of rules

RULE 265. PROFESSIONAL SERVICE COMPANIES

I.

A. Attorneys who are licensed to practice law in Colorado may do so in the form of professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, or joint stock companies, herein collectively referred to as "professional companies," permitted by the laws of Colorado to conduct the practice of law, provided that such professional companies are established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct. The provisions of this Rule shall apply to all professional companies having as shareholders, officers, directors, partners, employees, members, or managers one or more attorneys who engage in the practice of law in Colorado, whether such professional companies are formed under Colorado law or under laws of another state or jurisdiction. All professional companies conducting the practice of law in Colorado shall comply with the following requirements:

1. The name of the professional company shall contain the words "professional company," "professional corporation," "limited liability company," "limited liability partnership," or "registered limited liability partnership" or abbreviations thereof such as "Prof. Co.," "Prof. Corp.," "P.C.," "L.L.C.," "L.L.P.," or "R.L.L.P." that are authorized by the laws of the State of Colorado or the laws of the state or jurisdiction of organization. In addition, the name of the professional company shall always meet the ethical standards established by the Colorado Rules of Professional Conduct for the names of law firms.

2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.

3. The professional company may exercise all of the powers and privileges conferred upon such types of entities by the laws of the State of Colorado or other state or jurisdiction of organization but only for the purpose of conducting the practice of law pursuant to this rule and the Colorado Rules of Professional Conduct.

4. The articles of incorporation, partnership agreement, operating agreement, or other governing document or agreement of the professional company shall provide, and each of the shareholders, partners, or members shall agree, that each of them who is a shareholder, partner, or member of the professional company at the time of the commission of any professional act, error, or omission by any of the shareholders, officers, directors, partners, members, managers, or employees of the professional company shall be

jointly and severally liable to the extent provided by this Rule for the damages caused by such act, error, or omission; provided, however, that the governing document or agreement may provide that any such shareholder, partner, or member who has not directly and actively participated in the act, error, or omission for which liability is claimed shall not be liable, except as provided in clause (e) of this subparagraph I.A.4, for any of the damages caused thereby if at the time the act, error, or omission occurs the professional company has professional liability insurance which meets the following minimum standards:

(a) The insurance shall insure the professional company against liability imposed upon it arising out of the practice of law by attorneys employed by the professional company in their capacities as attorneys.

(b) Such insurance shall insure the professional company against liability imposed upon it by law for damages arising out of the professional acts, errors, and omissions of all nonprofessional employees.

(c) The policy may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(d) The insurance shall be in an amount for each claim of at least $100,000 multiplied by the number of attorneys employed by the professional company, and, if the policy provides for an aggregate top limit of liability per year for all claims, the limit shall not be less than $300,000 multiplied by the number of attorneys employed by the professional company; provided, however, that no professional company shall be required to carry total limits of insurance in excess of $500,000 for each claim or be required to carry an aggregate top limit of liability for all claims per year of more than $2,000,000.

(e) The policy may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. In either or both such events, the liability assumed by the shareholders, partners, or members of the professional company shall include the amount of such deductible or retained self-insurance and shall include the amount, if any, by which the payment of defense costs may reduce the insurance remaining available for the payment of claims below the minimum limit of insurance required by this Rule if the ultimate liability for the claim exceeds the amount of insurance remaining to pay for it.

(f) A professional act, error, or omission is considered to be covered by professional liability insurance for the purpose of this subparagraph I.A.4 if the policy includes such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

5. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 is limited to liability for professional acts, errors, or omissions which constitute the practice of law and shall not extend to actions or undertakings that do not constitute the practice of law. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 may be pursued only by a citation brought under C.R.C.P. 106(a)(5) after entry of a judgment against the professional company. Liability, if any, for any and all actions or undertakings, other than professional acts, errors, or omissions, shall be as generally provided by law and shall not be changed, affected, limited, or extended by this Rule.

B. Each attorney practicing law in Colorado as a shareholder, director, officer, member, manager, partner, or employee of a professional company, whether formed under the laws of the State of Colorado or under the laws of any other state or jurisdiction, shall comply with the following standards of professional conduct:

1. No such attorney shall act or fail to act in a way which would violate any of the Colorado Rules of Professional Conduct adopted by this Court. The professional company shall also comply at all times with all standards of professional conduct established by this Court and with the provisions of this Rule. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is a shareholder, director, officer, member, manager, or partner of such professional company to practice law in Colorado in the form of a professional company.

2. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney employed by the professional company to conduct that attorney's practice in accordance with the Colorado Rules of Professional Conduct promulgated by this Court. Any attorney who by act or omission causes the professional company to act or fail to act in a way which violates such standards of professional conduct or any provision of this Rule shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.

STANDING COMMITTEE 216

II.

Any professional company established for the purpose of conducting the practice of law must comply with all of the following additional requirements:

A. Except as provided in paragraph II.B and II.C, all officers, directors, shareholders, partners, members, or managers of the professional company shall be individuals who are duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law either in the State of Colorado or in such other state or jurisdiction and who at all times own shares or other equity interests in the professional company in their own right. In addition, all other employees or representatives of the professional company who practice law shall be duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law in the State of Colorado or in such other state or jurisdiction.

B. A professional company may have one or more shareholders, partners, or members which are professional companies so long as each such shareholder, partner, or member is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

C. A professional company may have directors, officers, or managers who do not have the qualifications described in paragraph II.A, but no director, officer, manager, or employee of a professional company who is not licensed to practice law either in the State of Colorado or elsewhere shall exercise any authority whatsoever over any of the professional company's activities relating to the practice of law.

D. Provisions shall be made requiring any shareholder, partner, or other member who withdraws from or otherwise ceases to be eligible to be a shareholder, partner, or member of the professional company to dispose of all shares or other equity interests therein as soon as practicable either to the professional company or to any person having the qualifications described in paragraph II.A. Provisions may be made for the redemption or disposition of shares or other equity interests over a reasonable period of time so long as the withdrawing shareholder, partner, or member does not exercise any management or professional function during such period of time.

E. A professional company may adopt retirement, pension, profit-sharing (whether cash or deferred), health and accident insurance, or welfare plans for all or some of its employees, including lay employees, provided that such plans do not require or result in the sharing of specific or identifiable fees with lay employees and provided that any payments made to lay employees or into any such plan on behalf of lay employees are based upon their compensation or length of service or both rather than upon the amount of fees or income received.

Amended eff. June 1, 1987; Nov. 1, 1991; Jan. 1, 1993. Repealed and adopted eff. Dec. 1, 1995. Amended eff. Dec. 6, 1995; Dec. 20, 1995.

*

Rothrock, Alec 3/4/2017
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NY Eth. Op. 957 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2013 WL 589087

New York State Bar Association
Committee on Professional Ethics

NONPROFIT ORGANIZATION OFFERING LEGAL SERVICES AND SEEKING GRANTS TO SUBSIDIZE THE LEGAL SERVICES PROGRAMS

Opinion Number 957
January 14, 2013

Digest: A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.
***1 Rules**: 1.8(f), 5.4(c) & (d), 5.5(b), and 7.2(b)

FACTS

1. The inquiring attorney is a salaried employee of a bona fide nonprofit credit counseling agency that is not a law firm. He has inquired whether he may ethically participate in two legal services programs that his employer would like to offer: (1) filing for bankruptcy protection for clients who are unable to do so outside of the agency because of their financial situation, and (2) advising seniors concerning whether they should join supplemental needs pooled income trusts previously established by a separate 501(c)(3) agency under the applicable provisions of the New York State Social Services Law by entering into "joinder" agreements.

2. The credit counseling agency presently advises debtors on whether they will benefit from payment plans with the debtors' creditors. The agency would like to add legal services to enhance the agency's role in providing financial solutions, primarily to assist the elderly or others in need of social security assistance. Since this market is underserved, the agency intends to assist individuals with Representative Payee services as well as to form a bill pay service for those who are incapable of handling their own finances or who lack assistance of others. The agency has not established any fee arrangement for the proposed services. However, in light of the agency's mission, the agency plans to keep fees to a minimum so that it can serve those who cannot afford private representation but are not sufficiently indigent to qualify for free legal aid. The agency plans to seek grant funding opportunities to assist it in subsidizing the legal services programs.

3. If the proposed programs are implemented, the inquiring lawyer will furnish legal services to the agency's clients. Each client for whom legal services are provided will sign an engagement letter that specifies that the agency itself will not give legal advice or represent clients and that the client-lawyer relationship is only between the client and the attorney. The agency's board of directors will adopt a policy prohibiting the agency from controlling the lawyer's representation of clients.

