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

AGENDA

July 13, 2012, 9:00 a.m.

Holland & Hart, LLP, 555 17th Street, 32nd^h Floor – Parking Info Below

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1. Approval of minutes – January 6, 2012 meeting [to be distributed later]

2. Report on status of proposed amendments to C.R.P.C. 1.12, cmt. [1]; C.R.P.C. 3.5; and C.R.P.C. 3.5(b), cmt. [2] [Marcy Glenn, pages 1-2]

3. Report from Pretexting (C.R.P.C. 4.1/4.3) Subcommittee [Tom Downey, pages 3-106]

4. Report on status of Task Force on the Protected Negotiation Act (fka the Collaborative Law Act) [Tony van Westrum, pages 107-116]

5. New business:

   a. Anticipated amendments related to COLTAF accounts [John Gleason]

6. Administrative matters:

   a. Select next meeting date

7. Adjournment (before noon)

Chair
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THE LAW OUT WEST

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January 26, 2012

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: Proposed Amendments to Comment [1] to CRPC 1.12; CRPC 3.5(b); and Comment [2] to CRPC 3.5

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 proposed amendments to Comment [1] to Rule 1.12 of the Colorado Rules of Professional Conduct (CRPC); CRPC Rule 3.5(b); and Comment [2] to CRPC 3.5.

These proposed amendments arose out of the Standing Committee's consideration of whether the recent amendments to the Colorado Code of Judicial Conduct create material inconsistencies with the CRPC. Based on the work of a subcommittee co-chaired by Standing Committee Members Judge John Webb and Alec Rothrock, the Standing Committee approved the recommended CRPC amendments, which I describe below.

The proposed amendments to Comment [1] to CRPC 1.12 are intended to correct inaccurate citations to superseded versions of the Model and Colorado Codes of Judicial Conduct. The Committee also recommends that the commentary cite only to the Colorado Code of Judicial Conduct, rather than to the Model Code of Judicial Conduct.

The proposed amendments to CRPC 3.5(b) and Comment [2] to CRPC 3.5 relate to a lawyer's ability to communicate ex parte with judges. Currently, CRPC 3.5(b) provides that a lawyer may not "communicate ex parte with [a judge] during the proceeding unless authorized to do so by law or court order." The proposed amendment to CRPC 3.5(b) would add a second exception that would permit lawyers to engage in a narrow class of additional ex parte communications with judges, but only to the extent that the Colorado Code of Judicial Conduct permits judges to engage in those communications, *i.e.*, when "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."

The Committee concluded that this amendment is necessary because the Colorado Code of Judicial Conduct authorizes only judges, but not lawyers, to participate in ex parte

communications. Therefore, the existing "authorized . . . by law" exception in CRPC 3.5(b) does not permit lawyers to participate in those ex parte communications, even where the judge is authorized to do so.

The proposed amendments to Comment [2] are intended to provide guidance to lawyers by identifying some of the specific circumstances in which the amended rule might apply. The proposed commentary also explains that a lawyer may not initiate an authorized ex parte communication under the new exception, but that a judge will be deemed to have initiated such a communication if the judge maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters and the lawyer communicates in compliance with that practice. The proposed comment language also addresses the lawyer's responsibility to terminate an ex parte communication if the judge exceeds his or her authority under the Colorado Code of Judicial Conduct.

I am enclosing both clean and redlined versions of the proposed changes, and I have emailed Word versions of the clean and redlined documents, with this cover letter, to Chris Markman. The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)

SUPPLEMENTAL REPORT OF THE

PRETEXTING SUBCOMMITTEE

The pretexting subcommittee[1] respectfully submits the following supplemental report.

I. Summary

In seeking to obtain information through covert investigative activities ("pretexting"), attorneys will often be in a position to advise clients or procure investigations by investigators or nonlawyer assistants. Conduct involving misrepresentation and nondisclosure may be inherent in many investigations and is often intended to mislead the targets, at least to the extent of causing them to treat the investigator as a member of the public or ordinary customer. The subcommittee recommends revising rule 8.4(c) of the Rules of Professional Conduct to address when such advice may be given, while continuing to prohibit dishonesty, fraud, deceit or misrepresentation by the lawyer himself or herself.

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[1] This report supplements the Final Report of the Pretexting Subcommittee, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct (Dec. 19, 2011) [hereinafter Final Report]. Tom Downey chaired the subcommittee. Members included: H. Berkman; J. Haried; M. Kirsch; A. Rocque; A. Rothrock; A. Scoville; D. Stark; J. Sudler; J. Webb; and J. Zavislan.

After presenting its report to the Standing Committee in December 2011, and after substantial deliberation and consideration of comments received from a variety of stakeholders, the subcommittee has revised the proposed amendment to R.P.C. 8.4(c). The revised proposal is less ambitious than the subcommittee's initial proposal, insofar as it is simpler, avoids several criticisms received in stakeholder comments, and requires no Comment changes. Section III of this report presents the revised proposal, and discusses and responds to some of the criticisms received primarily from the criminal defense bar.

However, unlike the initial report, which presented a single proposal, a minority of the subcommittee recommends one of two alternatives, presented in section V: (a) limit this amendment to government attorneys involved in law enforcement, or, failing that, (b) take no action. These alternatives reflect the minority's position that, even as revised, the proposal is too broad.

The changes arose because, as suggested at the Standing Committee's last meeting, the subcommittee solicited, received, and

carefully examined input from the following additional stakeholders:[2]

- Attorney General of Colorado: Letter from John W. Suthers (March 20, 2012) [AG]
- Colorado Criminal Defense Bar: Letter from Dan Schoen (Feb. 16, 2012) [CCDB]
- Colorado District Attorney's Council: Letter from Larry R. Abrahamson (March 22, 2012) [CDAC]
- Family Law Section, Colorado Bar Association: E-mail from Brenda L. Storey (Feb. 6, 2012) [CoBar Family]
- Intellectual Property Section, Colorado Bar Association: Letter from Nina Y. Wang (March 16, 2012) [CoBar IP]
- International Trademark Association: Letter from Alan C. Drewsen (March 19, 2012) [INTA]
- Marksmen: E-Mail from Ken Taylor (March 8, 2012) [Marksmen]

[2] Hereinafter, comments will be cited using the name indicated in brackets, in the form, for example, "Oracle Comment." The Colorado Trial Lawyers Association and the Colorado Defense Lawyers Association were contacted, but did not provide a response.

- Office of the Federal Public Defender, Districts of Colorado and Wyoming: Letter from Raymond P. Moore (Feb. 8, 2012) [FedDefender]
- Office of the State Public Defender: Memorandum from Frances Smylie Brown (Feb. 17, 2012) [StateDefender]
- Oracle Corporation: Letter from Todd Adler (March 14, 2012) [Oracle]
- RE/MAX, LLC: Letter from Adam Lindquist Scoville (March 20, 2012) [RE/MAX]
- Standing Committee of the Criminal Justice Act Panel, United States District Court for the District of Colorado (Feb. 27, 2012) [CJA Standing Committee]
- State of Colorado, Office of the Alternate Defense Counsel: Letter from Lindy Frolich (Feb. 15, 2012) [OADC]
- U.S. Department of Justice, United States Attorney, District of Colorado (April 18, 2011) [USA1]
- U.S. Department of Justice, United States Attorney, District of Colorado (March 13, 2012) [USA2]

Comments by various stakeholders are incorporated throughout the report. All responses are provided as Attachment A to this report.

In addition, the subcommittee considered that Missouri has amended its rule, as noted in the updated table of other states' rules, comments, and ethics opinions found in Attachment B.

II. Background[3]

The subcommittee was formed in response to an inquiry from the Colorado Bar Association Intellectual Property Section as to how rules such as R.P.C. 4.1, 4.2, 4.3, 5.3, and 8.4(c) might limit certain efforts to gather evidence before commencing a civil action, and thereby assure compliance with C.R.C.P. 11. For example, counsel representing a trademark holder might arrange for the purchase of an unlicensed product that infringed on the trademark using a person who misrepresented matters such as his or her identity, purpose for purchasing, desire to become a distributor of such products, and lack of affiliation with counsel. *See Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F.Supp. 2d 456, 475 (D.N.J. 1998) (describing such investigative techniques, and concluding, "If plaintiffs' investigators had disclosed their identity and the fact that

[3] Section II. is adapted from the corresponding section of the subcommittee's Final Report, and is included for the reader's convenience.

they were calling on behalf of plaintiffs, such an inquiry would have been useless to determine [defendant's] day-to-day practices."); *Accord Gidatex v. Campaniello Imports, Ltd.*, 82 F.Supp. 2d 119 (S.D.N.Y. 1999). However, courts—even courts that have condoned such investigations—have also excluded the resulting evidence or found ethical violations when the investigations have gone too far. *See Hill v. Shell Oil Co.*, 209 F.Supp. 2d 876, 879-880 (N.D. Ill. 2002) (concluding, "Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. ... They probably can employ persons to play the role of customers seeking services on the same basis as the general public"); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp. 2d 1147, 1155-60 (D.S.D. 2001) (finding violations of South Dakota analogs to rules 4.2, 4.3, 5.3, and 8.4); *In re Curry*, 880 N.E.2d 388, 404-05 (Mass. 2008) (disbarring attorney because, unlike "investigators who pose as members of the public in order to reproduce pre-existing patterns of conduct, [the attorney] built an elaborate fraudulent scheme whose purpose was to elicit or potentially threaten the [subject] into making statements that he otherwise would not have made"). *See, generally*, "Cheat

the Beatles: Ethics in Investigations," Alec Rothrock, Essay D3, Essays on Legal Ethics and Professional Conduct in Colorado, First ed. (CLE in Colo., Inc. Supp. 2008).

Particular concern was expressed within the subcommittee because of our supreme court's statement, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002)(sanctioning deputy district attorney for misrepresenting that he was a public defender to a barricaded and armed murder suspect in the context of surrender negotiations).

The subcommittee determined that a handful of states have addressed this issue through rule provisions allowing attorney involvement in "lawful investigative activities," investigations "authorized by law," and "lawful intelligence-gathering activity," or merely providing that rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law." Most of these states allow attorneys to act as advisors but not as direct participants. Likewise, most such states, namely Michigan, North Dakota, Oregon, Virginia, and Wisconsin,

permit such conduct by all attorneys, while in three (Alabama,[4] Missouri, and Florida), protection is limited to government attorneys. *See* Attachment B.

In all, at least ten states have either a rule, a comment, or an ethics opinion suggesting that all attorneys may at least supervise pretext investigations, and another six have a rule, comment, or ethics opinion reaching the same conclusion with respect to government attorneys. In several other states, there may have been less reason to address the issue through a rule change because cases held, usually in the course of evidentiary motions, that advising, retaining, or instructing investigators who pose as members of the public to reproduce pre-existing patterns of unlawful conduct does not violate the state ethical rules.[5]

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[4] In Alabama, notwithstanding that the exception that applies only to prosecutors, an ethics opinion suggests that any lawyer may employ private investigators to pose as customers under the pretext of seeking services on the same basis or in the same manner as a member of the general public. *Compare* Alabama R.P.C. 3.8(2)(a) *with* Alabama Op. RO-2007-05 (Sept. 12, 2007).

[5] *See, e.g., Apple Corps Ltd.*, 15 F.Supp. 2d at 474-76 (New Jersey); *Gidatex*, 82 F.Supp. 2d 119 (New York); *Hill*, 209 F.Supp. 2d at 879-880 (Illinois); *cf. In re Curry*, 880 N.E.2d at 404-05 (disbarring attorney but distinguishing the "elaborate fraudulent scheme" present there from the situations approved of in *Gidatex*, *Apple Corps* and *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-75 (1982)). In other cases, courts in other states decided that the rules were violated, or decided to exclude evidence on the basis of conduct they saw as violating the rules. *See e.g., Midwest Motor Sports, Inc.*, 144 F.Supp. 2d at 1155-60 (South Dakota). Other cases discuss evidence obtained by such means, without analyzing the ethical propriety of any lawyer involvement.

III. Revised Proposed Amendment to R.P.C. 8.4(c)

The subcommittee has narrowed its initial proposal to the following change to the Rule, without any change in the Comment:

Colo. RPC 8.4

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

Numerous aspects of the original proposal were carefully reconsidered in arriving at this substantially simpler language and abandoning the proposed Comment changes. The subcommittee believes that the revised proposal better balances the competing considerations raised by stakeholder comments.

A. Explanation of the Revised Proposal

In settling on this text, the subcommittee contemplated that the text contains three boundaries on the proposed exception: 1)

the exception applies only to "investigative activities;" 2) the exception does not allow direct participation, but only allows the lawyer to "advise, direct, or supervise" the activity; and 3) the investigative activity must be "lawful." Because the committee believes that these limitations are expressly stated and their meaning should be reasonably clear from the plain text of the proposed rule, the committee now believes no additional comments to the rule will be necessary. However, to aid in the Standing Committee's consideration, and to facilitate the suggestion of comments if the Standing Committee believes the limitations are not as clear as the subcommittee perceives them to be, we explain each in turn.

1. "Investigative Activities"

The term "investigative activities" is fairly broad, and its function as part of the proposed rule is not to prescribe the specific investigative techniques that the lawyer may advise, direct or supervise. Yet, in the spectrum of conduct that may be actionable under R.P.C. 8.4(c), there is much that the term "investigative activities" excludes. The subcommittee's discussion and

understanding is that the vast bulk of cases prosecuted under Rule 8.4(c) are cases involving lawyers who, for example, lie to their clients or misuse client funds. *See, e.g.*, People v. Katz, 58 P.3d 1176, 1189 (Colo.O.P.D.J. 2002)(attorney disbarred for knowing conversion of funds in dispute between him and co-counsel, misconduct based on deceit, dishonesty, and fraud, commingling of property, and attempted conversion). Such cases do not involve "investigative activity" of the type that might be eligible for the exception. Even *Pautler* did not involve an investigation, and the Colorado Supreme Court expressly distinguished the kind of "attorney involvement in undercover investigative operations that involve misrepresentation or deceit" that would qualify for other states' exceptions, as "circumstances inapposite" to Pautler's conduct. *See* 47 P.3d at 1179 and n. 4. The main purpose of limiting the proposed exception to "investigative activity" is to ensure that such cases—and indeed any situation other than the use of non-lawyer investigators—would continue to constitute violations of Rule 8.4(c).

2. "Advise, direct, or supervise"

As with the initial proposal, the exception in the current proposal covers lawyers who "direct, advise, or supervise others," but does not allow their direct participation. The subcommittee continues to believe that, so long as a lawyer is not a direct participant, the *degree* of lawyer's involvement should not otherwise be restricted, and so the phrase "direct, advise, or supervise," remains in both this and the minority proposal. Section V., *infra.*

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).

As between allowing the lawyer to participate directly in the pretext, allowing only indirect advice, direction, or supervision, or forbidding pretexting entirely, the subcommittee first notes that no

change to the Rules of Professional Conduct could accomplish the latter. *See* RE/MAX Comment at 2 (failing to allow lawyers ethically to oversee pretext investigations "will not render such investigations unlawful"). The current rule and *Pautler* have also led to an environment where lawyers actively distance themselves from oversight even of investigations that may later be used as evidence in their cases. Given this, a majority of the subcommittee continues to believe that allowing a lawyer to supervise the investigation increases the likelihood that the activities being supervised will remain lawful. While forbidding direct participation may not make the proposal palatable in the eyes of its opponents, the subcommittee nevertheless viewed it as an important measure to protect the public perception of the profession.[6]

3. "Lawful"

The current proposal only applies to conduct of others that is "lawful." The subcommittee discussed at length defining "lawful," but ultimately concluded that any definition would create more problems that it solved, as some stakeholders observed about the

[6] Allowing only indirect involvement also avoids problems attendant to an attorney becoming a witness. *See* Final Report at 9; R.P.C. 3.7.

initial proposal's citation to criminal cases invoking the good faith exception to the exclusionary rule. FedDefender Comment at 4.

Nevertheless, limiting lawyers to advising, directing or supervising conduct that is "lawful" has three main advantages: First, the subcommittee now believes that what is lawful can and should be determined on a case-by-case basis, by reference to the existing substantive constitutional, legislative, and common law. In other words, action is lawful if the investigator is entitled to take it; i.e. it is not tortious or proscribed by statute, constitution, or other law.[7] While the state of the law is not always settled, this gives attorneys and courts far more guidance than a *sui generis* standard that begs fresh definition in a Comment to the Rules or by the courts.

This leads to the second advantage of allowing investigative activity that is "lawful": even if the underlying substantive law is not completely transparent with respect to every possible tort or statute

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[7] One commentator suggested that a rule that allows covert activity would increase a lawyer's exposure to discipline by encouraging them inadvertently to advise others to commit illegal acts. *See* StateDefender Comment at 3 (*citing* Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq. (2006): Telephone Records and Privacy Protection Act of 2006, 18 U.S.C. §1039 (2006); and *Quigley v. Rosenthal,* 327 R.3d 1044 (10th Cir. 2003)). On the contrary, because such activity is illegal, the lawyer would not be covered by the exception, and although there may be exceptions, *see Quigley,* it is reasonable to assume that consulting a lawyer as to the permissibility of an action is more likely to *increase* compliance than *decrease* it.

as applied to every combination of facts, lawyers already have a special responsibility to know what the law is (and if the law is not clear, to advise accordingly). Investigators, furthermore, are not privileged to perform unlawful acts and can reasonably be expected to make it their business to know what investigative tactics are lawful and what are unlawful. The subcommittee also noted that of the states whose rules allow lawyer involvement in pretexting, none has attempted to define when such activity is lawful.

The third advantage to the "lawful" standard is that it incorporates the kind of two-tier standard the subcommittee aimed to present in the original proposal, without complicated new criteria. In other words, there are many actions and statements that law enforcement officers can lawfully make that would be unlawful for private citizens, including private investigators. Yet, dishonesty and illegality are not the same thing; even without law enforcement powers, the kinds of misrepresentations most likely to be effective in legitimate investigations procured by private lawyers, *see* Marksmen Comment, are often not fraudulent or illegal. Therefore, in the context of pretexting in civil disputes, the contextually-sensitive standard of what is lawful is a more valuable

limiting principle on what misrepresentation should be allowed than the phrase "background, identification, purpose or similar information," which several stakeholders criticized as extremely broad.

B. Response to Comments on the Proposal

The subcommittee briefly responds to certain comments received concerning the initial proposal, to the extent relevant to the current proposal, as follows.

1. Need for the Proposed Change

While several stakeholders disputed any need for a change to R.P.C. 8.4(c),[8] contrary views have been communicated to the subcommittee by government attorneys, private attorneys who practice intellectual property law, and clients concerned over protecting their intellectual property.

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[8] *See* FedDefender Comment at 2 (citing "absence of a substantial and demonstrated need," and noting, "I have perceived no inability on the part of law enforcement or prosecutors to bring criminal charges, to conduct investigations, to garner intelligence, or otherwise to conduct their day to day activities. If *Pautler* or the current rule were some major impediment, I would have expected some significant effort to bring about change long before the passage of a decade"); StateDefender Comment at 2 ("It does not appear from this report that the AUSA, HUD or the AG denied that its attorneys were participating in, had participated in or had supervised others in covert activities nor did those agencies allege that the language of the existing Rule 8.4 had impeded any lawful covert investigations."); *see also* CJA Standing Committee Comment (endorsing FedDefender and StateDefender comments); CCDB Comments (same); OADC Comment (same).

a. Comments from Government Lawyers

Attorney General Suthers echoed the view of United States Attorney Walsh that it is "vital for government agents to consult attorneys in my office while conducting covert investigations." USA2 Comment at 1 (quoting AG Comment at 1); *see also* CDAC Comment ("The advice requested from District Attorneys by our law enforcement agencies as they perform these very sensitive covert investigations is crucial to a successful prosecution"). The Attorney General expressed concern that *Pautler*'s broad language continues to be cited, inaccurately in his view, as "erecting an impenetrable barrier to my attorneys providing appropriate guidance to investigators engaged in covert investigations." AG Comment at 1-2. The United States Attorney, citing R.P.C. 5.3, 8.4(a), and 8.4(c), said, "This well established practice of attorney involvement in covert investigations, however, is arguably in tension with the Rules as currently written." USA2 Comment at 2.

The subcommittee shares the concern that a government attorney's merely giving advice to law enforcement investigators could constitute "conduct *involving* dishonesty, fraud, deceit or misrepresentation," (emphasis added), under R.P.C. 8.4(c), either

alone or in combination with R.P.C. 8.4(a) or 5.3. Despite the broad language of *Pautler*, many members see this result as anomalous because "[m]ost courts have recognized that ruses are a sometimes necessary element of police work." *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996).

b. Comments from Private Lawyers

Other stakeholders (private attorneys, associations, investigators and companies), have reiterated that, as observed in the subcommittee's initial report, R.P.C. 8.4(c) "may prevent an attorney from conducting an appropriate prefiling investigation in claims related to intellectual property rights." CoBar IP Comment at 1. Such an inquiry typically includes using a private investigator to "contact the online seller, exchange communication with the seller and purchase infringing or counterfeit goods to ultimately identify the seller . . . to understand the scope of use of the protected trademark." Id.[9] These investigations "are crucial in

[9] *See also* INTA Comment at 1 ("Pretext investigations in trademark cases occur generally when trademark owners and lawyers hire investigators to pose as consumers, purchasers, or counterfeiters to ascertain how the alleged infringer or counterfeiter presents himself to the consuming public or to ascertain the source of infringing or counterfeiting goods."); Marksmen Comment ("My company has conducted approximately 75,000 investigations. ... Marksmen... has adopted what the courts have said is proper standard in terms of approaching a target

helping brand owners prevent the harm that results from consumer confusion or trademark counterfeiting...." INTA Comment at 1. Thus, "Rule 8.4(c) may have the unintended effects of materially hampering the protection of intellectual property rights and decreasing the value of intellectual property." CoBar IP Comment at 2. The consequence of rejecting a limited amendment "will not [be to] render such investigations unlawful but it will prevent organizations from employing their attorneys in an oversight role to help ensure that such investigations are conducted in a lawful and ethical manner." RE/MAX Comment at 2. Although no reported attorney discipline case in Colorado has turned on a private lawyer's involvement with a pretext investigation, such cases have arisen in other jurisdictions.[10]

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company under pretext: •Limit contact to low level employees; •Pose as consumer seeking information; •Only record what is said in standard sales context; •Do not seek extended admissions; •Do not engage in elaborate deceptions; •Be especially careful if litigation already commenced.").

[10] *See, e.g., Bratcher v. Kentucky Bar Ass'n*, 290 S.W.2d 648 (Ken. 2009) (violation of Rule 4.2 through equivalent of Colo. RPC 8.4(a) by hiring investigator to contact represented employer regarding nature of references given to callers regarding plaintiff); *In re Curry*, 880 N.E.2d 388, 408 (Mass. 2008) ("An investigator is 'another' for purposes of" former Mass. equivalent of Colo. RPC 8.4(a)); *In re Ositis*, 40 P.3d 500, 503-04 (Or. 2002) (by directing private investigator to interview opposing party posing as a journalist, lawyer violated Oregon Code equivalent of Rule 8.4(a) by violating equivalent of Colo. RPC 8.4(c) "through the acts of another"); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) ("[I]f the investigator acts as the lawyer's 'alter ego,' the lawyer is ethically responsible for the investigator's conduct."). In addition, a minority of cases ruling on the admissibility of evidence gathered as the result of pretext investigations have excluded the evidence on the basis that the conduct violated the

A majority of the subcommittee also shares these concerns. However, as discussed in section III below, two members now believe that only the weightier policy considerations underlying the needs of law enforcement, not the lesser needs of private attorneys and their clients in some practice areas, warrant a Rule change that would allow greater attorney involvement in pretext investigations.

2. Departure from the ABA Model Rules

The subcommittee submits that opposition to the proposed amendment based on dissimilarity with the ABA Model Rules, *see* StateDefender Comment at 2, is overstated.

The Standing Committee's December 30, 2005 report to the supreme court recommending changes based on the 2000 revision of the Model Rules addressed uniformity as follows:

> Early in the process, the Standing Committee (like the Ad Hoc Committee) unanimously concluded that uniformity between jurisdictions adopting the New Model Rules is important. Uniformity enables the meaningful use of precedent from courts and ethics

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rules of professional conduct. *See, e.g., Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 698-99 (8th Cir. 2003) (lawyer violated Rules 4.2 and 8.4(c) through Rules 5.3 and 8.4(a) through conduct of private investigator); *McClellan v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, (D. Colo. 2009) (where private investigator hired by lawyers contacted represented persons in course of investigation, lawyers violated Colo. RPC 4.1, 4.2 and 8.4(c) "through the acts of another" under Colo. RPC 8.4(a)).

> committees in other jurisdictions. Moreover, the increase in multi-jurisdictional law practice (recognized by this Court when it adopted C.R.C.P. 220 through 222) renders uniform ethics rules beneficial to the Court and the bar alike.
>
> To effectuate this preference for uniformity, the Committee utilized an informal presumption: Unless existing Colorado law or public policy – as established by prior rules, Court decisions, or Colorado Bar Association ("CBA") Ethics Committee opinions – justified a departure from a New Model Rule, the Committee would recommend adoption of the New Model Rule. However, this presumption was rebuttable and the Committee occasionally recommended a unique Colorado rule instead of a New Model Rule based on a determination that the recommended rule would be substantially better than the New Model Rule; but even in these situations, the Committee carefully weighed the benefits against the detriments of a non-uniform rule. The Committee also considered uniformity with respect to the comments to the rules; but the comments, by definition, do not establish black-letter standards and, therefore, the Committee deemed uniformity in the comments to be less critical.

Nevertheless, since 2005 the Standing Committee has recommended several such rule changes, and the supreme court has adopted them, without engaging in the policy analysis urged by one stakeholder, *see* FedDefender Comment at 5, as necessary to

depart from the Model Rules. For example, R.P.C. 3.8 was revised extensively in 2010, and R.P.C. 1.5 was revised in 2011.

The most compelling reason for a Colorado-specific rule is the uncertainty resulting from specific Colorado precedent—the *Pautler* case. Dicta in *Pautler* suggests any involvement in any misrepresentation is categorically prohibited, but also suggests that this categorical prohibition may not apply to indirect involvement with covert investigations. *Compare* 479 P.3d at 1182 *with id.* at 1179 & n. 4.

Further, a majority of the subcommittee continues to believe that Colorado lawyers who act under the proposed amendment would be doing so, for conflicts of law purposes, in Colorado. The mere use of an interstate communications device, as one stakeholder suggested, *see* StateDefender Comment at 3, by the person who engaged in the pretext at a lawyer's direction would not make the lawyer accountable for compliance with ethical rules of other jurisdictions unless the "predominant effect" of the lawyer's conduct occurred in another jurisdiction. *See* R.P.C. 8.5(b)(2). The subcommittee's suggestion that the proposed amendment would

reduce lawyer discipline proceeded from the belief that it removes uncertainty.

3. Relevance of a Lawyer's Intent

As revised, 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.[11]

4. Availability of the Proposed Exception to Plaintiff/Prosecutors and Defense

Although the initial report discusses concerns of prosecutors and private attorneys who would be preparing a plaintiff's case, as some stakeholders have pointed out, defense counsel in civil and criminal disputes could invoke the proposed exception on the same footing as any private attorney. For example, in representing a

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[11] 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," StateDefender Comment at 4; *see also* FedDefender Comment at 4-5; CCDB Comment (endorsing comments of the Federal and State Public Defenders); OADC Comment (same). 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. Under R.P.C. 1.0 (h) "Reasonably" ... "denotes the conduct of a reasonably prudent and competent lawyer," and under 1.0 (i) "Reasonably believes" . . . "denotes . . . that the circumstances are such that the belief is reasonable." To the extent that the original proposal was overly nuanced concerning intent, the current proposal in any event avoids this concern.

client whose employee has filed a worker's compensation claim but was not yet represented, such a lawyer might direct an investigator to approach the claimant and ask for assistance, such as changing a tire, that would be inconsistent with the claimant's purported physical limitations. Likewise, a criminal defense attorney could use lawful covert means to investigate a violation of her client's constitutional rights, such as Fourth Amendment violations.

Although the text of the rule does not distinguish between prosecution and defense, or plaintiffs and defendants, the substantive law of what is "lawful" provides a significant distinction. What is lawful for a private citizen (including a private investigator) is much narrower than what is lawful for a police detective.

5. Interrelation with Rule 4.2 Concerning Communications with Represented Parties.

The current proposal does not create or imply any new exception to Rule 4.2. Hence, the subcommittee concluded that the Comment language in the initial proposal that "covert activity may violate Rule 4.2" was unnecessary. One stakeholder complained that the proposal "leaves open the critical question whether a

lawyer can supervise an investigation to prove a violation of a consent decree or injunction," assuming the defendant was represented in the original litigation. Oracle Comment at 5. If, under Rule 4.2, a failure to comply with an injunction is the same matter as the original litigation—and thus the defendant is represented 'in the matter,' this "puts a potentially debilitating restriction on pretexting investigations in situations like the one at issue in *Apple Corps.*" *Id.* at 6 (citing *Apple Corps. Ltd. v. Int'l Collectors Soc'y*, 15 F.Supp.2d 456 (D.N.J. 1998)). However, the subcommittee previously considered this issue and determined that the additional policy interests in protecting the attorney-client relationship that come into play once the target of the investigation has obtained counsel help outweigh the investigative needs of the other party. *See* Final Report at 11-12.[12]

[12] In addition to R.P.C. 4.2, the subcommittee previously considered other rule or comment changes, including to R.P.C. 3.8, 4.1, 4.3, 5.3, and 8.4(a). *See* section III.B.6, *infra*; Final Report, section IV., at 10-14. As discussed below and in the Final Report, the consensus in the subcommittee was against recommending changes to any other rule or comment.

6. *Whether Concerns over* Pautler *Could Effectively be Addressed by Comment Changes Only*

Before adopting the current proposal, the subcommittee also considered at length whether concerns of both government lawyers and private lawyers could be addressed by the addition of comments to R.P.C. 8.4 and 5.3, without more broadly endorsing lawyer participation in pretexting by a change in Rule 8.4(c).

According to Comment [1] to R.P.C. 8.4(a), lawyers are subject to discipline "when they request or instruct *an agent* to [violate the Rules] on the lawyer's behalf." (Emphasis added.) For prosecutors, clarification could be achieved by adding to this comment a statement that representatives of law enforcement agencies are not "agents" of a prosecutor or other government lawyer involved in law enforcement.[13]

However, such changes would not resolve private lawyers' concerns over discipline based on their dealings with investigators. Comment [1] to R.P.C. 5.3 lists "investigators" among persons

[13] R.P.C 8.4(a)'s prohibition is arguably broader than the comment language, insofar as it prohibits violating or attempting to violate the Rules "through the act of another" (emphasis added) and not merely the acts of an "agent." For the purpose of this discussion, however, we assume that R.P.C. 8.4(a) would be interpreted consistently with the comment.

whom "[l]awyers generally employ," and thus, who act for the lawyer, "whether employees or independent contractors."

Ultimately, the subcommittee rejected this approach as unduly conflating agency analysis with professional responsibility. In other words, regardless of whether an exception could be achieved through such an interpretation, the subcommittee took the view that the lawyer ought not be able to escape responsibility for supervising his or her investigator, simply because the investigator would not be considered the lawyer's agent. The subcommittee concluded that legality of the conduct in which the lawyer was involved presented a more meaningful limitation than whether the actor was the lawyer's agent.

7. Differing Interests of Government and Private Attorneys

The suggestion by two subcommittee members to limit the proposed exception to lawyers representing the government is founded chiefly on the greater degree of deception allowed of law enforcement, as contrasted with private investigators. The majority of the subcommittee readily agrees that law enforcement is afforded

much broader latitude to dissemble. But this does not mean: a) that all dishonesty by a private investigator is unlawful; b) that the boundaries of what conduct would be unlawful are so unclear that courts cannot be trusted to apply them; or c) that no advice, direction, or supervision of pretext investigations by private attorneys should be tolerated.[14]

The paucity of case law specifically concerning the tort liability of investigators does not mean the standard is unclear. After all, private investigators are ordinary citizens and enjoy no special privilege or immunity from tort or criminal responsibility. Thus, courts seeking to determine if the investigator's activity is lawful need not search in vain for a special standard for investigative activity; they can rely on the wealth of ordinary common law and statute.

Moreover, there are strong policy reasons to recognize the need for an exception to apply to private as well as government attorneys. In many cases, pretext investigations can be the only way of

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[14] The minority report points to judicial recognition that law enforcement may engage in deception. *See, infra,* section V.A. Although cases are fewer, the majority of them hold the investigations to be permissible, or that some may be permissible but the lawyers or investigators went too far in the particular case. *See* section II. and n. 3, *supra* (citing cases).

gathering evidence of illegal deception or fraud, such as trademark counterfeiting, or housing discrimination. *See* INTA Comment ("[S]uch investigations may be used to gather evidence not otherwise discoverable...."). Public policy favors allowing a limited range of legal but dishonest conduct, where it is only in the conduct of investigations, and it is, after all, aimed at someone who the lawyer reasonably thinks is engaged in illegal deception of the public, if it is necessary to prevent that illegal deception.

Finally, the majority notes that no stakeholder has proposed limiting the exception to government attorneys. Quite the opposite; the vast bulk of comments opposing the amendment were from the criminal defense bar, concerned with possible abuse by government attorneys. In fact, by specifically limiting the proposed exception to "lawyers representing the government," the minority introduces a distinction that was criticized by several stakeholders: that the exception applies only to prosecutors and not to defense attorneys.

IV. CONCLUSION

The subcommittee has come to see, as the elephant in the room, the reality that lawyers who use investigators often expect

that the investigator will engage in conduct which a lawyer could not do directly. A regime in which the lawyer can be sanctioned merely for advising or supervising even lawful misrepresentation results in the lawyer maintaining distance from such conduct by giving the investigator only oblique instructions or, in the civil context, relying on the client or outside counsel to hire and instruct the investigator more specifically. The changes to Rule 8.4(c) discussed above would remove these artifices and permit lawyers to advise, direct, or supervise investigators concerning lawful investigative activity. Such advice and direction would enable lawyers to be held more accountable for investigations they procure or advise and, through that oversight, would probably make the investigations less likely to violate the law.

V. Minority Report

Two members submit the following minority report.

A. Limit Any Change to Government Lawyers Involved in Law Enforcement

These members consider the revised proposal, *see* Section III., *supra*, to be overly broad. They propose a narrower exception to R.P.C. 8.4(c) that would read:

Colo. RPC 8.4

> 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;* . . . .

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. *See* Missouri Rule

8.4(c) (recently amended to include an exception for a lawyer "for a criminal law enforcement agency, regulatory agency, or state attorney general," who may "advise others about" or "supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations").

While both government lawyers and private lawyers in certain civil areas have legitimate angst over the breadth of R.P.C. 8.4(c), especially in light of *Pautler*, the interests of the former differ because courts have long acknowledged—as did the Ethics Committee in Formal Opinion 112—that law enforcement officers may dissemble. "Although deception by the police is not condoned by the courts, the limited use of ruses is supported by the overwhelming weight of authority. Most courts have recognized that ruses are a sometimes necessary element of police work []." *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996). The

comment to Missouri Rule 8.4(c) similarly observes, "The exception involves current, acceptable practice of these entities."[15]

In contrast, these members have not found any authority suggesting that private investigators acting for lawyers in civil matters may engage in deceit. Hence, at a minimum, a lawyer who directs or supervises such activity could, in some circumstances, be causing tortious conduct to occur. *See generally*, "Liability of one hiring private investigator or detective for tortious acts committed in course of investigation," 73 A.L.R. 3d 1175. *See also Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 663 (D. Colo. 1992) ("Law enforcement authorities are afforded license to engage in unlawful or deceptive acts to detect and prove criminal violations. Private attorneys are not.").

But these members' position does not depend on the assumption that all deceptive conduct by investigators in civil matters is necessarily tortious or in any other way unlawful.

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[15] *See, e.g., People v. Nelson*, 2012 COA 37 (officer obtained suspect's consent to open door by knocking and saying, "maintenance"); *People v. Roth*, 85 P.3d 571, 572-73 (Colo. App. 2003) ("Police officers, acting with the intent to interdict persons transporting drugs to a music festival, posted large signs on a road stating 'Narcotics Checkpoint, One Mile Ahead' and 'Narcotics Canine Ahead.' The signs were part of an elaborate ruse because there was no checkpoint or other impediment to the free flow of traffic. The purpose of the signs was to allow police officers, dressed in camouflage clothing and hidden on a nearby hill, to monitor the reactions of persons traveling past the signs.").

Rather, these members perceive such conduct to be dishonest, and their desire to limit the exception to government lawyers is informed by the plain language of R.P.C. 8.4(c) -- "dishonesty, fraud, deceit, or misrepresentation." 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. *See People v. Katz*, 58 P.3d 1176, 1189 (Colo. O.P.D.J. 2002) (adopting the following definition of "dishonesty" from a disciplinary matter, *In the Matter of Shorter*, 570 A.2d 760, 769 (D.C. App. 1990), "it encompasses conduct evincing 'a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness . . . .'").

The Rules do not define "dishonesty." Nor has our supreme court done so in a disciplinary case.[16] A line of Oregon disciplinary cases distinguishes fraud from dishonesty. While the former involves affirmative misrepresentation, the latter encompasses "conduct that indicates a disposition to lie, cheat, or defraud;

[16] In the insurance context, our supreme court has equated it to "wrongful purpose and moral obliquity." *Western Sur. Co. v. May Mercantile Ass'n*, 283 P.2d 959, 960 (Colo. 1955).

untrustworthiness; or a lack of integrity." *In re Complaint as to Conduct of Skagen*, 342 Or. 183, 203, 149 P.3d 1171, 1184 (2006).

These members view even lawful deception by private investigators as involving conduct that still lacks "fairness and straightforwardness," *In the Matter of Shorter*, 570 A.2d at 769, and indicates "a predisposition to lie." *In re Complaint as to Conduct of Skagen*, 342 Or. at 203, 149 P.3d at 1184. Therefore, these members depart from the majority because they believe that a civil lawyer who directs or supervises even lawful pretexting diminishes the profession as a whole by suborning the investigator's dishonesty. This problem may be exacerbated because the majority's emphasis on whether investigative activities are "lawful" leaves the sponsoring lawyer with no reason to ask the harder question -- are the activities "dishonest"?

Although the distinction may be a matter of degree, these members also believe that pervasive judicial acceptance of deception by law enforcement puts the government lawyer directing or supervising dishonest investigative activities on a higher moral plane than his or her civil counterpart. Further, government lawyers have incentives that do not exist in civil litigation to monitor

potentially illegal conduct by their investigators. Because a government investigator acts as an arm of the state, such conduct could lead to suppression of evidence based on constitutional violations. However, because misconduct by a private investigator does not raise constitutional concerns, similar sanctions have not been consistently imposed in civil proceedings involving private litigants. Hence, the civil lawyer is rarely at risk that investigative misconduct will become a fatal flaw in the case.

While the members supporting a limitation to government attorneys engaged in law enforcement have some sympathy for difficulties faced by the intellectual property lawyers, as discussed at length in various stakeholder comments, the current proposal is not cabined to any area of civil practice. Even the limiting language in the initial proposal, "matters of background, identification, purpose, or similar information," would not lead to such a restriction. An area of very likely potential abuse would be dissolution of marriage cases. Given the high degree of animosity in such cases, one can only imagine the deceptions that could be put to use and the correlative diminution in the public perception of the integrity of lawyers who were involved.