QUESTIONS

***2** 4. May a lawyer employed by a **nonprofit** credit counseling agency assist the agency in offering legal services programs?

5. May a lawyer employed by a **nonprofit** credit counseling agency assist the agency in seeking grants to support the agency's legal services programs?

OPINION

Rothrock, Alec 3/4/2017
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Legal Services Offered by a Nonprofit Organization

6. Rule **5.4(d)** prohibits a lawyer from practicing with or in the form of an entity authorized to practice law *for profit* if a nonlawyer owns any interest in the entity, is a member, corporate director or officer of the entity, or has the right to direct or control the professional judgment of the lawyer. However, Rule **5.4(d)** does not extend to **nonprofit** organizations.

7. New York Judiciary Law § 495 prohibits corporations from practicing law, but New York Judiciary Law § 495(7) carves out exceptions for (1) organizations that offer prepaid legal services, (2) **nonprofit** organizations that furnish legal services as an "incidental activity" in furtherance of some other "primary purpose," and (3) organizations whose primary purpose is to furnish legal services to indigent persons. Judiciary Law § 496 requires organizations exempt under § 495(7) to report and annually update the following information to the Appellate Division: a statement describing the nature and purposes of the organization, composition of the governing body, type of legal services offered, and names and addresses of any attorneys employed by the organization.

8. Therefore, **nonprofit** organizations authorized to practice law under Judiciary Law §§ 495(7) and 496 and organizations that offer prepaid legal services and furnish legal services to the indigent are not subject to Rule **5.4(d)**'s prohibition against lawyers working at an entity where a nonlawyer is "a member, corporate director or officer thereof."

9. The credit counseling agency is a **nonprofit** organization operated primarily to provide financial counseling to those in need of assistance. Its services include credit counseling, budget planning, debt management plans, bankruptcy counseling and advocacy of pooled income trusts established by others. In furtherance of these activities, the agency proposes to furnish legal services to help clients seek bankruptcy protection and to review joinder agreements that will enable seniors to join existing pooled income trusts. If the agency's legal services constitute "incidental activities" in furtherance of some other "primary purpose," the agency is exempt from the prohibitions of Judiciary Law § 495 by virtue of subdivision (7). In *Paskowski v. DiBenedetto*, 184 Misc.2d 34, 705 N.Y.S.2d 521 (Family Court, Rockland County, 2000), the court held that a legal services program established by a nonprofit community organization to provide emergency housing and outreach programs to victims of domestic violence is exempt under Judiciary Law § 495(7) because it offers legal counseling to those who use the shelter's services.

***3** 10. Similarly, the credit counseling agency that employs the inquiring attorney wishes to offer legal solutions that follow from their other services: representation of a client in a bankruptcy proceeding and in reviewing and advising the client concerning the joinder agreements that they must sign to join existing pooled income supplemental needs trusts. This Committee does not render opinions on questions of law such as the interpretation and application of Judiciary Law § 495, but for purposes of this opinion we will assume that the agency that employs the inquiring attorney is not violating § 495. If the agency is violating § 495, then the inquiring attorney may not assist the agency in offering or providing legal services because he would be assisting a nonlawyer (the agency) in the unauthorized practice of law, in violation of Rule 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law").

11. Even if a nonprofit organization is in compliance with Judiciary Law § 495, however, lawyers working for the organization are still required to comply with the applicable Rules of Professional Conduct. Three rules are especially relevant here. Rule 1.8(f) provides that a lawyer shall not accept compensation (or anything else of value) from a third party for representing a client unless "(1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6." Rule 5.4(c) prohibits a lawyer from permitting a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services. And Rule 7.2(b)(4) permits a lawyer to be employed or paid by a "bona fide" organization to furnish legal services to others, so long as (*inter alia*) there is no interference with the lawyer's exercise of independent professional judgment.

12. The Code predecessors of Rule 1.6 and 5.4(c) were applied in N.Y. City 1997-2, which concluded that a lawyer employed

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by a social services agency to represent clients must provide independent and competent representation and preserve client confidences in accordance with the ethics rules, without allowing it to direct or regulate the lawyer's independent professional judgment. We agree with that aspect of Opinion 1997-2.

Seeking Grant Funding Opportunities

13. The agency proposes to seek grant funding opportunities to assist it in paying for the legal services programs. As noted above, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship, and the client's confidential information is protected as required by Rule 1.6. Rule 1.8(f) does not prohibit the agency from seeking grants to support the proposed legal services programs as long as the grants are not tied to any particular client's legal services, the grantors do not interfere with the lawyer's exercise of professional judgment, and neither the lawyer nor the agency reveal client confidential information in the grant applications or in any communications regarding how the grant money is being used.