In sum, these members reject extending "the end justifies the means" rationale, beyond the unique needs of lawyers who represent the government. *See Hamilton v. Miller*, 477 F.2d 908, 909 fn. 1 (10th Cir. 1973) ("It would be difficult indeed to prove discrimination in housing without this means [pretext applicant] of gathering evidence."). They are gravely concerned that giving all private attorneys the ability to direct, advise, or supervise persons in lawful covert activity would eventually lead to abuse and a decline in the morality and stature of the profession.

If the minority proposal is rejected, then these members favor taking no further action.

B. Take No Further Action

Any change to the Rules, comments, or both, that broadens lawyer involvement in pretexting, (i.e., covert investigations), raises an overarching policy question noted by several stakeholders. In the words of one, "The public persona of lawyers is already relatively poor, and we are concerned that an amendment that specifically allows a lawyer to direct, advise, or supervise others in

lawful covert activity that involves misrepresentation or deceit will only make this worse." CoBar Family Comment.[17]

As discussed in the initial report, the majority still believes that Colorado lawyers are entitled to more guidance than the current Rules and Comments provide, especially in light of *Pautler*. The minority agrees in principle, but notes the absence of any R.P.C. 8.4(c) case in Colorado involving a covert investigation.

The majority further submits that the above characterization of the policy issue disregards the benefit that enabling lawyers to supervise and give legal advice to those engaged in investigations that involve pretexting would reduce the potential for improper conduct. The minority responds that this aspirational view is incapable of verification. While the majority also takes comfort in the requirement that such activity must, to afford the lawyer any protection from disciplinary action under R.P.C. 8.4(c), be "lawful," the minority would reiterate that, for the reasons discussed in section V.A, the ultimate issue should be "dishonesty," not legality.

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[17] *See also In re Pautler*, 47 P.3d 1175, 1179 (2002) ("Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession -- as well as at the heart of the system of justice.").

The majority recognizes the concern of some stakeholders that for the Standing Committee to have considered this issue, but then chosen to do nothing further, could be perceived as an endorsement of the broadest possible interpretation of *Pautler*. Such a perception could reduce the comfort that some government lawyers find in Formal Ethics Opinion 112, "Surreptitious Recording of Conversations or Statements," (July 19, 2003) ("The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants."), or that other lawyers involved in investigations may take from the explicit, if brief, comment in *Pautler* distinguishing the attorney's actions from other states' exceptions for the supervision of covert investigations. *See Pautler*, 47 P.3d at 1179 and n.4.

The minority believes that drawing any inferences from inaction by the Standing Committee would be very speculative. The somewhat analogous rule of statutory construction applies only where the legislature has taken "action in amending a previously

construed statute without changing the portion that was construed." *People v. Swain*, 959 P.2d 426, 431 (Colo. 1998). Further, the OARC's representative on the Standing Committee has declined to take a position. This suggests that if the Standing Committee does nothing, OARC would simply continue to exercise reasonable prosecutorial discretion. After all, notwithstanding the shadow cast by *Pautler*, stakeholder comments confirm that covert investigations are ongoing, in both government and private proceedings.

The minority remains persuaded by the perception, and perhaps reality, of diluting lawyers' honesty. If the broadest language in *Pautler* applies to all supervision of pretext investigations (which is the core question at issue), then the proposed change in the R.P.C. 8.4(c) could be characterized as a calculated retreat from holding lawyers to the highest standard of honesty. Hence, the minority submits that, if a change is not limited to government lawyers, the status quo should be preserved because the cure would be worse than the disease.

Respectfully Submitted,

/s/

Thomas E. Downey

SUPPLEMENTAL REPORT OF THE

PRETEXTING SUBCOMMITTEE

ATTACHMENT A

SUPPLEMENTAL REPORT OF THE

PRETEXTING SUBCOMMITTEE

Comments Received on the
December 19, 2011
Final Report of the Pretexting Subcommittee
Colorado Supreme Court Standing Committee on the Rules of Professional Conduct

1. Attorney General of Colorado: Letter from John W. Suthers (March 20, 2012) [AG]
2. Colorado Criminal Defense Bar: Letter from Dan Schoen (Feb. 16, 2012) [CCDB]
3. Colorado District Attorney's Council: Letter from Larry R. Abrahamson (March 22, 2012) [CDAC]
4. Family Law Section, Colorado Bar Association: E-mail from Brenda L. Storey (Feb. 6, 2012) [CoBar Family]
5. Intellectual Property Section, Colorado Bar Association: Letter from Nina Y. Wang (March 16, 2012) [CoBar IP]
6. International Trademark Association: Letter from Alan C. Drewsen (March 19, 2012) [INTA]
7. Marksmen: E-Mail from Ken Taylor (March 8, 2012) [Marksmen]
8. Office of the Federal Public Defender, Districts of Colorado and Wyoming: Letter from Raymond P. Moore (Feb. 8, 2012) [FedDefender]
9. Office of the State Public Defender: Memorandum from Frances Smylie Brown (Feb. 17, 2012) [StateDefender]
10. Oracle Corporation: Letter from Todd Adler (March 14, 2012) [Oracle]
11. RE/MAX, LLC: Letter from Adam Lindquist Scoville (March 20, 2012) [RE/MAX]
12. Standing Committee of the Criminal Justice Act Panel, United States District Court for the District of Colorado (Feb. 27, 2012) [CJA Standing Committee]
13. State of Colorado, Office of the Alternate Defense Counsel: Letter from Lindy Frolich (Feb. 15, 2012) [OADC]
14. U.S. Department of Justice, United States Attorney, District of Colorado (April 18, 2011) [USA1]
15. U.S. Department of Justice, United States Attorney, District of Colorado (March 13, 2012) [USA2]

ATTORNEY GENERAL OF COLORADO
John W. Suthers

March 20, 2012

Thomas E. Downey, Jr., Esq.
Chair of Pretexting Subcommittee
Standing Committee on Rules of Professional Conduct
Downey & Associates PC
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Dear Mr. Downey:

I have reviewed the Final Report of the Pretexting Subcommittee and I am in concurrence both with the recommendation of that Final Report and with the need to pursue this proposed change to COLO. RPC 8.4(c).

I have had the privilege of serving as an elected District Attorney, the presidentially appointed United States Attorney for the District of Colorado, and as the elected Colorado Attorney General. In each one of these public law enforcement agencies and law offices, appropriate undercover investigations have been a critical part of our efforts to protect the public health, safety, and welfare through criminal and civil prosecutions. In each and every instance, investigators in my agencies – and from other state and federal agencies – have sought guidance and direction from my attorneys regarding the conduct of covert investigations.

Proper undercover investigations have always been a staple of sound law enforcement practices, and evidence legally obtained through such activities has long been sustained to support both criminal convictions and civil judgments obtained by my office. I concur fully with the comments of United States Attorney John F. Walsh, in his letter to this Subcommittee dated March 13, 2012, that it is "vital for government agents to consult attorneys in my office while conducting covert investigations. Such consultation has long been recognized as good public policy because it increases the likelihood that the legal rights of investigative targets will be protected and maximizes the government's ability to obtain relevant, admissible evidence in meritorious cases."

I do not read *In re Pautler*, 47 P.3d 1175 (Colo. 2002), as erecting an impenetrable barrier to my attorneys providing appropriate guidance to investigators engaged in

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covert investigations. And yet, *Pautler* continues to be cited for that very proposition. That is why I strongly support the Subcommittee's attempt to clarify that COLO. RPC 8.4(a), 8.4(c), and 4.1 (a) allow attorneys in my office to provide good faith and appropriate advice about such covert investigations.

Thank you for your consideration.

Sincerely,

JOHN W. SUTHERS
Colorado Attorney General

Colorado Criminal Defense Bar

Liberty, Justice, Equality

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Tom Downey, Chair, Pretext Subcommittee
Downey and Associates, PC
383 Inverness Parkway, Ste. 300
Englewood, CO 80112

Re: Proposed Changes to Rule C.R.P.C. 8.4

Dear Mr. Downey,

Colorado Criminal Defense Bar has reviewed the proposed changes to C.R.P.C. 8.4(c) and the responses submitted by the State and Federal Public Defenders in opposition to the change. The CCDB joins in those organizations in opposing changes to the rule. We write separately to reaffirm the paramount obligation of lawyers to serve with honesty and integrity. Any rule change that sanctions their involvement, directly or indirectly, in deceit should be rejected.

Sincerely,

Dan Schoen
Executive Director
Colorado Criminal Defense Bar

Colorado District Attorneys' Council

1580 Logan Street, Suite 420
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March 22, 2012

Thomas E. Downey, Jr., Esq.
Chair of Pretexting Subcommittee
Standing Committee on Rules of Professional Conduct
Downey & Associates PC
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Dear Mr. Downey:

Members of the Colorado District Attorneys' Council have been made aware of the Final Report of the Pretexting Subcommittee and concur with the recommended changes to the Colorado Rules of Professional Conduct.

In reviewing letters of Attorney General John W. Suthers and United States Attorney John F. Walsh, we believe they both very clearly present the concerns and issues of prosecutors. The advice requested from District Attorneys by our law enforcement agencies as they perform these very sensitive covert investigations is crucial to a successful prosecution. We must work as a team with law enforcement and not ignore effective and appropriate investigative efforts to uncover criminal activity. When using deception as a part of any operation, it is crucial that it is done without violating a suspect's constitutional rights. There are often very sensitive discussions that take place while these investigations proceed. To ensure individual rights are fully protected, the advice of legal counsel is crucial. Thus, the Subcommittee proposal is proper, not only for effective law enforcement, but also necessary to protect the rights of those under investigation.

As representative of the Colorado District Attorneys' Council, I urge your approval of the Subcommittee's recommendations.

Sincerely,

Larry R. Abrahamson
District Attorney
President, Colorado District Attorney's Council

From: Brenda L. Storey, Esq. [bls@mcguanehogan.com]
Sent: Monday, February 06, 2012 5:49 PM
To: Tom Downey
Subject: RE: Pretexting Subcommittee- Propose Modifications to RPC 8.4(c)

Hi Tom.

The Family Law Section Executive Council thanks you for wanting our input! We were able to consider and discuss the proposed modification. Council expressed considerable concern about the proposal. The public persona of lawyers is already relatively poor, and we are concerned that an amendment that specifically allows a lawyer to direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit will only make this worse. The CBAs objectives for the 2011/2012 year include "enhancing public confidence in the legal profession." Our Council does not believe that the proposed modification comports with that objective and, in fact, will do quite the opposite. We see nothing in the proposal to enhance our Section, its members' practices, or even our reputations. We oppose it.

Best regards,

Brenda L. Storey

From: Tom Downey [mailto:Tom@downeylawpc.com]
Sent: Mon 2/6/2012 9:48 AM
To: Brenda L. Storey, Esq.
Subject: RE: Pretexting Subcommittee- Propose Modifications to RPC 8.4(c)

Brenda,

Just following up on my email of January 9th. We would appreciate receiving any comments the Family Law Section may have on the proposed modification to RPC 8.4(c) at your earliest convenience.
Thank you.
tom
Thomas E. Downey, Jr.
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From: Tom Downey
Sent: Monday, January 09, 2012 5:03 PM
To: 'bls@mcguanehogan.com'

Subject: Pretexting Subcommittee- Propose Modifications to RPC 8.4(c)

Brenda,

Pursuant to our brief telephone conversation this afternoon, I am forwarding herewith the report of the Pretexting Subcommittee of the Standing Committee on the Rules of Professional Conduct.

The Standing Committee met on January 6 and considered the attached Report. The Committee voted to table the matter until its next meeting on April 20th, and requested that the Subcommittee reach out to additional areas of the practicing bar, including the Family Law Section of the Colorado Bar Association, for additional comment and input. I would appreciate your sharing this report with the members of your Section, and we look forward to receipt of any comments or suggestions your Section might propose.

I will try to schedule another meeting of the Subcommittee for either the week of February 13 or 20th. If at all possible, we would appreciate your Sections input prior to that time.

Thank you. Please let me know if you have any questions.

Tom

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March 16, 2012

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RE: Comment to Proposed Exception to R.P.C. 8.4[c]

Dear Mr. Downey:

On behalf of the Intellectual Property Section ("IP Section") of the Colorado Bar Association, we write to provide comment to the proposed exception to Rule 8.4[c] of the Colorado Rules of Professional Conduct.

The IP Section originally sought clarification with respect to the application of the Colorado Rules of Professional Conduct to pretexting in civil investigations, given the perceived conflict between Rule 11 (of both the Colorado Rules of Civil Procedure and the Federal Rules of Civil Procedure) and the Colorado Rules of Professional Conduct.

As the Committee is well aware, Rule 11 requires an attorney to conduct a reasonable prefiling investigation, such that the pleading is well-grounded in fact. CRCP Rules 4.1, 4.2, 4.3, and 8.4 prohibit attorneys from, among other things, making false statements of material fact to third parties, failing to disclose material facts to third parties, communicating with represented persons, or engaging in dishonest conduct. These prohibitions, in some situations, may prevent an attorney from conducting an appropriate prefiling investigation in claims related to intellectual property rights (*i.e.*, patent, trademark, copyright, and trade secret).

In order to satisfy pre-filing obligations, as well as initiate an effective enforcement action, intellectual property attorneys may need to obtain samples of allegedly infringing products in order to examine and analyze them; ascertain the source of allegedly infringing products and/or methods; and the manner in which allegedly infringing products and/or methods are made or used. For example, in the case of counterfeit goods, before or after commencing an action against an Internet infringer or counterfeiter, a brand owner hires private investigators to contact the online seller, exchange communication with the seller and purchase infringing or counterfeit goods to ultimately identify the seller and ascertain his or

her domicile to understand the scope of use of the protected trademark. Nevertheless, Rule 8.4[c] without amendment, appears to prohibit the above-described behavior in Colorado – despite the fact that there may be no other effective way prior to litigation to obtain the necessary information.

For many types of intellectual property rights violations, the only manner in which a property owner can adequately protect its investment in its intellectual property and avoid diluting such rights is to bring a swift enforcement action. As it currently stands without amendment, Rule 8.4[c] may have the unintended effects of materially hampering the protection of intellectual property rights and decreasing the economic value of intellectual property. Accordingly, the IP Section supports the limited exception and clarifying comments proposed by the Committee for two main reasons. First, the proposed exception and clarifying comments provide understandable guidelines for intellectual property attorneys to follow when engaging in presuit investigations. Second, the limited exception that allows intellectual property attorneys to use agents, such as professional investigators, to obtain background, identification, purpose, or similar information is sufficiently tailored to permit the gathering of preliminary evidence to support the initiation of a litigation, but prevent discovery without providing a target with adequate opportunity to secure legal representation.

Finally, the IP Section would like to thank the Supreme Court Standing Committee on the Rules of Professional Conduct, and in particular, the Subcommittee on Pretexting, for their inquiry into amending Rule 8.4[c]. We appreciate the time and attention that the Standing Committee has devoted to consideration of these complex issues.

Sincerely,

Nina Y. Wang
Chair, Intellectual Property Section
Colorado Bar Association

International Trademark Association

Alan C. Drewsen
Executive Director

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March 19, 2012

Thomas E. Downey, Jr.
Downey & Associates, P.C.
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Dear Mr. Downey:

The International Trademark Association (INTA) is pleased to provide comments on the final report prepared by the Pretexting Subcommittee of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct. The comments were prepared by the INTA Anticounterfeiting and Enforcement Committees. For the reasons discussed below, we support the proposed amendment of Colorado Rule of Professional Conduct 8.4(c) that would create a limited exception to the prohibition in Rule 8.4 in order to permit lawyers to "direct, advise, or supervise others" who conduct "pretext" investigations, while continuing to prohibit direct lawyer participation in any deception or subterfuge.

INTA is a not-for-profit organization founded in 1878 with 5,900 members in more than 190 countries. INTA's members include trademark owners of all sizes, law firms, advertising agencies, and professional associations who share the common mission of supporting trademarks as essential elements of fair and effective commerce.

In trademark infringement and counterfeiting cases, pretext investigations are commonly used and evidence gathered through such investigations generally has been accepted by the courts. When such investigations involve lawyers, they are generally regulated by state rules governing lawyers' conduct.

Pretext investigations in trademark cases occur generally when trademark owners and lawyers hire investigators to pose as consumers, purchasers, or counterfeiters to ascertain how the alleged infringer or counterfeiter presents himself to the consuming public or to ascertain the source of infringing or counterfeiting goods. These investigative techniques are a reliable and efficient way to collect information on use or non-use of a trademark, gather information about trademark counterfeiting or infringement, ascertain information about an alleged infringer or counterfeiter, or learn information about an individual's representations to the public.

In these cases, pretext investigations are crucial in helping brand owners prevent the harm that results from consumer confusion or trademark counterfeiting, which constitutes a crime and, in some cases, creates health and safety risks for the public. Most importantly, such investigations may be used to gather evidence not otherwise discoverable, because the alleged infringer or counterfeiter does not cooperate in the legal process. The lawyer's role in helping supervise and keep the investigation within legal bounds is an important limiting function.

In the course of such investigations, investigators may explicitly or implicitly misrepresent who they are, may misstate the purpose of their visit, questions or interviews, and may tape record, photograph or videotape others during the visits to the extent such recording is permitted by law.

As noted in the subcommittee's report, certain types of pretext investigations have been allowed by courts. For example, New York courts have approved pretext investigations where investigators posed as consumers or purchasers to buy infringing or counterfeited goods and record conversations to prove the representation that alleged infringers and counterfeiters made to the public. The leading New York case is *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999). In this case, the court found permissible an investigator posing as an interior designer to obtain information from sales clerks. The court found the investigations ethical because the investigators contacted low-level employees without access to privileged information and that the investigator posed as an ordinary consumer. In addition, the court found that enforcement of trademark laws to prevent consumer confusion and fraud is an important policy objective and found pretext investigations provide an effective enforcement mechanism for detecting and proving anticompetitive activity, which might otherwise escape discovery or proof. *See also Apple Corps Ltd. v. International Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (rejecting challenge to evidence collected by investigator in trademark and copyright case because "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").

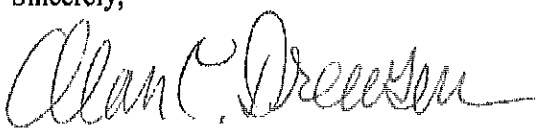
One frequently cited case against pretext investigations is *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003). In that case, the court appeared particularly troubled by the ethical issues raised by the investigators' communications with managerial employees and by the secret recording of the conversations, which the court held was unethical under South Dakota law. In some respects, this case is consistent with the rulings in *Gidatex* and *Apple Corps*, although, to the extent the *Midwest Motor Sports* decision more broadly criticizes all use of deception by investigators, the decision has been characterized as an "aberration" in this area of law (David H. Bernstein and D. Peter Harvey, "Ethics and Privilege in the Digital Age," 93 TMR 1240, 1254 (2003)).

In another well-known decision, *In re Gatti*, 330 Or. 517, 8 P3d 966 (2000), it was ruled that no exception to the ethics rules will be created in favor of pretexting by judicial decree, and the practice will always render a lawyer vulnerable to sanction even if the client is not to be penalized by virtue of the lawyer's actions. The *Gatti* legacy seems to suggest that the attorney is in jeopardy whether or not the client's case is prejudiced. As the subcommittee's report notes, the decision in *In re Pautler*, 47 P.3d 1175 (Colo. 2002), causes a similar concern for attorneys practicing in Colorado. As a result of the uncertainty created by *Gatti*, Oregon amended their rules of professional conduct in a manner similar in substance to the amendment the Pretexting Subcommittee currently proposes, as noted in Attachment 1 to the Subcommittee's report.

INTA has endorsed ethical and legal pretexting in its Board Resolution (Attachment 2) as an essential tool in investigating and combating trademark infringement and counterfeiting; urged that private uses of pretext investigations with respect to potential trademark infringement and counterfeiting be permissible; and, where such uses of pretext investigations are prohibited, urged adoption of an exception for pretext investigations for trademark infringement and counterfeiting.

We reiterate these positions by offering our support for the proposed amendment to Rule 8.4(c). Should the subcommittee have any questions or comments concerning our support for the amendment, please contact Claudio DiGangi, External Relations Manager – Internet & the Judiciary at cdigangi@inta.org or Candice Li, External Relations Manager – Anticounterfeiting at cli@inta.org.

Sincerely,



October 11, 2007

Action Request

The Anticounterfeiting & Enforcement Committee (ACEC) requests that the Board of Directors approve a resolution setting out INTA's position with respect to Pretext Investigations in U.S. Trademark Infringement Cases.

Resolution

WHEREAS, in trademark infringement and counterfeiting cases, pretext investigations are commonly used and evidence gathered through such investigations generally has been accepted by U.S. Courts;

WHEREAS, certain types of pretext investigations have been permissible by U.S. Courts and when such investigations involve lawyers, they are generally regulated by state rules governing lawyers' conduct;

WHEREAS, pretext investigations are crucial to establishing infringement or counterfeiting through enabling investigators to gather evidence not otherwise discoverable as the alleged infringer or counterfeiter would not cooperate;

WHEREAS, pretext investigations in trademark infringement cases serve an important policy objective, i.e., preventing consumer confusion or deception and protecting consumers against fraud and, in some counterfeiting cases, against health and safety risks;

WHEREAS, INTA is concerned about the proposed S.B. 328 ("the Bill"), currently being considered by the California legislature, which if made law will effectively prohibit all private uses of pretext investigations, including trademark pretext investigations.

BE IT RESOLVED, that the International Trademark Association:

1. Endorses ethical and legal pretexting as an essential tool in investigating and combating trademark infringement and counterfeiting;
2. Urges governments not to prohibit private uses of pretext investigations in respect of potential trademark infringement and counterfeiting; and
3. Where such private pretext investigations are prohibited, urges governments to make an exception for pretext investigations for trademark infringement and counterfeiting.

Background

In trademark infringement and counterfeiting cases, pretext investigations are commonly used and evidence gathered through such investigations generally has been accepted. When such investigations involve lawyers, they are generally regulated by state rules governing lawyers' conduct.

Pretext investigations in trademark cases occur generally when trademark owners and lawyers hire investigators to pose as consumers, purchasers, or counterfeiters to ascertain how the alleged infringer or counterfeiter presents himself to the consuming public or to ascertain the source of infringing or counterfeiting goods. These investigative techniques are a reliable and efficient way to collect information on use or non-use of a trademark, gather information about trademark counterfeiting or infringement,

ascertain information about an alleged infringer or counterfeiter, or learn information about a suspect's representations to the public.

Pretext investigations may occur at any time including before or after litigation has started. They may be crucial to establishing infringement or counterfeiting. They may be used to gather evidence not otherwise discoverable, because the alleged infringer or counterfeiter would not cooperate.

In the course of such investigations, investigators may explicitly or implicitly misrepresent who they are, may misstate the purpose of their visit, questions or interviews, and may secretly tape record, photograph or videotape others during the visits (to the extent such secret recording is permitted by law).

Examples of such pretext investigations are:

- A brand owner suspects that its products are infringed upon or counterfeited and therefore hires private investigators to visit some stores or showrooms, speak to salespeople, determine who the owner of the store is and ascertain the scope of the infringing or counterfeit activity;
- Before or after commencing an action against an infringer or counterfeiter, a brand owner hires private investigators to take pictures of a store window displaying infringing or counterfeit goods, to buy infringing or counterfeit goods and to speak with sales representatives in order to assess how they present the products to consumers;
- Before or after commencing an action against an Internet infringer or counterfeiter, a brand owner hires private investigators to contact the online seller, exchange communication with the seller and purchase infringing or counterfeit goods to ultimately identify the seller and ascertain his or her domicile; or
- After commencing an action against an infringer or counterfeiter, discovery is difficult and a brand owner has difficulties getting the requested documentation. The brand owner, therefore, hires an investigator to visit defendant's stores, speak to defendant's salespeople and record conversations with defendant's low-level employees in order to gather evidence as to defendant's representations to consumers regarding the infringing or counterfeit goods.

U.S. Case Law Supports the Use of Certain Pretext Investigations

In the United States, certain types of pretext investigations have been allowed by courts. However, it is generally unethical for a non-government lawyer to use or supervise an investigator who will give a false impression about something or use deception. In addition, lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. New York courts have approved pretext investigations where investigators posed as consumers or purchasers to buy infringing or counterfeited goods and record conversations to prove the representation that alleged infringers and counterfeiters made to the public. The leading New York case is *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999). In this case, the court found permissible an investigator posing as an interior designer to obtain information from sales clerks. The court found the investigations ethical because the investigators contacted low-level employees without access to privileged information and that the investigator posed as an ordinary consumer. In addition, the court found that enforcement of trademark laws to prevent consumer confusion is an important policy objective and found pretext investigations provide an effective enforcement mechanism for detecting and proving anticompetitive activity, which might otherwise escape discovery or proof. See also *Apple Corps Ltd. v. International Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (rejecting challenge to evidence collected by investigator in trademark and copyright case because "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").

The most cited case against pretext investigations is *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003). In that case, the court appeared particularly troubled by the ethical issues raised by the investigators' communications with managerial employees and by the secret recording of the conversations, which the court held was unethical under South Dakota law. In some respects, this case is

thus consistent with the rulings in *Gidatex* and *Apple Corps*, although, to the extent the *Midwest Motor Sports* decision more broadly criticizes all use of deception by investigators, the decision has been characterized as an "aberration" in this area of law. David H. Bernstein and D. Peter Harvey, "Ethics and Privilege in the Digital Age," 93 Trademark Reporter 1240, 1254 (2003).

In another famous case, *In re Gatti*, 330 Or. 517, 8 P3d 966 (2000), it was ruled that no exception to the ethics rules will be created in favor of pretexting by judicial decree, and the practice will always render a lawyer vulnerable to sanction even if the client is not to be penalized by virtue of the lawyer's actions. The *Gatti* legacy seems to suggest that the attorney is in jeopardy whether or not the client's case is prejudiced. This should be of particular concern when in-house counsel directs "pretexting" since, often, in-house counsel is not admitted in the state in which he works, and this disregard of state ethics rules can be used as leverage to argue that in-house counsel should be required to be admitted in the state in which he works.

In general, pretext investigations are allowed provided that investigators are seeking only information that a member of the public or an ordinary consumer could obtain from a low-level employee in contrast to a corporate executive or a member of a litigation control group. This general rule has been confirmed recently by the New York County Bar Association's Opinion 737. The opinion provides that non-government employees may ethically supervise pretext investigations where either the investigation is of a violation of intellectual property or civil rights and the lawyer believes in good faith that such a violation is taking place, or will take place imminently or the pretexting is expressly authorized by law. In addition, the evidence sought must not reasonably be available by lawful means.

S.B. 328

The California legislature is currently considering S.B. 328 ("the Bill"), which would prohibit the use of "pretexting" in order to obtain personal information about any individual - though law enforcement officials would be exempted. Specifically, the Bill would prohibit any person from obtaining or attempting to obtain, or causing or attempting to cause the disclosure of personal information about a customer or employee contained in the records of a business through specified methods, such as by making false, fictitious, or fraudulent statements or representations.

While the Bill would protect one's privacy against investigators who engage in questionable techniques to gather personal information about individuals, the Bill, as currently drafted, is overly broad and may have the effect of banning all private uses of pretext investigations, including trademark pretext investigations that are widely used and that have been allowed by courts throughout the country.

The Bill was referred to the Assembly Banking and Finance ("B&F") as well as the Assembly Judiciary. The Bill was pulled from the B&F hearing on June 27 and made a 2-year bill.

Conclusion

The Bill as currently drafted would prohibit pretext investigations which are commonly used in trademark counterfeiting and infringement investigations. The courts have addressed such investigations, and they are generally regulated by ethics rules when lawyers are involved. There is no need for additional regulation.

The ACEC recommends that INTA should express concern about the scope of the statute and, at a minimum, request an exception for pretext investigations in trademark cases. Such an exception would not only be in the interest of INTA members but also of the general public, because trademark pretext investigations serve an important policy objective, i.e., preventing consumer confusion or deception and protect consumers against fraud and, in some counterfeiting cases, against health and safety risks.

From: Ken Taylor <ktaylor@marksmen.com>
Subject: Colorado - Proposed Amendment to RPC 8.4(c)
Date: March 8, 2012 3:54:43 PM EST
To: Tom@downeylawpc.com
Cc: Ken Taylor <ktaylor@marksmen.com>

March 8, 2012

Thomas E. Downey, Jr.
Downey & Associates, P.C.
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Dear Mr. Downey.

I have heard from corporate and law firm clients in Colorado about your committee's review of Rules of Professional Conduct for lawyers in Colorado. I am not a lawyer. I run a world leading private investigation firm called Marksmen that specializes in Intellectual Property investigations. I also speak frequently on the ethics of investigations at various State Bar Associations across the country (including Colorado a couple of years ago), all the major Intellectual Property Associations (INTA, IACC, IPO, AIPLA and in Europe, MARQUES), as well as at various local Intellectual Property organizations (CV attached).

My company has conducted approximately 75,000 investigations. We abide by what would be your proposed amendment to the Rules, by only using a pretext to hide the identity of our name and the purpose of our investigations. We do not coerce confessions from our targets, or violate any of their personal rights as citizens. Our efforts are in many cases trying to find the perpetrators of counterfeit activity (including the trafficking of illegal pharmaceuticals, air plane parts, children's toys and clothing, electrical standards certifications and other instances involving the public safety.) Other investigations include commercial diversion and trademark use (or mis-use).

I am sure you are aware of the case law in the United States that hinges on this issue. One difficulty is that the issue is not crystal clear. In the cases where the courts have deemed pretext investigations permissible for investigators (not lawyers) there is still some ambiguity. That being said, Marksmen, as a world leading firm, has adopted what the courts have said is proper standard in terms of approaching a target company under pretext:

•Limit contact to low level employees

•Pose as consumer seeking information

•Only record what is said in standard sales context

•Do not seek extended admissions

•Do not engage in elaborate deceptions

•Be especially careful if litigation already commenced

You are also probably are aware of what other bar associations and IP organizations have opined in this regard, but I include these in support of what I am urging you to pass in Colorado:

ABA Formal Opinion 01-422 (June 24, 2001)

•Electronic recordings without knowledge

•Committee specifically stated that it was not addressing application of Model Rules to deceitful but lawful conduct that often accompanies recordings in trademark infringement investigations

NYCLA Formal Opinion 737 (May 23, 2007)

•ethically permissible "in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence."

But still unethical unless:

•investigating violation of IP rights and good faith belief that violation is taking place or will take place imminently

•evidence not reasonably and readily available through other lawful means

•lawyer's and investigator's conduct does not otherwise violate ethical rules or applicable law

•dissemblance does not unlawfully or unethically violate the rights of third parties

•Conditions are narrow

•In most cases permissible conduct will be limited to situations involving:

–virtual necessity of investigators posing as ordinary consumers

–engaged in otherwise lawful transaction

–to obtain basic information not otherwise available

INTA Board Resolution -- Oct. 11, 2007

1. Endorses ethical and legal pretexting as essential tool in investigating and combating trademark infringement and counterfeiting
2. Urges governments not to prohibit private uses of pretext investigations in respect of potential trademark infringement and counterfeiting where private pretext investigations are prohibited, urges governments to make exception for investigations for trademark infringement and counterfeiting

•Retain experienced investigator

–careful instructions/supervision

–effective communication

–work to customize investigation

•Limit scope of investigation

•Follow ethical guidelines (NYCLA)

•Use other resources to gather information

–target's website, industry trade sites, business directories, search engines, USPTO/TTAB data, Secretary of State and SEC filings, Whois records, "Way Back Machine", news databases, etc.

•Particular care in overseas investigations

I know that the *In re Paulter* case in CO is an emotional one and has stirred passions in shaping the rules, but it is in my opinion, an outlier in terms of ethical behavior and business practice. I feel if the amendment, as your committee proposes, does not pass, Colorado will send a message of endorsement where criminals and other bad actors will hide under the safe harbor of the Professional Rules that (in terms of what the major of the courts have ruled) were not created to protect such behavior. If the amendment passed, I feel Colorado can look to itself as a leader in clarifying what has been an issue lawyers and investigators and judges have tap-danced around.

Despite some of the resistance you may be getting, I support your position on the amendment that allows legal investigations that don't go behind the backs of represented parties and that do not probe into citizens rights to privacy.

Thanks for your consideration.

Kind regards,

Ken Taylor
President and CEO
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Chapel Hill, NC 27514
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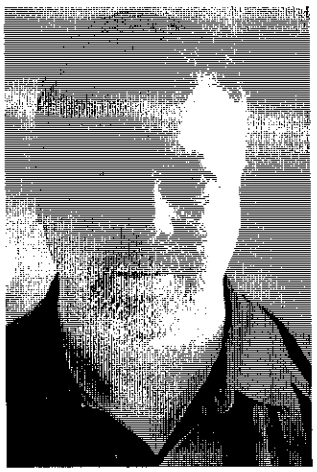
kt@marksmen.com

Marksmen investigates, patrols and negotiates IP rights worldwide.

MARKSMEN®



Ken Taylor
Chairman, President and CEO
Marksmen, Inc.

BIOGRAPHICAL INFORMATION

Ken Taylor is founder, CEO and Chairman of Marksmen, Inc., a world-leading IP protection firm that investigates, patrols and negotiates Intellectual Property rights and domain names worldwide. He has been working involved with IP for over 17 years and an active participant with various IP, anti-counterfeiting and Internet organizations such as: INTA, IPO, PTMG, MARQUES, ICANN, AIPLA and the IACC. Ken is a licensed private investigator in both California and North Carolina and is a frequent speaker and published author on trademark and domain name issues. In a past life he was a screenwriter, playwright and actor in Los Angeles and New York. He currently writes and publishes poetry.

EDUCATION

B.A. in English, Auburn University

PROFESSIONAL ACTIVITIES

Member, Intellectual Property Constituency, ICANN
Former Committee Member, IPO Branding Committee
Member, International Trademark Association (INTA)
Past Committee Member, INTA Internet Committee (DNS Governance)
INTA Public Relations Committee, INTA Meetings Committee

Current Committee Member, INTA Bulletin Committee
Member, MARQUES
Past Committee Member MARQUES Cyberspace Team
Current Chair MARQUES Membership Team
Member, International Anti-Counterfeiting Coalition (IACC)
Member, Triangle Intellectual Property Law Association (TIPLA)
Member, California Association of Licensed Investigators (CALI)
Licensed Private Investigator, State of California
Licensed Private Investigator, State of North Carolina

LAW RELATED PUBLICATIONS, ETC.

"You Want What for that Domain Name?", IP Asia, 2000
"Gumshoes in the Digital Age", Managing Intellectual Property, 2001
ICANN Tackles the Whois Issue - MARQUES News Spring 2005
Various Articles for INTA Bulletin – Features, Membership & Benefits Services 2005-2010

SPEAKING ENGAGEMENTS

Speaker, Austin Intellectual Property Law Association, 2000
Speaker, IP Litigation, Minnesota Institute of Legal Education, 2002
Speaker, Intellectual Property Law Course, Texas Bar, 2003
Speaker, IPO Annual Meeting, 2003
Speaker, AIPLA Annual Meeting, 2003
Speaker, INTA Trademark Administrators Conference, 2005
Speaker, AIPLA Mid-Winter Meeting, 2006
Speaker, INTA Annual Meeting, 2006
Speaker, IP Section of the Hillsborough County Bar Association, 2007
Speaker, Pittsburgh Intellectual Property Law Association, 2007
Speaker, MARQUES Annual Meeting 2007
Speaker, INTA Leadership Meeting, 2007
Speaker, INTA In-House Trademark Counsel Workshop, 2008
Speaker, Alabama State Bar – IP Section, 2008
Speaker, California Alliance of Paralegals Association, 2008
Speaker, INTA Trademark Administrators Conference, 2008
Speaker, Triangle Intellectual Property Law Association, 2009
Speaker, INTA Annual Meeting 2009
Speaker, New Jersey Trademark Counsel Luncheon Club, 2009
Speaker, Colorado Bar IP Section Meeting, 2010
Speaker, Dallas Bar Association, IP Section, 2010
Speaker, National CLE Conference - Intellectual Property, 2011

Raymond P. Moore
Federal Public Defender
Warren R. Williamson
Chief, Trial Division
Jill M. Wichlens
Chief, Appellate Division
Virginia L. Grady
Senior Litigator

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February 8, 2012

Thomas E. Downey, Jr.
Chair, Pretexting Subcommittee
Downey & Associates, P.C.
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Re: Proposed Changes to R.P.C. 8.4(c)

Dear Mr. Downey:

I was recently provided with the Final Report of the Pretexting Subcommittee by A.U.S.A. Matthew Kirsch, who I understand is a member of the Subcommittee. Mr. Kirsch invited any comments I might wish to tender with respect to the proposed rule change. Having now examined the Subcommittee's report, I wish to tender comments in opposition to the proposed rule change.

As a preliminary matter, you should be aware that the Subcommittee will be receiving comments from the Office of the Colorado State Public Defender in which I join. I have met with and discussed the proposed rule change with members of the broader defense bar - including the state public defender office, the Colorado Criminal Defense Bar ("CCDB"), Alternate Defense Counsel ("ADC"), and the Standing Committee of the Criminal Justice Act panel ("CJA"). Although I do not speak for them, my understanding is that there is widespread agreement in opposition to the proposed changed. What follows is my individualized view on the matter as I feel it is important to complement the objections of others with some of my own thoughts.

It is my strongly held belief that enabling, empowering or endorsing the use of dishonesty, fraud, deceit or misrepresentation by Colorado attorneys - directly or indirectly - demeans the profession. And it is no less demeaning simply because the proposed degree to which such conduct is permitted is perceived by some to be limited and fully cabined. It may be old fashioned - indeed, it may be corny - but I believe we should hold ourselves to a higher standard.

This is particularly true in light of the absence of a substantial and demonstrated need for the proposed change. In the decade since *Pautler*, I have perceived no inability on the part of law enforcement or prosecutors to bring criminal charges, to conduct investigations, to garner intelligence or otherwise to conduct their day to day activities.[1] If *Pautler* or the current rule were some major impediment, I would have expected some significant effort to bring about change long before the passage of a decade. Yet, I am unaware of any legislative or other such efforts. And even the currently proposed change was initiated, in my understanding, not by law enforcement or prosecutors, but rather by a segment of the intellectual property bar. Also, based on my review of the materials attached to the Subcommittee's report, it appears that the proposed creation of exceptions to the rule against attorney misrepresentation - putting aside the specifics of the scope of the exceptions - is a minority position in the United States. I cannot reconcile these facts with anything approximating a compelling need. And absent compelling need, I see no reason to retreat from the standards embodied in the current rule and articulated by the Colorado Supreme Court in *Pautler*. I submit that we should, as the Court so succinctly put it:

> . . . stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reason for doing so.

Pautler, 47 P.3d 1175, 1182 (Colo. 2002).[2]

My expectation is that the Subcommittee will note that the proposed rule change does not permit any attorney to deceive, lie or misrepresent directly - only to "direct, advise, or supervise others." I regard the distinction as wordsmithing which will ultimately prove to create a distinction without a difference.