CONCLUSION

***4** 14. A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

NY Eth. Op. 957 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2013 WL 589087

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TAB D

Rothrock, Alec 4/1/2017
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West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Professional Service Companies
Chapter 22. Professional Service Companies

C.R.C.P. Rule 265

RULE 265. PROFESSIONAL SERVICE COMPANIES

Currentness

(a) Rendering Legal Service Through a Professional Company. One or more attorneys who are licensed to practice law in Colorado may render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional company is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

(1) *Professional Company Name.* The name of the professional company shall comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

(2) *Owners' Liability for Professional Acts, Errors, or Omissions.* Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally to the extent provided by this Rule the liability of the professional company for such act, error, or omission. Notwithstanding the preceding sentence, any owner who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company does not assume such liability, except as provided in subsection (a)(3)(D), if, at the time the act, error, or omission occurs the professional company has professional liability insurance that meets the minimum requirements stated in subsection (a)(3).

(3) *Professional Liability Insurance Policy Requirements.* The professional liability insurance contemplated in subsection (a)(2) shall meet the following minimum requirements:

(A) Professional Acts Coverage. The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the rendering of legal services by any attorney through the professional company and against the liability imposed upon it arising out of the acts, errors, and omissions of all nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

(B) Policy Language. The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(C) Limits of Coverage. The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys who render legal services through the professional company or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser $300,000 multiplied by the number of attorneys who render legal services through the professional company or $2,000,000.

(D) Deductibles and Defense Costs. The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. The liability assumed by each owner of the professional company who has not directly participated in the act, error or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damages or the sum of the following:

(I) such deductible or retained self-insurance; and

(II) the amounts, if any, by which the payment of defense costs has reduced the insurance remaining available for the payment of damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by subsection (a)(3)(C).

(E) Determination of Coverage. An act, error, or omission in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this Rule if the policy or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

(F) Limitation of Vicarious Liability. The liability assumed by the owners of a professional company under this Rule is limited to the liability of the professional company for acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable and shall not extend to any other liability incurred by the professional company. Liability, if any, for any and all acts, errors, and omissions, other than acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

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RULE 265. PROFESSIONAL SERVICE COMPANIES, CO ST RCP Rule 265

(b) Compliance with Rules of Professional Conduct. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through a professional company to comply with the Colorado Rules of Professional Conduct promulgated by this Court.

(c) Violation of Rule: Termination of Authority. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

(d) Professional Company Constituencies. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "Professional Company" Defined. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

Credits

Amended eff. June 1, 1987; Nov. 1, 1991; Jan. 1, 1993. Repealed and adopted eff. Dec. 1, 1995. Amended eff. Dec. 6, 1995; Dec. 20, 1995; Feb. 26, 2009.

Notes of Decisions (7)

Rules Civ. Proc., Rule 265, CO ST RCP Rule 265
Current with amendments received through January 15, 2017

End of Document

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Marcy Glenn

From: James Coyle <j.coyle@csc.state.co.us>
Sent: Friday, March 10, 2017 10:21 AM
To: Marcy Glenn
Cc: David Stark; Anthony van Westrum
Subject: U.S. Representative Robert Goodlatte Letter on advertising issues
Attachments: US Rep Goodlatte Letter 03-07-17.pdf

Hi Marcy,

Enclosed is a letter from U.S. Representative Robert Goodlatte. All other jurisdictions received a similar letter on this attorney advertising issue.

The ABA Government Affairs section is preparing an ABA response. This may include an agreement to the AMA resolution referred to in the letter. Several organizations, including NOBC and APRL are providing information to assist in such response (note that no ad instructs anyone to stop taking medication, nor are there misstatements of fact (rather, these ads are alleged to alarm, kind of like a political ad maybe).

Virginia is the only state to date that intends to respond to Rep. Goodlatte (VA is his bar association). All others to date are deferring to the ABA. I would also like to defer to the ABA on this.

Please let me know if you would like to take a different position on this.