As an example, consider an internet sting where an agent - pretending to be a young girl - is attempting to identify perceived child predators and "meet" them for sexual purposes. As a direct actor, the attorney cannot type the conversations which will produce the meeting. Yet, the

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[1] I do not mean to ignore the concerns of the civil bar or any portion thereof. By virtue of my current position, my interest and expertise lie in the realm of criminal law. Although I perceive no compelling need for what I categorize as the "civil" side of the proposed change (8.4(c)(1))), I believe better insight and comments may come from those who practice regularly in that arena.

[2] I am fully aware that the U.S. Attorney and others involved to one degree or another with law enforcement have expressed concerns about the current rule or supported the proposed changes. To my knowledge, no one has demonstrated that their legal duties are not being fulfilled under the current rule.

attorney can stand behind the agent and "direct" or "supervise" the sting by saying, "tell him x" or "tell him y." While the attorney cannot get his hands dirty by typing the misleading or deceptive promises and representations on the keyboard, he or she can play the role of puppeteer and "direct" the agent to do so.[3] This is a road down which we should not embark.

To be clear, my opposition to the rule change is based on principle and, in my opinion, lack of demonstrated need rather than on the particular text of the change as drafted. But I feel that I would be remiss if I did not address the language of the exception as proposed. I have already commented upon my lack of comfort with the overbroad notion of "limiting" the dishonesty to the highly maleable concepts of supervision and direction. But my concerns with the proposed language go further.

On first read, the proposed exceptions to current Rule 8.4 appear to be exceptions created for the plaintiff's bar (both civil and criminal) in that only those who file claims need to investigate covertly. If this is a correct reading, I find it both a curious and confounding statement to the public that half the bar needs to utilize these methodologies while the other half does not.

If my reading of the exceptions' intended beneficiaries is correct, the separation of the entitled from the non-entitled may nevertheless prove to be more illusory than real in practice. On the civil side, a defendant would only need to file a counterclaim to cross the aisle from non-entitled to entitled. And on the criminal side, it does not even require that simple manipulation. We routinely investigate what we perceive to be constitutional violations committed by the arresting or prosecuting authorities. Further, I cannot help but note that we (public defenders) are also "government lawyers."

As I see the matter, if the exceptions are intended to be restricted, they fail utterly. Indeed, the Subcommittee will give birth to a goldfish which will consume the whale as the exception swallows the rule. On the other hand, if the exceptions are intended to be widely

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[3] I do not consider my example to be some rare hypothetical unlikely to appear often in the real world. In a time of on-line banking, social media, mega upload sites, limewire, e-bay, Amazon, and increasingly sophisticated computer networks and programs, it is hardly surprising that various forms of computer crime have grown - and continue to grow - over the years. The spectrum of offenses includes fraud, identity theft, hacking, child pornography, child enticement, cyber threats, and a host of other offenses which will need to be investigated, to one degree or another, in the on-line world. Even in the physical world, the line between "direction" and "direct misrepresentation" may blur as "supervisors" can be in radio or telephone contact with agents in essentially real time. And the measured distinction between actor and puppeteer that forms such a bright line for the Subcommittee simply eludes me.

available rather than restricted, despite my perception of the intended beneficiaries, then the risk of evisceration of the principles embodied in current Rule 8.4 will be - in my opinion - in full bloom.

On a still more granular level, the proposed rule revision contains provisions which are simply disturbing. First is the notion of self policing inherent in making an ethics violation contingent on bad faith. Second is the grant of an exception for "lawful intelligence - gathering."

I submit that the subjective intentions and beliefs of the attorney directing, supervising or advising with respect to matters involving dishonesty and misrepresentation should have no role in determining whether an ethics violation has occurred. Ethics are not individualized matters varying with the subjective beliefs and intentions of the actor - or at least they should not be. Yet here, in the context of the use of rank dishonesty, is where the Subcommittee proposes to rely, albeit only partially, on the subjective, good faith belief of the actor. I submit that the concept is ill-advised at a bare minimum. And further, it is positioned in an oddly inconsistent manner within the materials provided.

The comment to the proposed rule change speaks of "good faith" as attaching to a "belief that the activity was lawful." More specifically, the comment speaks to the lawfulness of the "covert activity." But that not what the text of the proposed exceptions provide. There, the issue is a good faith belief in such matters as "a violation of law. . . is likely to take place," "covert activity will aid" the investigation, the "action is within the scope of the lawyer's duties," and "the purpose" of the covert activity being to gather "information" or "intelligence." The former (good faith in lawfulness) may arguably be discernable by reference to substantive law. The latter will not. Instead, the good faith attaches to personal beliefs as to what will occur in the future or whether covert action will be helpful or obtain information or intelligence. The source for the belief in such instances will lie in the mind of the lawyer or in the beliefs of his or her agency - not in caselaw. Regardless of intention of the Subcommittee, this is "subjective" good faith belief that amounts to self policing.

I note that in the comments which follow the proposed rule change, reference is made *United States v. Leon* and *Davis v. United States*, as if these cases support the subjective good faith standard introduced by the Subcommittee. I respectfully submit that they do not.

Leon permits good faith to overcome deficiencies in a warrant - but it is good faith of a type quite different from that embodied in the proposed rule change. In *Leon*, the law enforcement officer is entitled to rely in good faith on the validity of a warrant issued by a neutral and detached magistrate or judge. The agent is trusting in the judgment and decisions of others outside of law enforcement - not self policing his or her own actions. Here, of course, there is no neutral and detached arbiter upon which the attorney relies. It is his own "good faith" belief in such matters as the purposes of the investigation which contributes to the determination of

whether an ethics violation occurs.[4] As a criminal law practitioner, I find it ironic that criminal defendants (laymen) frequently encounter the circumstance in court where "ignorance of the law" is neither defense nor excuse, yet the very same degree of "good faith" ignorance may preclude a finding of an ethical violation by the prosecuting attorney under the proposed rule.

Quite apart from what I have coined self-policing inherent in the proposed rule change is the expansiveness of allowing dishonesty not only where the purpose is related to "a suspected violation of civil, criminal or constitutional law," but also where such dishonesty is used "to engage in lawful intelligence - gathering." My view is that this justification eviscerates the general rule for "government lawyers."

Simply stated, the question is, "What covert activity cannot be cast as some form of 'intelligence gathering?'" I submit that the answer is "None." I presume that the Subcommittee members are old enough, as I am, to recall "intelligence gathering" with respect to "communists," "civil rights leaders," "Vietnam War protestors" and others in the not too recent past. There are always those philosophically at odds with the government to such a degree that suspicions abound - from both directions. I submit that it is unnecessary and dangerously at odds with what ethical rules should stand for to declare the mere process of "intelligence gathering" - disconnected from any suspected law violation - as a justification for falsity and deception. This goes much, much too far.

Regardless of the justification, my position is that the ethical rules should not retreat in the face of today's reported need for "intelligence - gathering." Instead, I side with the Supreme Court's statement in *Pautler*:

> The obligations concomitant with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals.

(47 P.3d at 1182).

Finally, I note my concern about the lack of parallel between the proposed revised rule and the ABA Model Rules. I do not pretend that I am an historian on the formation of the Standing Committee in Colorado. Based on my conversations with others, however, I am led to believe that a rebuttable presumption exists in favor of conformity with the Model Rules. I am disturbed both by the lack of input of or discussion with the ABA, and by the justification for dismissing the lack of parallel. The Subcommittee Report minimizes the lack of uniformity

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[4] *Davis* is essentially no different from *Leon*. It catalogs circumstances where the law enforcement agent can in good faith rely upon others. The direct holding pertains to reliance on the current state of the law as embodied in the opinions of the courts as of the time of reliance. The case also discuss reliance on computer databases, statutes and similar circumstances.

between the Model Rules and the proposed Rule because, in part, "pretext investigations seem unlikely to implicate interstate practice."

Exactly what is meant by this comment is less than clear. However, if it means to suggest that pretext investigations using fraud and deceit will not cross state lines, then I respectfully submit that the statement is at odds with reality. In the civil realm, the notion that those who infringe upon patents, trademarks or trade dress confine their sales and other activities to a single jurisdiction seems facially naive. And in the realm of criminal law, the notion is simply not at all credible. From drug conspiracies crossing state lines, to frauds against victims of multiple jurisdictions, to various species of computer crime which respect neither state nor national boundaries, crime - particularly federal crime - is not cabined and confined in the tidy jurisdictional packages implicit in the Subcommittee's comment.

I appreciate and thank the Subcommittee for the opportunity to be heard. As is apparent from the foregoing, I would oppose modification of Rule 8.4(c). I accordingly ask that the Subcommittee abandon its current efforts to modify the existing rule.

Very truly yours,

RAYMOND P. MOORE
Federal Public Defender

RPM/cbc

OFFICE OF THE STATE PUBLIC DEFENDER

MEMORANDUM

Date: May 2, 2012

To: TOM DOWNEY, CHAIR, AND PRETEXTING SUBCOMMITEE

From: FRANCES SMYLIE BROWN; CHIEF DEPUTY PUBLIC DEFENDER

Subject: PROPOSED CHANGES TO CRPC RULE 8.4

Pursuant to the subcommittee's request for input from stakeholders regarding the subcommittee's proposed changes to CRPC Rule 8.4, the Colorado State Public Defender submits the following:

UNDERSTANDING OF PROPOSED CHANGES

The Office of the State Public Defender (OSPD) understands that the subcommittee is proposing that CRPC Rule 8.4(c) be changed to allow both private lawyers and government lawyers - under certain circumstances - to "direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit."

For private lawyers, the circumstances would exist when the lawyer, in good faith, believes a civil or constitutional violation is or will take place and that the covert activity will aid in the investigation of such a violation. Additionally, for private lawyers, the misrepresentation or deceit must be limited "to matter of background, identification, purpose or similar information". Although "covert activity" is defined in the proposed amendments to the Comment section, neither "background", "identification" or "purpose" are defined or explained in the proposed amendments.

For government lawyers, the circumstances would exist when the government lawyer, in good faith, believes the lawful covert activities are within the lawyer's duties in the enforcement of law AND the purpose of the lawful covert activity is to gather information related to a suspected civil, criminal or constitutional violation OR to engage in lawful intelligence gathering. There is no limitation in the proposed rule on the type of information that can be gathered by government attorneys. As is noted by the subcommittee in its Report, pp. 19-20, there is no definition of "lawful intelligence gathering" in the proposed amendments to the Comment section of Rule 8.4.

The OSPD further understands that the subcommittee's stated reason for the proposed changes was that "a majority of the subcommittee felt that Colorado attorneys were entitled to clarification where tension exists between the plain language of any rule and the unique challenges of particular practice areas." Report p.8. Specifically, the

subcommittee was concerned that attorneys practicing in certain areas of the law – intellectual property law, the US Attorney General (AUSA), the US Department of Housing and Urban development (HUD) and the Colorado Attorney General (AG) – had noted problems with the existing Rule. The Colorado Attorney General, while not submitting a formal report, acknowledged "that the propriety of attorney involvement in pretext investigations has been a long-standing concern." Report p. 4-5. It does not appear from this report that the AUSA, HUD or the AG denied that its attorneys were participating in, had participated in or had supervised others in covert activities nor did those agencies allege that the language of the existing Rule 8.4 had impeded any lawful covert investigations.

STATEMENT OF POSITION OF THE OFFICE OF THE STATE PUBLIC DEFENDER

The OSPD adopts and supports the statement of the Colorado Supreme Court in *In re Pautler*, 47 P.3d 1175,1183 (Colo. 2002), that "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." The OSPD believes that directing, advising or supervising a non-lawyer to engage in "misrepresentation and deceit" would be viewed by the public as the functional equivalent of a lawyer engaging in this action. Consequently, the OSPD does not support the subcommittee's proposed amendment to Rule 8.4(c).

REASONS FOR OPPOSITION TO RULE CHANGE

When the Standing Committee was established in 2004, it determined that "uniformity between jurisdictions adopting the New Model Rules is important" since it "enables the meaningful use of precedent from courts and ethics committees in other jurisdictions." Therefore the Standing Committee adopted a rebuttable presumption that "unless existing Colorado law or public policy – as established by prior rules, Court decision, or Colorado Bar Association ("CBA") Ethics Opinions – justified a departure from the New Model Rules, the Committee would recommend adoption of the New Model Rules." (*Report and Recommendation Concerning the American Bar Association Ethics Rules 2000 Model Rules of Professional Conduct,* Colorado Supreme Court Standing Committee On the Colorado Rules of Professional Conduct, December 30, 2005, p. 5).

The ABA New Model Rules do not have a "lawful covert activity" exception to Rule 8.4. However, the pretexting subcommittee dismissed the Standing Committee's rebuttable presumption by deciding that it "was not a major concern" since the "proposed changes would lessen rather than increase the risk of lawyer discipline, and pretext investigations seemed unlikely to implicate interstate practice." Report, p.8. It is unclear why the subcommittee believed these two grounds were justification for ignoring the Standing Committee's presumption since neither is cited by the Standing Committee as grounds for departure from the ABA Model Rules. More importantly, they are simply not true.

It is much more likely that a rule that allows "covert activity" will increase a lawyer's exposure to discipline than lessen exposure. There are a myriad of federal and state laws that make certain covert activities illegal and the state of the law is constantly evolving. *See, e.g.*, Gramm-Leach-Bliley Act, 15 U.S.C. §6801 *et seq.* (2006), *as amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (making it a crime to obtain customer information from financial institutions through false statements); Telephone Records and Privacy Protection Act of 2006, 18 U.S.C. §1039 (2006) (prohibiting obtaining confidential phone records through the use of false or fraudulent statements, representations or documents). In *Quigley v. Rosenthal*, 327 R.3d 1044 (10th Cir. 2003), three lawyers were consulted, one of them a district attorney, on the legality of advising one family to record the inadvertently intercepted cell phone calls of a neighboring family with whom they were having a dispute. All three lawyers erroneously advised the family that the wiretapping was legal as the lawyers were all unaware that the federal wiretapping statute had been recently amended.

A lawyer who unwittingly directs, advises, or supervises another to violate a state or federal law may be subject to discipline under other provisions of the Rules of Professional Conduct such as Rule 8.4(a), (b) and (d). Or an attorney who directs, advises, or supervises another to invade a third party's privacy rights to obtain information may be subject to discipline under Rule 4.4 in addition to Rule 8.4(b). Even if the lawyer did not actually direct the other person to violate the laws or the rights of a third party, the lawyer may be subject to discipline under Rule 5.3 for negligent supervision. At the very least, the lawyer's actions may be the subject of litigation resulting in the possibility of the lawyer being called as a witness, the lawyer's instructions to the other person being subject to discovery and possibly even a piercing of the attorney-client privilege due to a crime-fraud exception.

The second reason cited by the subcommittee for ignoring the Standing Committee's presumption – that the amendment is unlikely to implicate interstate practices - is similarly flawed. A quick review of the state of the law on pretexting by lawyers demonstrates that there is absolutely no consensus as to what is and is not allowed under state ethics rules regarding pretexting by attorneys. See, **COMMENT** A LOSE-LOSE SITUATION: ANALYZING THE IMPLICATIONS OF INVESTIGATORY PRETEXTING UNDER THE RULES OF PROFESSIONAL RESPONSIBILITY http://law.case.edu/journals/LawReview/Documents/Braun_final.pdf. This chaotic state of law, coupled with the fact that most likely a pretexting situation will involve some sort of interstate communication devices, will expose Colorado attorneys to unwittingly violating other state's ethics rules and possibly impacting their ability to engage in any multijurisdictional practice of law.

More importantly, "existing Colorado law or public policy" does not support a deviation from the ABA rule; in fact, it argues long and hard against a change in Rule 8.4(c), especially a change as drastic as this one. This state has long been the model for the commandment "A lawyer shall not lie, misrepresent or engage in deceit, under any circumstances, for any reason." *see In re Pautler,* 47 P.3d 1175, 1183 (Colo.

2002)(District attorney's motive in misrepresenting himself as a public defender to murder suspect in order to effectuate the suspect's surrender did not excuse ethical violations); *People v. Reichman*, 819 P.2d 1035 (Colo. 1991)(District attorney's motive to protect officer's undercover identity by filing of false documents with the court did not excuse ethical violations). In *Pautler*, Justice Kourlis succinctly summarized the issue and the obvious solution by stating:

> Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession-as well as at the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish. Id at 1179.

Therefore, there does not appear to be legitimate reason for departing from the Standing Committee's presumption in favor of maintaining the present wording of Rule 8.4 which conforms with the wording of the ABA New Model Rules.

Additional reasons for rejecting the proposed amendments are the overly broad wording of the amendments. Only three states – Alabama, Florida and Oregon – have ethics rules that specifically include a lawful activity or lawful covert activity exception to 8.4(c). The other states cited in the Report as recognizing an exception do so by Comment, Ethics Opinion or case law. In the three states that have ethics rules with an 8.4(c) exception, none of them include the incredibly broad language included in these proposed amendments and, even with more limited language, are not without their own problems. As noted in an ABA article on the Oregon rule, "Sylvia E. Stevens, the Oregon State Bar's general counsel, says she continues to get questions about the permissible use of undercover investigations, especially from intellectual property lawyers. "It's hard to know what the rule's boundaries are," she says." *See*, http://www.abajournal.com/magazine/article/when_the_truth_can_wait/.

Adding to the problem of the broad language is the fact that the proposed amendments contain 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. First and foremost there is no "good faith" exception to breaking the law so under the proposed amendments a lawyer could be held criminally liable for his actions in conducting/directing an investigation but not be held to have violated the ethics rules if he had a subjective belief his actions were lawful. Furthermore, when looking at the overly broad wording of the proposed exceptions, it is hard to imagine an investigation scenario that would not fall under "background", "identification", "purpose", "similar information", "information related to a suspected violation of civil, criminal or constitutional law" or "lawful intelligence gathering." Consequently, Colorado would go from being the benchmark state for lawyer honesty to the benchmark state for allowing "deceit and misrepresentation" by lawyers in virtually all circumstances.

CONCLUSION

The Colorado State Public Defender believes, without question, that the proposed amendments would lower the standard of the practice of law in Colorado. Consequently the OSPD opposes the adoption of the proposed amendments to Rule 8.4 (c).

ORACLE

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March 14, 2012

VIA FIRST CLASS MAIL AND EMAIL
Thomas E. Downey, Jr.
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Tom@downeylawpc.com

Re: Proposed Amendments to Colorado Rule of Professional Conduct 8.4(c) and Related Comments

Dear Mr. Downey:

I am writing to you in your capacity as chair of the pretexting subcommittee of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct. For the reasons stated below, Oracle Corporation (Oracle) strongly supports the subcommittee's proposed amendments to Colorado Rule of Professional Conduct (Colo. RPC) 8.4(c) and the proposed new comments to the rule. We understand that you have received substantial input from prosecutor's offices, public defenders, and criminal defense attorneys on proposed new subsection 8.4(c)(2) and related comments. In this letter, Oracle will focus its comments on subsection 8.4(c)(1) and related comments, with particular emphasis on the challenges facing corporations seeking to establish and enforce trademark rights.

BACKGROUND ON ORACLE CORPORATION

Founded in 1977, Oracle is the world's largest enterprise software company and a leading provider of computer hardware products and services. Oracle provides the world's most complete, open, and integrated business software and hardware systems to more than 380,000 customers—including 100 of the Fortune 100—representing a variety of sizes and industries in more than 145 countries around the globe. Oracle develops technologies that help customers manage information, streamline business processes, and reduce the costs and complexity of managing their IT infrastructure. Oracle's portfolio includes its famous Java-branded technology and brand as well as other software and hardware assets from Sun.

Oracle employs more than 3,000 people in Colorado with offices in Broomfield, the Denver Tech Center, and Colorado Springs. As the owner of one of the world's most valuable brands, Oracle takes the enforcement of its trademark rights very seriously. Oracle and both its in-house and outside counsel also take their legal and ethical obligations seriously. Oracle therefore has a keen interest in the subcommittee's proposed amendments that would allow lawyers to direct or supervise covert trademark investigations.

THE NEED FOR EFFECTIVE TRADEMARK INVESTIGATIONS

Brand owners must occasionally conduct covert investigations in trademark matters. The need for such investigations can arise in three contexts: clearing a trademark, proving alleged trademark infringement, and establishing the violation of a consent order or injunction. The following three hypothetical scenarios typify the challenges involved in these investigations and illustrate the need for using pretexting in some investigations.

Clearing a trademark

When clearing a new trademark, brand owners must sometimes investigate potential third-party uses of identical or similar marks. Assume Company A's trademark search for the proposed mark ARACHNIA for video games reveals Company B's expired federal trademark registration for ARACHNID ADVENTURE covering video games. Even though Company B's federal registration has expired, it retains common law rights in the ARACHNID ADVENTURE mark if it is still distributing video games under this mark. Company B's failure to renew its registration or make required maintenance filings with the U.S. Patent and Trademark Office has no effect on its common law rights. On the other hand, if Company B is no longer using the ARACHNID ADVENTURE mark and has not used the mark for a significant time, it has abandoned its rights and Company A may adopt the ARACHNIA mark.

Thus, before adopting ARACHNIA as a trademark, Company A will need to investigate whether Company B is still distributing the ARACHNID ADVENTURE video game. This might initially entail checking Company B's Internet website for a list of its products. But such a search may not be conclusive. Company A might therefore need to call Company B's customer support line and ask whether Company B is still distributing ARACHNID ADVENTURE, and if not, when Company B stopped the distribution. Company B's sales representative will likely provide the information only if the caller poses as a customer and misrepresents her identity and the purpose of her call. She is unlikely to obtain the information if she discloses that she is calling on behalf of a competitor to clear a mark.

Proving trademark infringement

Assume that after Company A adopts the mark ARACHNIA, it learns of an apparent infringement by Company C. Company A wishes to confirm the alleged infringement before taking legal action against Company C, but Company C has no retail outlets and does not market its product to retail stores. Company A seeks to satisfy its duties under Fed. R. Civ. P. (or Colo. R. Civ. P.) 11 and the heightened pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Under Tenth Circuit precedent, this means it must allege "enough facts to state a claim for relief that is plausible on its face." *Smith v. US*, 561 F.3d 1090, 1103-04 (10th Cir. 2009) (citations omitted). Company A therefore hires an investigator, posing as a customer, to contact Company C and obtain details of Company

C's use of the infringing mark, including the duration of its use. The investigator may also purchase the product for use as evidence in a potential infringement suit.

Proving civil contempt

Finally, assume that Company A and Company C enter into a consent order (or Company A obtains an injunction) under which Company C agrees to discontinue using its infringing mark. But some months later, Company A hears that Company C is up to its old tricks. Company A wishes to confirm whether the rumor is true and to decide whether it should seek sanctions against Company C for civil contempt. Because a plaintiff must prove the elements of civil contempt by clear and convincing evidence, *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1315 (10th Cir. 1998), Company A must obtain direct evidence of the violation. It therefore hires an investigator to pose as a customer and seek to obtain evidence of the renewed infringement and a copy of the infringing product.

THE ETHICS OF COVERT INVESTIGATIONS

Investigations like those described above would be very difficult if not impossible without misrepresenting the sponsor's or investigator's identity and purpose, and perhaps related facts. Because Oracle wishes to ensure that such investigations are conducted in strict compliance with the law, these investigations are best supervised by trademark counsel. But whether a lawyer can be involved depends on the ethics rules and decisional law of the particular jurisdiction, and these rules are not uniform.

As the subcommittee has observed, ten states have amended their rules or comments to permit covert investigations involving pretexting in at least some circumstances. *See* Final Rpt., Attachment 2. Colorado law, however, is currently unsettled. As the subcommittee notes in its report, several Colorado ethics rules bear on the issue. They include:

- Rule 8.4(c), which prohibits lawyers from engaging in "dishonesty, fraud, deceit, or misrepresentation," and arguably applies to all three of the above scenarios;
- Rule 4.3, which governs lawyers' dealings with unrepresented persons, and arguably applies in first two scenarios;
- Rule 4.2, which prohibits lawyers from communicating with persons known to be represented in a matter, and arguably applies in the third scenario; and
- Rules 8.4(a) and 5.3(c), which prohibit lawyers from doing through another what lawyers cannot do themselves.

Notwithstanding these and analogous ethics rules, a significant majority of courts have held that lawyers may direct and even participate in covert trademark infringement investigations. *See*

Apple Corps, Ltd. v. Int'l Collectors Soc'y, 15 F. Supp.2d 456, 427-76 (D.N.J. 1998); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119, 122-26 (S.D.N.Y. 1999); *A.V. by Versace, Inc. v. Gianni Versace*, 2002 WL 2012618, at *9 (S.D.N.Y. 2002); *Hill v. Shell Oil Co.*, 209 F. Supp.2d 876, 880 (N.D. Ill. 2002); *but see Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp.2d 1147, 1155-60 (D.S.D. 2001).

Sound policy objectives underlie these decisions. As one court observed, "enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof." *Gidatex*, 82 F. Supp.2d at 124. As the *Apple Corps* court noted in addressing rule 4.2, applying the rule to prohibit covert investigations in trademark cases "would serve merely to immunize corporations from liability for unlawful activity, while not effectuating the purposes behind the rule." *Apple Corps*, 15 F. Supp.2d at 475; *see also Weider Sports Equip. v. Fitness First, Inc.*, 912 F.Supp. 502, 508 (D. Utah 1996) (rigidly applied, rule 4.2 "shelters organizations, corporations, and other business enterprises from the legitimate and less costly inquiry and fact gathering process sometimes necessary to make a legitimate assessment of whether a valid claim for relief exists").

Of course, the ethics rules rest on equally important policy foundations. Rules 4.2 and 4.3 are designed to prevent lawyers from manipulating represented and unrepresented lay persons. *See Apple Corps*, 15 F. Supp.2d at 474, 476. Rule 4.2 has further goals: "to protect the integrity of the attorney-client relationship; to prevent the inadvertent disclosure of privileged information; and to facilitate settlement by channeling disputes through lawyers familiar with the negotiation process." *Hill*, 209 F. Supp.2d at 878. And the purposes underlying rule 8.4(c) are obvious and compelling, since a lawyer's duty of honesty is his highest calling. *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002).

The subcommittee's proposed amendments balance these competing policy implications in a sensible manner. Under the proposed new rule and comments, corporations like Oracle can hire lawyers to supervise trademark investigations and thus ensure that the investigations do not cross the line. In attempting to harmonize the rulings of other courts, the *Hill* court noted the "discernable [sic] continuum in the cases from clearly permissible to clearly impermissible conduct." 209 F. Supp.2d at 880. It is critical to have trademark counsel making these nuanced distinctions rather than leaving them up to investigators and non-lawyer staff. The rules also ensure accountability, since a lawyer will remain ethically bound by the actions of their agent-investigators if the lawyer does not adequately supervise them.

The amendments will also ensure that lawyers can meet their Rule 11 obligations and that they and their clients can satisfy the standards for stating a valid claim for trademark infringement. They will help ensure that infringers not insulated from liability by rules designed for situations other than the lawful investigation of possible anti-competitive conduct.

Further, the rule is narrowly-tailored to avoid problems that prompted some of the negative court decisions:

- The rule limits lawyers to directing, advising, or supervising investigations. Lawyers cannot conduct the investigation themselves. It therefore removes the risk of lawyers using their superior knowledge or skills to manipulate lay persons.

- The rule limits lawyers' involvement to "lawful" covert investigations. It thus would not insulate lawyers who violate or participate in violating substantive law.

- The rule is limited to investigations involving misrepresentations of background, identification, purpose, or similar information. It thus would not allow lawyers to concoct elaborate schemes to entrap innocent third parties with wholly different types of misrepresentations, and thus, cause the parties to say or do things they otherwise would not. *E.g., In re Curry*, 880 N.E.2d 388, 404-05 (Mass. 2008).

SUGGESTED REVISIONS

Oracle submits the following suggested revisions for the subcommittee's consideration.

Covert Activity. The amended rule states that lawyers may direct others in "covert activity that involves misrepresentation or deceit . . . ." This presupposes that "covert activity" does not necessarily involve misrepresentation or deceit. But proposed comment [2A] defines "covert activity" to ***mean*** "an effort to obtain information through the use of misrepresentation or other subterfuge." The result of this definition is that the rule is redundant. To avoid this redundancy, the subcommittee could either (1) eliminate the qualifying language in Rule 8.4(c) or (2) eliminate or change the definition of "covert activity" in comment [2A]. Indeed, covert activity need not involve misrepresentation or subterfuge. Searching for prior use of marks online could be viewed as covert activity in that the sponsor or investigator's identity is concealed, but it involves no misrepresentation or deceit.

Action. Second, in paragraph 8.4(c)(2), the subcommittee uses the term "action". We would suggest this be changed to "activity" for sake of consistency.

Rule 4.2. Third, comment [2C] states that a lawyer who complies with the exceptions to Rule 8.4(c) does not violate rule 8.4(a) but might still violate rule 4.2. This comment allows lawyers to supervise most pre-litigation covert investigations (first and second scenarios above) and plainly prohibits lawyers from supervising covert investigations once litigation has commenced. But it leaves open the critical question whether a lawyer can supervise an investigation to prove a violation of a consent decree or injunction (third scenario above). The answer appears to turn on whether the alleged violation is a separate "matter" from the underlying infringement suit. See *People v. Wright*, 196 P.3d 1146, 1147 (Colo. 2008) (rule 4.2

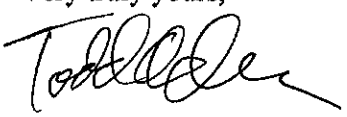
"only purports to constrain a lawyer . . . from communication about the subject of that representation, with someone who is represented by a lawyer in the same matter").

If the violation of a consent decree or injunction is a separate matter, then the lawyer could supervise the investigation because she would not "know" whether the target is represented in the "matter"; if it is the same matter, then Rule 4.2 would bar the lawyer's involvement. This uncertainty puts a potentially debilitating restriction on pretexting investigations in situations like the one at issue in *Apple Corps*. As noted above, in order to prove a claim for civil contempt by clear and convincing evidence, trademark counsel will likely require direct proof that can only be obtained by a covert investigation. But under the current proposal, before supervising any such investigation, prudent trademark counsel would first contact opposing counsel in the underlying matter to ask whether the lawyer continues to represent Company C. This contact would let the cat out of the bag. Oracle favors clarifying comment [2C] to allow lawyers to supervise these important types of investigations.

CONCLUSION

Oracle appreciates the opportunity to comment on the proposed amendments to Rule 8.4(c). The new rule will provide needed clarification and guidance in a murky area of legal ethics. Should you have questions about these comments, please contact me.

Very truly yours,



Todd Adler
Senior Corporate Counsel
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March 20, 2012

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RE: Comments of RE/MAX, LLC on the **"Final Report of the Pretexting Subcommittee"**

Dear Mr. Downey:

RE/MAX, LLC is pleased to provide this comment on the December 19, 2012 "Final Report of the Pretexting Subcommittee" of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct.

About RE/MAX
Based in Denver, Colorado, RE/MAX, LLC ("RE/MAX") is the franchisor of the global "RE/MAX" network of real estate brokerages and owner of the "RE/MAX" trademark and the RE/MAX balloon design. RE/MAX franchises a network of more than 6,000 independently owned and operated real estate brokerages, with nearly 90,000 affiliated real estate agents in more than 80 countries, making the RE/MAX brand one of the most globally well-known brands to be headquartered in Colorado. Nobody in the world sells more real estate than RE/MAX.

RE/MAX agrees with the Subcommittee that the Rules of Professional Conduct should provide clear guidance and boundaries regarding the use of pretexts in investigations.
In Colorado and nationwide, the appropriate use of investigators is a perennial ethics topic for intellectual property attorneys and others at national and regional CLE conferences,[1] in part because for many companies, investigations are a necessary way in which a consumer's report of confusion is substantiated, or a counterfeit product is traced to its source. The consensus view often presented is, in essence, that so long as the investigator limits the pretext to what is necessary to be treated like a member of the consuming public, the lawyer's retention of the investigator is not a violation of ethical rules. Whether the same can be said in Colorado in light of *In re Pautler*, 47 P.3d 1175 (Colo. 2002) is not clear. On one hand, the Supreme Court's stance, "resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so," *id.* at 1182, suggests a much stricter approach, at least if applied in conjunction with rules concerning the lawyers' responsibilities for their agents, and non-lawyers they retain. *See* Colo.R.P.C. 5.3, 8.4(a). But on the other hand, *In re Pautler*

[1] *See, e.g.*, 2010 Rocky Mountain IP Institute – David Hricik, Mercer University School of Law, Macon, Georgia, Ethics for IP Attorneys in Pre-Lawsuit Investigations; September 2009 International Trademark Association Rountable – Ethics in Trademark Investigations; April 2010, Colorado Bar Association IP Section – Using Deception in IP Related-Investigations: Are You Unwittingly Violating The Colorado Rules of Professional Conduct?; 2009 International Trademark Association Annual Meeting – Using the "P" Word: The Inside Scoop on Pretext Investigations.

did not involve the use of an investigator, and the Supreme Court at one point expressly distinguished its facts from the conduct of investigations.[2]

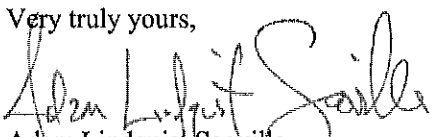
Whether or not the Supreme Court ultimately agrees that the proposed exception is warranted, Colorado attorneys are entitled to know where the ethical boundaries lie.

Prohibiting attorney supervision of investigations involving pretexts would serve primarily to remove a check against unlawful investigative tactics, and disadvantage Colorado businesses.
If a limited exception allowing licensed Colorado attorneys to "direct, advise, or supervise others" in lawful investigations involving pretexts is rejected, leaving Colorado attorneys to infer that such involvement is prohibited, two unintended consequences will result. First, it will not render such investigations unlawful but it will prevent organizations from employing their attorneys in an oversight role to help ensure that such investigations are conducted in a lawful and ethical manner. True, if an investigation crosses the boundary into the unlawful, criminal penalties or civil liability may apply if the conduct is discovered. But in-house and outside counsel are in the best position to know about an investigation (which is, after all, covert), to advise on what is lawful, and to promote the use of only those lawful means that come within the boundaries of the exception.

Second, Colorado companies increasingly have to guard against intellectual property infringement, counterfeiting, and piracy around the world. RE/MAX, for example, would not only object to another real estate company calling itself "Remax" or using a red, white, and blue balloon logo in the United States. RE/MAX would also be concerned if that happened in any of the more than 80 countries where our authorized network has a presence, in more countries where we might eventually have a presence, and in other "hot spots" where a bogus "Remax" operation could damage our brand's reputation and be used to run fraudulent scams and phishing schemes perpetrated on consumers over the Internet. To engage in effective intellectual property protection worldwide, many U.S. brand owners rely on their in-house IP attorneys to engage an outside law firm (sometimes known as "coordinating counsel") that manages, on behalf of multiple clients, relationships with a network of local counsel in countries around the world. When in-house counsel learns of potential infringement in a foreign country, they may instruct (or *direct*) local counsel (sometimes through coordinating counsel) to have an investigation performed. Quite simply, the infrastructure for investigation of intellectual property infringement is through networks of lawyers, *supervised* by in-house counsel. If a company's in-house counsel cannot direct or supervise the retention of non-lawyer investigators, who may need to pose as customers to gather information about intellectual property infringement, this places companies headquartered in Colorado (or whose intellectual property attorneys are based here) at a competitive disadvantage in preventing infringement in the global marketplace. Moreover, this would likewise disadvantage numerous Colorado firms—small, medium, and large—that act as coordinating counsel for clients based in Colorado and elsewhere.

Thank you for the opportunity to comment on the Subcommittee's report. If we can provide further information, please feel free to contact me.

Very truly yours,



Adam Lindquist Scoville
Senior Counsel

[2] *See In re Pautler*, 47 P.3d at 1179 & n.4 (distinguishing as "circumstances inapposite here" Oregon ethics rule change designed to allow, in the Court's characterization, "'supervising' or 'advising,' not permitting direct participation by attorneys," in "investigative operations").

CRIMINAL JUSTICE ACT
STANDING COMMITTEE

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February 27, 2012

Via Electronic Email to tom@downeylawpc.com and
Via Facsimile to (303) 313-1122
Thomas E. Downey, Jr.
Chair, Pretexting Subcommittee
Downey & Associates, P.C.
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Re: Proposed Changes to R.P.C. 8.4(c)

Dear Mr. Downey:

I write on behalf of the Standing Committee of the Criminal Justice Act Panel ("CJA Standing Committee"), for the United States District Court for the District of Colorado, in response to the Final Report of the Pretexting Subcommittee (Final Report). We have recently received the Final Report and we now join in the comments from the Federal Public Defender and the Colorado State Public Defender in opposition to the proposed changes to R.P.C.8.4(c). Additionally, we offer the Subcommittee the following observations as it considers amending R.P.C. 8.4(c),

At bottom, the purpose and motivating force behind the proposed changes to R.P.C. 8.4(c) can be syllogistically summarized as follows:

- ***Currently, lawyers are not able to engage (or to direct others to engage) in dishonesty, fraud, deceit or misrepresentation;***
- ***In some instances, engaging in dishonesty, fraud, deceit or misrepresentation is useful in advancing the interests of a party;***
- ***Therefore, the rule should be changed to permit some parties to direct, advise and supervise others in lawful covert activity that involves misrepresentation or deceit.***

Viewed through this prism, the proposed rule change in fact creates a sea change in what it means to be a Colorado lawyer. Far from "bolster[ing] public confidence in the profession" by "continuing the direct prohibition against direct misrepresentations by attorneys" by only permitting attorneys to supervise and advise others in being dishonest, deceitful and fraudulent

(Final Report at 9), the proposed rule creates the perception of attorneys creating loopholes that sanction others to engage in fraudulent conduct at their behest. While the Final Report notes that "a benefit of allowing lawyer supervision and advice may be keeping pretext investigations within other legal boundaries, such as avoiding entrapment", *id.*, it is at least as likely that lawyers will be brainstorming ways in which they can squeeze their deceptive litigation strategies into a rule that never contemplated such conduct.

So fundamental is the proposed rule change to the nature of lawyering that the Colorado Supreme Court will have to amend the Oath of Admission to practice law. The Oath we took to become lawyers requires an immediate and enduring commitment NOT to do what now this proposed rule change would permit. To become a lawyer, we promised to "employ only such means as are consistent with **truth** and honor" and "treat all persons whom [we] encounter through [the] practice of law with fairness, courtesy, respect, and **honesty.**" These promises are without exception, qualification, or caveat. And yet, the proposed change to R.P.C. 8.4(c) makes an exception. As proposed, Rule 8.4(c) would read: "It is professional misconduct to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, **EXCEPT. . .**"

It is this very language -- creating an exception to honesty -- that demeans the profession's moral and ethical standards. Indeed, this language stands in direct contravention to the high standards of professionalism that the Colorado Supreme Court requires. "Members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive." *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002) (emphasis added). Our high moral and ethical standards do not allow for the exception the Pretexting Subcommittee proposes even if there is a laundry list of positive "motives" that may lend it support. Whether aiding a civil lawyer in gathering evidence for a lawsuit or assisting the sting of a suspected drug ring, the ends do not justify the means.

The CJA Standing Committee appreciates the opportunity to present its views to the Subcommittee. The CJA Standing Committee respectfully requests that the Pretexting Subcommittee abandon its efforts to amend R.P.C. 8.4(c).