Jim

James C. Coyle
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From: Cheryl Lilburn
Sent: Friday, March 10, 2017 10:09 AM
To: James Coyle <j.coyle@csc.state.co.us>
Subject: Goodlatte Letter

Cheryl L. Lilburn

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March 7, 2017

James C. Coyle
Attorney Regulation Counsel
Office of Attorney Regulation Counsel
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Denver, CO 80203

Dear Mr. Coyle,

I write to you to take immediate action to enhance the veracity of attorney advertising. The American Medical Association (AMA) recently adopted a resolution supporting a legislative or regulatory "requirement that attorney commercials which may cause patients to discontinue medically necessary medications have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician . . ." The AMA's resolution notes that "[t]elevision commercials that seek plaintiffs regarding new medications are rampant on late-night television," that "[o]ften potential complications are spoken about them in an alarming way," and that "[a]s a result of these ads, some patients have endangered themselves by stopping prescribed medications without speaking to a physician." The AMA resolution concludes that advertisements "are 'fearmongering' and dangerous to the public at-large because they do not present a clear picture regarding the product." Dr. Russell W.H. Kridel, M.D., member of the AMA's Board of Trustees, explained the need for such commercials to advise patients to consult with a physician before discontinuing medications by noting that:

> The onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor. By emphasizing side effects while ignoring the benefits or the fact that the medication is FDA approved, these ads jeopardize patient care. For many patients, stopping prescribed medication is far more dangerous, and we need to be looking out for them.[31]

Indeed, much of this advertising is designed to frighten patients. After emphasizing the potential side effects of an FDA approved and doctor prescribed medication, one advertisement

[31] https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting

urges patients to call 1-800-BAD-DRUG[32] -- a less than subtle suggestion that the drug in question is inherently harmful. Another commercial holds itself out to be a "medical alert,"[33] while another one states unequivocally that the FDA approved drug is "dangerous."[34] One even depicts a patient being loaded into an ambulance.[35] It is little wonder that patients are confused and concerned about such medications and that same have decided to discontinue taking their doctor-prescribed and often lifesaving medication. These deceptive advertisements have had deadly consequences.

A recent article published in the Heart Rhythm Journal reveals that numerous patients have ceased using their anticoagulant without consulting a physician after viewing negative legal advertisements. Based on incidents reported to the FDA Safety Information and Adverse Event Reporting System, the article summarizes these serious cases, including two deaths, as follows:

> In the majority of these cases (23/31, 75%), patients experienced a stroke or a transient ischemic neurologic event; 2 patients had persistent residual paralysis. One patient, a 45 year-old man receiving rivaroxaban for treatment of a deep vein thrombosis, stopped the drug and died of a subsequent pulmonary embolism, and 1 female patient, receiving rivaroxaban for stroke prevention, stopped the drug and died of a massive stroke. All these cases were considered to be serious medical events by the health care professionals that submitted the reports.[36]

These reports are extremely alarming and bring into clear focus the rationale for the AMA's resolution. Its recommendation is meant to ensure that legal advertising is not deceptive and that patients are not scared into discontinuing their prescribed medication. The legal profession, which prides itself on the ability to self-regulate, should consider immediately adopting common sense reforms that require all legal advertising to contain a clear and conspicuous admonition to patients not to discontinue medication without consulting their physician. It should also consider reminding patients that the drugs are approved by the FDA and that doctors prescribe these medications because of the overwhelming health benefits from these drugs. Given the cases noted above, lives depend on it.

Because of our concern about patient safety, we would appreciate your informing the Committee about the steps being taken to review this matter, including any amendments to your rules of professional conduct that have been made or are being considered.

---

[32] https://www.ispot.tv/ad/793E/pulaski-and-middleman-xarelto-and-pradaxa-warning
[33] https://www.ispot.tv/ad/Afkx/the-sentinel-group-xarelto-and-pradaxa-alert
[34] https://www.ispot.tv/ad/ANKO/guardian-legal-network-users-of-xarelto-or-pradaxa
[35] https://www.ispot.tv/ad/AGIM/the-driscoll-firm-xarelto-and-pradaxa-linked-to-internal-bleeding. This commercial prominently displays the Driscoll firm's website address, settlementhelpers.com, which brings one to a page that contains numerous trusted logos including the logo of the American Bar Association, thereby implying an endorsement by the ABA.
[36] http://www.heartrhythmcasereports.com/article/S2214-0271(16)00014-2/abstract

Thank you for your attention to this important patient safety issue. We look forward to your response by March 21, 2017.

Sincerely,

Bob Goodlatte
Chairman