Sincerely,

Patrick L. Ridley
Chair, CJA Standing Committee

cc: CJA Standing Committee

State of Colorado
Office of the Alternate Defense Counsel

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February 15, 2012

Thomas E. Downey, Jr.
Chair, Pretexting Subcommittee
Downey & Associates, P.C.
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Englewood, CO 80112

Re: Proposed changes to CRCP 8.4

Dear Mr. Downey:

I am the director of the Office of the Alternate Defense Counsel. I wanted to let you know that I have reviewed the letter from Raymond Moore from the Office of the Federal Defender, as well as the letter from Frances Brown, from the Colorado State Public Defender's office regarding the proposed changes to CRCP 8.4. Rather than reiterate what they have already outlined in their correspondence, I am sending you this letter to indicate the Office of the Alternate Defense Counsel is in agreement with the objections raised to the proposed changes.

Please feel free to contact me if you have any questions regarding my agency's position.

Sincerely,

Lindy Frolich

U.S. DEPARTMENT OF JUSTICE

John F. Walsh
United States Attorney
District of Colorado

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April 18, 2011

Via Electronic Mail and U.S. Mail

The Honorable John Webb
Colorado Court of Appeals
101 West Colfax Avenue
Suite 800
Denver, CO 80202

Dear Judge Webb:

Thank you for the opportunity to comment on the Colorado Supreme Court's Standing Committee on the Rules of Professional Conduct's ("Committee") proposal to revise Colorado Rule of Professional Responsibility ("Colorado Rule") 8.4(c) as well as potentially other Colorado Rules.

We understand the initial inquiry came to the Committee from a group of civil practitioners who expressed concern over application of language from In re Pautler, 47 P.3d 1175 (Colo. 2002). Although we respect Pautler's holding, we share the concern of these practitioners about Pautler's potential scope.

We request that the Committee review Colorado Rule 8.4(c) as well as Colorado Rule 4.1(a) from the standpoint of all practitioners: both government and private attorneys, and both civil and criminal attorneys. We believe that the participation of government attorneys in investigations of violations of law provides significant benefits to society by increasing the likelihood that the legal rights of investigative targets will be protected and by maximizing the ability to obtain relevant, admissible evidence in meritorious cases. While we understand the Committee is considering revision of the Colorado Rules to address civil attorneys' supervision of stings or similar transactions and the use of testers by federal agencies, we are concerned about the potential limitations that these rules could impose on all attorneys engaged in the investigation of violations of civil and criminal law, and we believe that clarification of the scope of these rules is warranted. Specifically, we believe the Committee should consider all

the civil and criminal areas in which government attorneys practice in weighing any changes and where such attorneys, in furtherance of government investigations, direct, supervise, or advise others who engage in deceit as an investigative tool.

United States Department of Justice ("DOJ") prosecutors, civil DOJ attorneys, and other federal government attorneys[1] use a variety of law enforcement investigatory techniques — such as undercover operations, use of confidential informants and other covert techniques — that may be regarded as deceitful and can involve the use of false statements of material fact or law, but that are lawful in nature and well-established in practice. In considering this issue, various jurisdictions have adopted, through their rules, comments, case law, or ethics opinions, an exception when applying their Rules 8.4(c) and 4.1(a) to permit government attorneys to direct, supervise, and advise agents who engage in deceitful conduct during the course of lawful investigations. We recommend the Colorado Rules be amended to specifically address this work done by government attorneys.

The higher standard of conduct applied to government attorneys makes the risk of violating Rules 8.4(c) or 4.1(a) particularly acute. Colorado courts and the existing Colorado Rules hold government attorneys to a higher standard than non-government attorneys.[2] But in their current form, neither Colorado Rules 8.4(c) and 4.1(a), nor their respective Comments, create an explicit exception for government attorneys who are authorized to direct, supervise, and advise investigative agents to use law enforcement investigative techniques that may be regarded as deceitful, including the use of false statements of material fact or law.

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[1] Although this letter primarily addresses the impact of these Colorado Rules on United States Department of Justice attorneys, the Colorado Rules also impact other federal government attorneys who engage in similar techniques in the course of performing their official duties. For example, as discussed below, attorneys within the Department of Housing and Urban Development may use testing evidence to investigate and/or establish claims arising under the Fair Housing Act. And as also discussed below, we are similarly concerned about the impact of the Colorado Rules on attorneys for recipients of federal funding that typically employ testing when investigating and enforcing civil right laws.

[2] The Court in Pautler stated, "District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices." Pautler, 47 P.3d at 1180. Similarly, Comment [5] to Rule 8.4 states in pertinent part, "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

Colorado Rule 8.4(c) states:

> It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

Comment [2] to Rule 8.4 states:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Colorado Rule 4.1(a) states:

> In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person[.]

As the Rules are currently written, however, there is a risk that Colorado Rules 8.4(c) and 4.1(a) may be construed to prohibit a federal government attorney's direction of, supervision of, or advice regarding lawful investigative activity.

Courts long have recognized the ability of law enforcement agents or cooperating informants to engage in subterfuge and misrepresentation in a criminal investigation as

critical to the government's ability to uphold the public's interest in law enforcement.[3] Overwhelming precedent reflects the fact that such activities are necessary to detect illegal activity that frequently is not provable without the use of guile, deception, and misrepresentation. See, e.g., Hampton v. United States, 425 U.S. 484, 495 (1976) (Powell, J., concurring) (contraband crimes are "difficult to detect in the absence of undercover Government involvement"); United States v. Russell, 411 U.S. 423, 432 (1973) (infiltration of drug rings is the only practicable means of detecting unlawful conduct, and as such is a recognized and permissible means of investigation). A DOJ attorney's direction, advice, or supervision of deceit and misrepresentation in a criminal investigation, however, could be misconstrued as running afoul of the Colorado Rules.

Because such covert investigative activities often raise difficult and sensitive legal or policy issues, it is vital for government agents to consult DOJ attorneys in conducting these investigative operations. The interests of justice are not served when government attorneys cannot direct, supervise, or provide advice regarding covert law enforcement investigations. See, e.g., United States v. Salemme, 91 F. Supp. 2d 141, 188-97 (D. Mass. 1999) (discussing the importance of oversight by the Attorney General of FBI activities, and noting that the FBI is formally subject to the oversight and direction of the Attorney General, 28 U.S.C. §§ 503, 531-33), rev'd in part on other grounds, 225 F.3d 78 (1st Cir. 2000). Attorney involvement in investigations is usually required by federal law or DOJ policy and is often critical to a proper and effective investigation and prosecution. Government attorney involvement is equally important in ensuring that constitutional and other legal rights of investigative targets are protected. Attorneys, even more than investigators, are aware that violations of targets' rights often have a variety of negative consequences, from suppression of evidence to dismissal of charges, even in otherwise meritorious cases.

These investigative techniques, while deceitful, are lawful and certainly do not involve moral turpitude on the part of a federal government attorney. For example, the DOJ is charged with protecting the government against the submission to federal agencies of false claims for payment. See False Claims Act, 31 U.S.C. §§ 3729 et seq. A DOJ attorney, civil or criminal, may direct or supervise agency agents or cooperating witnesses

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[3] See, e.g., Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (Court recognized the "necessity of undercover work" and its value "to effective law enforcement"); Andrews v. United States, 162 U.S. 420, 423 (1896) (government agent could properly obtain evidence for prosecution through use of fictitious name); Sorrells v. United States, 287 U.S. 435, 441-42 (1932) ("Artifice and stratagem may be employed" for law enforcement purposes).

in a civil health care fraud investigation that may require the agents to pretend to be patients or vendors in order to uncover efforts to defraud the Medicare program. The witness' or agent's pretense necessarily would involve misrepresentation as to his or her identity or the purpose of his or her contact with the health care provider. Under the Colorado Rules as written, the DOJ attorney's direction of, supervision of, or advice regarding the investigation might be misconstrued as running afoul of Colorado Rules 8.4(c) and 4.1(a).

Likewise, both the DOJ and the Department of Housing and Urban Development ("HUD") are responsible for ensuring that persons are afforded equal opportunity in housing and are not discriminated against based upon their race, color, religion, gender, national origin, familial status, or handicap. See Fair Housing Act, 42 U.S.C. §§ 3601 et seq. Any person or entity found to have engaged in discrimination may be liable for civil penalties and/or a payment of damages to victims of the discrimination. In order to determine whether discrimination is occurring, the DOJ and HUD may engage in "testing" of a housing provider, i.e., sending in cooperative witnesses or government employees to pose as home seekers to discover whether the "testers" are provided the same information and given the same opportunity to purchase or rent regardless of their membership in a protected class. HUD also provides funding through the Fair Housing Initiative Program ("FHIP") to fair housing organizations that employ similar tactics to help identify and investigate housing providers suspected of housing discrimination. These investigative techniques are essential to enforcing anti-discrimination law. See Hamilton v. Miller, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("it would be difficult indeed to prove discrimination in housing without [using a tester] for gathering evidence"). However, absent additional clarification, attorneys supervising such "testing" — whether a government attorney from the DOJ or HUD, or a private attorney from a FHIP organization — could be misconstrued as running afoul of the Colorado Rules.

It is therefore important to eliminate any argument that a government attorney violates Colorado Rules 8.4(c) or 4.1(a) by directing, supervising or providing advice regarding such an investigation. This could be done by amending the Colorado Rules to bring Colorado in line with several other states' Rules 8.4[4] and 4.1[5] and make it clear that

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[4] Iowa Rule 8.4 expressly permits attorneys to "advise clients or others about or to supervise . . . lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity." IOWA RULES OF PROF'L CONDUCT R. 8.4, Comment [6] (2010). Tennessee excludes from Rule 8.4(c)'s prohibitions investigative techniques that "prosecutors are authorized by law to use, or to direct investigative agents to use . . . that might be regarded as deceitful," and states that lawful secret or surreptitious recordings for the purpose of evidence gathering or

government attorneys engaged in otherwise legitimate law enforcement investigations are not prohibited from directing or supervising agents in an investigation or giving them advice, even when dishonesty, fraud, deceit, or misrepresentation are used as investigative tactics.

Specifically, we recommend that Colorado Rule 8.4(c) be amended[6] to read as follows:

> It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal or civil law enforcement agency or regulatory agency to advise others about or to direct or supervise another in an undercover

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preservation do not violate Rule 8.4. TENN. RULES OF PROF'L CONDUCT R. 8.4 cmts. 4, 5 (2011). OHIO RULE OF PROFESSIONAL CONDUCT 8.4, Comment [2A] (2007) provides, "Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Florida Rule 8.4 permits lawyers employed by a law enforcement or regulatory agency to advise or supervise investigators involved in misrepresentation. FLA. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2010). Alabama, North Carolina, South Carolina, Oregon and Wisconsin also have rules or comments that permit Government lawyers to supervise law enforcement investigations that involve some elements of misrepresentation or deceit.

[5] Wisconsin Rule 4.1(b) provides, "Notwithstanding [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities." WIS. RULES OF PROF'L CONDUCT R. 20:4.1 (2007). The Committee Comment to Wisconsin Rule 4.1 explains, "[W]here the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor . . . ." WIS. RULES OF PROF'L CONDUCT R. 20:4.1, Wisconsin Committee Comment. Comment 2 to South Carolina Rule 4.1 also provides that a government lawyer involved in a law enforcement investigation does not violate the Rule 4.1 prohibition against making false statements of material fact through "use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation." S.C. RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2005).

[6] In the alternative, we would suggest that the Committee consider inserting the requested language into the Comment to Rule 8.4(c).

> investigation. A government lawyer who directs, supervises, or provides advice regarding a lawful covert operation that involves misrepresentation or deceit for the purpose of gathering relevant information, such as a law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule. In addition, a lawyer who provides supervision or advice to an organization that is responsible for assisting a government agency with the law enforcement investigation of suspected unlawful activity does not, without more, violate this rule.

We recommend the addition of the following language as Comment [4] to Rule 4.1:

> A government lawyer directing, supervising or providing advice regarding a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or other non-lawyers, of false identifications, backgrounds and other information for purposes of the investigation or operation.

The proposed additions to the Colorado Rule 8.4(c) and the Comment to Colorado Rules 4.1 would make it clear that attorneys engaged in otherwise legitimate law enforcement investigations, regardless of whether the investigations are criminal or civil, are not prohibited from directing or supervising agents in covert investigations or giving them legal advice even when deceit—including false statements of material fact or law—is one of the tools used in the investigation.

The proposed additions also are consistent with the Colorado Comments to Colorado Rule 4.2. Rule 4.2 prohibits contact with a person represented by counsel about the subject matter of the representation unless the representing counsel consents or it is otherwise authorized by law or a court order. Comment [5] to the Rule clarifies that "[c]ommunications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." Thus, the Colorado Supreme Court recognizes that government attorneys engaged in legitimate law enforcement investigations may be involved in actions that otherwise may arguably violate Rule 4.2.

Similarly, the proposed amendment also would be in accord with the Colorado Bar Association's Ethics Committee's Opinion 112. That opinion found that, because

surreptitious recording of conversations or statements by an attorney typically involves 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. In discussing Colorado Rules 8.4(c) and 4.1 (as well as Colorado Rule 4.4), however, the Committee found a criminal law exception, as surreptitious recordings are an appropriate, effective means of gathering evidence in the criminal arena and it is beneficial to have attorney oversight of such activities.

The proposed additions would also reflect that misrepresentations about identity or purpose that are made only for the purposes of investigating the facts are different from other misrepresentations. The proposed additions thus would be consistent with the court's analysis in Apple Corps. Ltd. v. International Collector's Society, 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998). In that copyright case, the plaintiffs suspected the defendants were violating a consent order by continuing to sell unlicensed Beatles paraphernalia. The plaintiffs' counsel and other agents, posing as consumers, contacted the defendants and successfully purchased the unlicensed materials in direct contravention of the consent order. The court rejected the defendants' objection that the conduct of the plaintiffs' counsel was deceitful in violation of New Jersey's Rule 8.4(c). The court, instead, determined that Rule 8.4(c) does not apply to misrepresentations about identity or purpose that are made only for the purposes of gathering evidence. The court stated:

> 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. 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. 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.

Id. at 475.[7]

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[7] The case is referenced in Utah State Bar Ethics Advisory Op. 02-05 (2002), which considered the same issue that is now before the Committee. A federal government lawyer who participated in criminal and anti-terrorism covert investigations

Accordingly, for all of the above-stated reasons, we urge the Committee to amend Colorado Rules 8.4 and 4.1 so that the rules and comments accurately reflect that while a prosecutor or civil government lawyer (or an attorney for an organization responsible for assisting with law enforcement, like a FHIP grantee) may not himself or herself engage in deceit, the lawyer may direct, supervise, or advise others who engage in deceit in the course of legitimate law enforcement investigations.

Thank you again for this opportunity to comment. We greatly appreciate the opportunity. If an addition to the rules or comments is proposed, we respectfully request an additional opportunity to provide our views at that stage.

Sincerely,

JOHN F. WALSH
United States Attorney
United States Attorney's Office
for the District of Colorado
1225 Seventeenth Street, Suite 700
Denver, CO 80202

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asked the Utah State Bar for an opinion about whether his conduct violated Utah's Rule 8.4 (which is similar to the Colorado Rule). The Utah Bar opined that the Rule did not prohibit state or federal prosecutors or other government attorneys from participating in or supervising otherwise legitimate covert law enforcement investigations. The Utah Bar acknowledged that even Congress has recognized "in this era of increasingly powerful and sophisticated [wrongdoers], some of the undercover technique is indispensable to the achievement of effective law enforcement" and that it would not serve the purposes of the Rule to prohibit prosecutors or other government lawyers from engaging in or supervising otherwise legitimate covert law enforcement activities. Id. at 2. "Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful undercover investigations." Id. at 4.

U.S. DEPARTMENT OF JUSTICE

John F. Walsh

United States Attorney
District of Colorado

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March 13, 2012

Thomas E. Downey, Jr., Esq.
Chair of Pretexting Subcommittee
Standing Committee on Rules of Professional Conduct
Downey & Associates PC
383 Inverness Parkway, Suite 300
Englewood, CO 80112

Dear Mr. Downey:

I understand that the Pretexting Subcommittee, in the process of gathering input on its proposed change to COLO. RPC 8.4(c), has received input from the defense bar suggesting that there is no demonstrated need for the Subcommittee's proposed change. Although my letter dated April 18, 2011, may not have explicitly stated this, I am writing to affirm that the United States Attorney's Office needs clarification of the ethical rules applicable to investigations, civil and criminal, involving covert investigative tactics including dishonesty, fraud, deceit, or misrepresentation. I support the Subcommittee's proposed rule change because I believe it effectively and appropriately provides that clarification.

As I explained in my earlier letter, it is vital for government agents to consult attorneys in my office while conducting covert investigations. Such consultation has long been recognized as good public policy because it increases the likelihood that the legal rights of investigative targets will be protected and maximizes the government's ability to obtain relevant, admissible evidence in meritorious cases. For that reason, this office and the Department of Justice strongly supports the proposed language amending the Colorado Rules of Professional Conduct, particularly in light of the some of the language in Colorado Supreme Court's decision in In re Pautler , 47 P.3d 1175 (Colo. 2002), to make clear that the Colorado Rules 8.4(a), 8.4(c), and 4.1(a) should not be construed to prohibit attorneys in my office from providing direction to or advice about such covert investigations.

Any such construction would be contrary to settled law establishing the legality of covert investigations, as well as obvious and compelling public policy considerations. As I noted in my previous letter, the United States Supreme Court has approved the use of covert investigative

techniques in cases dating back to the nineteenth century, and government attorney involvement in investigations is often required by federal law or policy. This well established practice of attorney involvement in covert investigations, however, is arguably in tension with the Rules as currently written. Rule 8.4(c), for example, says it is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Several other Rules, including 8.4(a) and 5.3, prohibit lawyers from directing others to do something they themselves cannot. Finally, as noted by the defense bar's comments, Pautler contains sweeping statements such as, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." 47 P.3d at 1183.

The uncertainty created by the conflict between the well established policy and the current Rules is real. The Ethics Advisors and Professional Responsibility Officers in my office routinely receive questions about this topic. During nearly every – if not all – ethics training sessions in the office, attorneys raise questions about the propriety of and limits applicable to directing or advising law enforcement agents conducting covert investigations. Similar questions are often referred to appropriate offices at the Department of Justice in Washington, D.C., which can delay investigations where time is of the essence. In short, attorneys in my office are regularly unsure about the propriety of responding to requests for guidance from law enforcement agents.

There is no justifiable basis for depriving government attorneys who are acting in good faith of the ability to determine whether their conduct is consistent with the Colorado Rules of Professional Conduct. The argument that there is no need for clarification of the ethical rules because covert investigations are already occurring is akin to arguing that we don't need air traffic controllers because people would fly airplanes without them; the premise is true as far as it goes, but it completely ignores the reduction in crashes that result from the guidance and supervision air traffic controllers provide. There is a need for clarification of the ethical rules applicable to government attorneys asked by investigators to provide direction to or advice about covert investigations. The Subcommittee's proposed rule change provides that guidance, and I urge the Subcommittee to continue its effort to promulgate that change.

Sincerely,

JOHN F. WALSH
United States Attorney

JFW/je

SUPPLEMENTAL REPORT OF THE

PRETEXTING SUBCOMMITTEE

ATTACHMENT B

"PRETEXTING" RULES AND COMMENTS IN OTHER JURISDICTIONS THAT DEVIATE FROM ABA MODEL RULES OF PROFESSIONAL CONDUCT, PLUS ETHICS OPINIONS THAT INTERPRET THOSE RULES OR RULES IDENTICAL TO ABA MODEL RULES

Compiled by Alec Rothrock
Updated June 2012

State	Rule	Comment	Ethics Op.
Alabama	**3.4** (1994) A lawyer shall not: . . . **(d)** request a person other than a client to refrain from voluntarily giving relevant information to another party, unless: . . . (3) the information pertains to **covert** law enforcement investigations in process, such as the use of undercover law enforcement agents. **3.8** (1994) . . . **(2)** The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except: (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.	**3.4** (1994) Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2. **3.8** (1994) Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law. Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.	Op. RO-2007-05 (Sept. 12, 2007): During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public. Following rationale of *Apple Corps Limited, MPL v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998) (Alabama Rule 4.2 applicable only to contact with represented parties)

State	Rule	Comment	Ethics Op.
Alaska		**8.4** (2009) [4] This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.	
D.C.			D.C. Op. 323 (March 29, 2004) Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties. ("The prohibition against engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" applies, in our view, only to conduct that calls into question a lawyer's suitability to practice law.")
Florida	**8.4** (Jan. 1, 2006) . . . **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;	**8.4** (Jan. 1, 2006) Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.	

State	Rule	Comment	Ethics Op.
Iowa		**8.4** (July 1, 2005) [6] It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.	
Michigan	**8.4** (2005) It is professional misconduct for a lawyer to: . . . **(b)** engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;		

State	Rule	Comment	Ethics Op.
Missouri	**4-8.4 MISCONDUCT** (2012) It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations;	[3] Rule 4-8.4(c) recognizes instances where lawyers for criminal law enforcement agencies, regulatory agencies, or the state attorney general advise others about or supervise others in undercover investigations and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these entities. This exception is not intended to state or imply that an entity has the authority to conduct undercover investigations unless that authority is separately granted to the entity by law. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3. This exception does not authorize conduct otherwise prohibited by Rule 4¬4.2. Nothing in the rule allows the lawyer to advise others about or supervise others in undercover investigations unless the criminal law enforcement agency, regulatory agency, or state attorney general is authorized by law to engage in such conduct.	

State	Rule	Comment	Ethics Op.
New York			New York County Op. 737 (May 23, 2007): [I]t is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. ("dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance")
North Carolina		**8.4** (Feb. 7, 2003) [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.	

State	Rule	Comment	Ethics Op.
North Dakota	**8.4** (Aug. 1, 2006) It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;		
Ohio		**8.4** (Feb. 1, 2007) [2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.	
Oregon	**8.4** (Dec. 1, 2006) (a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; . . . (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.		Oregon Op. 2005-173 (Aug. 2005) (interpreting Rule 8.4(a)(3) and (b))
South Carolina		**4.1** (Oct. 1, 2005) [2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.	

State	Rule	Comment	Ethics Op.
Tennessee		**8.4** (September 29, 2010) [5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.	
Utah			Utah State Bar Ethics Advisory Opinion No. 02-05 (March 18, 2002): A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.
Virginia	**8.4** (March 25, 2003) It is professional misconduct for a lawyer to: . . . **(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law		Virginia Op. 1845 (June 16, 2009) (interpreting Rule 8.4(c) in UPL investigations by bar) Virginia Op. 1765 (June 13, 2003) (interpreting Rule 8.4(c) in context of attorney working undercover for federal intelligence agency)

State	Rule	Comment	Ethics Op.
Wisconsin	**4.1** (July 1, 2007) (a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [Rule 1.6]. (b) Notwithstanding par. (a), [Rule 5.3 (c)(1)], and [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities.	**4.1** (July 1, 2007) Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See [Rule 1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See [Rule 8.4(c)]. Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.	WISCONSIN COMMITTEE COMMENT Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See SCR 20:1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See SCR 8.4(c). Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

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July 3, 2012

RE: Task Force Solicitation of Comments Concerning a Draft "Protected Negotiation Act" for Colorado

Dear Colleague:

You are being contacted because you are a leader in the legal or dispute resolution community, with a particular constituency and perspective regarding negotiated agreements and the disputes they often generate. We are co-chairs of a Colorado Bar Association Task Force that was originally asked to consider the pros and cons of the Uniform Collaborative Law Act now in circulation around the country. After lengthy meetings, however, we expanded our directive and now propose even broader confidentiality protections for a whole array of lawyer-advised negotiations in Colorado. We are soliciting comments about our proposal from you and your constituency group by Monday, September 17, 2012.

BACKGROUND, HISTORY

As you may know, Colorado has long been a leader in providing strong confidentiality protections for negotiated agreements, so long as the communications are shared under the auspices of a trained mediator. The Colorado Dispute Resolution Act (CDRA), Colo. Rev. Stat. § 13-22-301 *et seq.*, first promulgated in substance in 1983, provides that no party or mediator can be compelled to disclose information concerning any "mediation communication." That term is broadly defined in § 13-22-302(2.5) to include

> any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to any [settlement discussions with a trained mediator], including but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party . . . .

An exception is offered for a final, executed written agreement, although that, too, may be kept secret by agreement of the parties. Of course, this confidentiality is subject to being set aside in certain key settings, e.g., when required by statute, or if the communication reveals an intent to commit a felony. See Colo. Rev. Stat. § 13-22-307.

In short, so long as a mediator is directly involved,[1] two parties negotiating the resolution of a dispute in Colorado may now freely communicate essentially any fact (or, admittedly, any untruth) without fear of later disclosure, whether in the matter at hand or in any third-party action. Subject of course to the various statutory exceptions in CDRA.

As an aside, when the Uniform Laws Commission proposed that Colorado adopt the Uniform Mediation Act in 2001-02, the CBA carefully considered the suggestion by convening an *ad hoc*

1. The Colorado Supreme Court has limited protected "mediation communications" to only those made in the presence of or at the direction of a mediator. *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008). The Court felt that CDRA's confidentiality protections were in abrogation of the common law's presumption of disclosure and should be narrowly construed, absent a more explicit legislative directive. *Id.* at 1107.

committee to consider the Commission proposal. Ultimately, the CBA committee concluded that CDRA was sufficient, and in fact an improvement over the proposed UMA, and the uniform legislation did not advance in the Colorado legislature.

The Uniform Collaborative Law Act (UCLA)

Moving to the present, an additional form of dispute resolution has acquired adherents in a number of states, especially Texas: the so-called "collaborative law process." In the classic collaborative law setting (mainly used in family law disputes at this early stage of practice development), two disputing parties agree in writing ahead of time that they will, with the maximum confidentiality provided by law, engage their respective counsel solely to the extent of dispute resolution *outside of court*; should either party abandon the negotiations and pursue litigation, both parties will automatically terminate their respective advocates as lead counsel.[2] This process is thought to create a special incentive for open communication and settlement success, as each party would suffer the daunting cost of hiring new counsel to proceed to court.

The Uniform Laws Commission chose in 2010 to champion this process nationally with a proposed uniform act, one that provides formal confidentiality of all collaborative process communications. That draft act has been discussed at length at recent American Bar Association annual meetings and in 2011 suffered a 2:1 defeat in the House of Delegates. Without going into excess detail, it appears that the main expressed objections to the uniform legislation are (1) that many powerless clients could be ruined financially by a scurrilous opponent who cynically engages in bad-faith, expensive negotiation proceedings and then demands litigation using new counsel; and (2) that lawyers should never agree to curtailing their services on the determination of an opposing party (this latter point might not be as strong in Colorado in light of our Supreme Court's approval of unbundled legal services, at least in state court[3]).

While collaborative law practice was expanding across the United States, the CBA Ethics Committee was asked to opine on the propriety of collaborative law agreements. In the somewhat controversial Opinion No. 115, Ethical Considerations in the Collaborative and Cooperative Law Contexts (adopted February 24, 2007), the Ethics Committee determined that it would be unethical for a lawyer to agree to the so-called "four-party" collaborative law participation agreement (with both parties and their respective lawyers signatories), as it appeared to the Ethics Committee that the lawyers were agreeing with each other to leave the clients in a potentially problematic position. Two-party agreements were approved in the Opinion's footnote 11. The Ethics Committee did not address whether the collaborative law participation agreement could simply be an acceptable unbundled legal service under Colo. RPC 1.2(c).

Only a few states have passed some version of the UCLA as of today. Nonetheless, given strong indications of support for the uniform act by Colorado's Uniform Law Commissioners in the state legislature, CBA President David Masters appointed a "Collaborative Law Task Force" in 2011, headed

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2. Whether settlement counsel and his or her firm might be able to continue as an advisor in the case or as second chair at trial will depend on the scope of the underlying collaborative process agreement; the typical practice is continued involvement only to the extent of transitioning the case to new trial counsel.

3. Unbundled legal services are permitted pursuant to Colo. RPC 1.2(c) and its Comment 6. The federal court for the District of Colorado, on the other hand, has a local directive that declines to allow unbundled legal practice in the federal court. *See* D.C.COLO.LCivR 83.4, as modified by Appendix O, Admin. Order 2007-6.

by the two of us: Terri Harrington, an active collaborative law practitioner, and Robin Rossenfeld, an active private mediator trained in collaborative law.

The Task Force's Proposed "Protected Negotiation Act" (PNA)

The Task Force generally concurs that some form of two-party collaborative law process should be made available to Colorado practitioners, with a concomitant negotiation privilege provided by statute. But the Task Force has substantially broadened its reach, drafting a statute of wider scope: the "Protected Negotiation Act." Building on the already robust confidentiality provided by CDRA, the Task Force recommendation would allow any two (or more) *adequately informed* parties to hold secret talks, beyond the later reach of either party, of any third party, or of any court — but, of course, with carefully defined exceptions. In essence, the PNA would extend to *un*mediated negotiations the same kind of protections already granted to mediated communications in Colorado.

Task Force members have debated at length the controversial points and believe each has been addressed in the draft PNA. For instance, what about the party that lacks resources for two different lawyers, or that is woefully uninformed about the risk of undertaking truly secret negotiations? The PNA is enforceable only for agreements that have been made in writing, and only where the client has been fully informed of the possible ramifications by a lawyer. What then of the party who lies to the other party about being fully informed, then seeks to renege? Setting aside whether the second party should at the outset probe the truth of the first party's assertion, the first party is, upon signing, essentially estopped from denying informed consent, thus protecting the second party.

What about the apparent demise of the parol evidence rule for these fully informed negotiations? Setting aside its rare invocation in the world of competent integration clauses, the draft PNA incentivizes the parties to achieve clarity of definition in their agreement, and not to sandbag with an ambiguous phrase. And as to whether Rule 408 is already standing guard at this post, its exceptions routinely swallow its purported scope, and the Rule as written leaves many parties shocked at how narrow their protected communications turn out to be.

A NOTE ON TASK FORCE ACTIVITY AND COMPOSITION

That Task Force met virtually weekly for much of 2011 and early 2012, first to assess whether passage of the UCLA would be right for Colorado (in that process, the Uniform Laws Commission staff helpfully provided a suggested modification of the UCLA that more closely comported with the Colorado regulatory scheme, which relies almost exclusively on the courts to oversee lawyer conduct, rather than the legislature) and then to draft the proposed Protected Negotiation Act. We have been joined in this effort by a large number of participants, including, to single out but a few, John DeBruyn, long-time member of the ADR Section and well-known legislative contributor; David M. Johnson, a former president of the Colorado Bar Association; Richard W. Laugesen, chair of the Supreme Court's Standing Committee on the Rules of Civil Procedure; Gerald D. Pratt, a member of the CBA Ethics Committee; Andrew M. Toft, a member of the CBA Legislative Policy Committee and CBA Board of Governors representative for the Solo/Small Firm Section; Anthony van Westrum, a member of the CBA Ethics and Legislative Policy committees and of the Supreme Court's Standing Committee on the Rules of Professional Conduct; and J. Gregory Whitehair, a trial lawyer and provider of alternative dispute resolution services in intellectual property and other disputes. Others who have been active participants include Marlin W. Burke, James F. Carr, Michael A. Kirtland, David Littman, Lauren C. Oray, Troy R. Rackham, Bonnie M. Schriner, and Cynthia H. Shearer.

CONCLUSION

The Task Force recognizes that this PNA proposal is paradigm-shifting, but it sincerely believes that the proposal comports with best practices today, especially in light of robust integration clauses and a relatively moribund parol evidence rule, and that it would be a significant improvement over exception-riddled evidence Rule 408. That said, we may be missing some key nuance that your group is in a position to identify. Thus our solicitation for comments.

We enclose three items for your consideration:

(A) The June 25, 2012 Task Force working draft of the Protected Negotiation Act;

(B) A proposed insert to Comment 6 of Colo. RPC 1.2.

(C) A listing of other rules for which cross-references to the PNA in statutory/rules publications would be useful. (Our examination of other rules, to date, has not identified any needed amendments to existing statutes or rules to implement the PNA if passed.)

Please provide us with your comments, concerns, and recommendations at either or both of the above email addresses. It would be helpful if you used the phrase "Comments re: Protected Negotiation Act" or something similar in the subject line.

We thank you in advance.

Terri Harrington *Robin Rossenfeld*

TERRI HARRINGTON, Co-Chair ROBIN R. ROSSENFELD, Co-Chair

PROPOSED NEW PART 6 OF TITLE 13, ARTICLE 22
PROTECTED NEGOTIATION ACT

13-22-601. Short title. This part 6 shall be known and may be cited as the "Protected Negotiation Act".

13-22-602. Legislative Declaration. In order to foster the resolution of disputes, the reaching of agreements, the curtailment of evidentiary issues concerning pre-agreement negotiation communications, and the facilitation of transactions and other matters, it is declared to be the policy of this state to protect by statutory privilege negotiations among parties to such disputes, agreements, transactions, and other matters if the parties agree to obtain the protections of such privilege for their negotiations. To that end, it is the purpose of this part to establish a statutory privilege for protected negotiations subject to this part.

13-22-603. Definitions. As used in this part 6, unless the context otherwise requires:

(1) "Negotiation" includes any activity or process intended or used to assist, inform, bind, or otherwise enable one or more parties to resolve or conclude a protected negotiation matter, including, but not limited to, communicating, coaching, counseling, consulting, administering, mediating, facilitating, fact finding, arbitrating, and providing expert information, opinion, or determination.

(2) "Participant" means:

(a) A person who has signed a protected negotiation participation consent; or

(b) A lawyer representing a party or another participant in a protected negotiation.

(3) "Party" means a person who has signed a protected negotiation agreement with respect to a negotiation between or among that person and one or more other persons with a view toward resolving or concluding a protected negotiation matter that is the subject of the protected negotiation agreement.

(4) (a) "Protected information" means, with respect to a protected negotiation, an expression, whether oral or in a record and whether verbal or nonverbal, made to prepare for, conduct, participate in, convene, or reconvene a protected negotiation, that is either:

(I) Expressed after all of the parties sign a protected negotiation agreement and before the protected negotiation is concluded; or

(II) Expressed before all of the parties sign a protected negotiation agreement, if all of the parties agree, at any time, in a record signed by all of the parties, that such expression is protected information with respect to the protected negotiation.

(b) Except as all of the parties agree, at any time, in a record signed by all of the parties, a protected negotiation agreement or a protected negotiation participation consent is not protected information.

(c) Except as all of the parties agree, at any time, in a record signed by all of the parties, an agreement that is reached as a result of a protected negotiation and that is expressed in a record that is signed by all of the parties is not protected information.

(5) "Protected negotiation" means a negotiation under a protected negotiation agreement.

(6) "Protected negotiation agreement" means an agreement, evidenced by a record, signed by two or more persons, by which they agree to participate as parties in a negotiation with a view toward resolving or concluding one or more specified protected negotiation matters, which agreement states expressly that the parties are entering into the agreement for the purpose of obtaining the protections provided by section 13-22-605 with respect to the protected negotiation.

(7) "Protected negotiation matter" means any matter, of any character or nature, that can be the subject of a negotiation, such as the subject of a negotiation to resolve a dispute or to reach an agreement or to facilitate a transaction. Such matter may include any claim, dispute, argument, issue, problem, question, process, agreement, affair, transaction, or other matter.

(8) "Protected negotiation participation consent" means a record signed by a person for the purpose of consenting to participate in a protected negotiation as a participant other than a party, which record identifies the protected negotiation agreement and states expressly that the participant agrees that the protections provided by section 13-22-605 apply to all protected information respecting the protected negotiation, including that protected information to which the participant gains access or which the participant provides.

(9) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound, or process.

13-22-604. Required Advisement Prior to Protected Negotiation. (1) Except as provided in subsection (2) of this section, no person is bound as a party by a protected negotiation agreement unless and until that person has been advised by that person's lawyer about the application of this part to that person as a party and to the protected negotiation under the protected negotiation agreement.

(2) A separate record, signed by a person who is or becomes a party to a protected negotiation agreement, acknowledging that the person has received, from that person's lawyer, the advisement contemplated by subsection (1) of this section with respect to that protected negotiation agreement shall be conclusive evidence in any proceeding, other than in an action by the party against that party's lawyer seeking damages or indemnity based upon the alleged professional negligence of that lawyer in giving the advice contemplated by subsection (1) of this section, that the person received the advisement contemplated by this section. For this purpose, a separate record is a record that contains [, in substance,] only the acknowledgment contemplated by this subsection (2).

13-22-605. Protection for Protected Negotiation. Except as provided by Section 13-22-606, no party or participant in a protected negotiation shall disclose, or through discovery or compulsory process be required to disclose, any protected information.

13-22-606. Exceptions to Protection for Protected Negotiation. (1) (a) Except as provided in paragraph (b) of this subsection, section 13-22-605 shall not apply to protected information to the extent that all of the parties agree, at any time, in a record signed by all of the parties, it shall not apply.

(b) To the extent that all of the parties and the participant agree, at any time, in a record signed by the parties and the participant, the consent of a participant may be required before the parties exercise their right under this subsection (1) to limit the application of section 13-22-605 with respect to protected information.

(2) Section 13-22-605 shall not apply to protected information to the extent that the protected information:

(a) Is available to the public under the "Colorado Open Records Act," part 2 of article 72 of title 24, C.R.S. or other applicable law;

(b) Is a threat or statement of a plan to inflict bodily injury or commit a crime of violence; or

(c) Is intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity.

(3) Section 13-22-605 shall not apply to protected information if a court finds, after a hearing in camera, that the person seeking discovery or admission of the protected information has shown that the evidence that would be established by the protected information is not otherwise available, the need for the evidence substantially outweighs the interest in protecting the protected information, and the protected information is sought or offered in a proceeding:

(a) To prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless an appropriate governmental agency is a party or a participant in the protected negotiation in which the protected information was expressed.

(b) To prove or disprove the occurrence of a crime;

(c) To establish or oppose a claim of rescission or reformation of[, or a defense to liability on] a contract entered into in the course of, or arising out of, the protected negotiation, based upon fraud, duress, or lack of capacity;

(d) To prove or disprove a claim for a fee for services or expenses of a participant arising from or related to a protected negotiation; or

(e) To prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a protected negotiation.

(4) If protected information is subject to an exception under subsection (3) of this section, only the part of the protected information found by the court to be necessary for the application of the exception may be discovered or admitted.

(5) Discovery or admission of protected information pursuant to subsection (3) of this section does not make that or any other protected information discoverable or admissible for any other purpose.

(6) Any protected information that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

(7) Nothing in this section shall prevent the discovery or admissibility of evidence that is otherwise discoverable, merely because the evidence was protected information in a protected negotiation.

13-22-607. Relation to other parts. (1) Except as provided in subsection (2) of this section, the absence of correspondence between any provision of this part, other than this section, and any provision of any other part of this article shall not affect the interpretation or construction of this part or of any other such part.

(2) Except as otherwise provided in a protected negotiation agreement, a mediation communication as defined in Section 13-22-302 expressed in a protected negotiation is subject to section 13-22-307 and not subject to section 13-22-605.

PROPOSED AMENDMENT TO COMMENT [6] OF RULE 1.2
OF THE COLORADO RULES OF PROFESSIONAL CONDUCT

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. ***For instance, a lawyer representing one of the parties in a multi-party collaborative process agreement or other protected negotiation agreement may in advance agree with the client-party to limit or terminate the representation at some time or upon some event, such as the filing of a lawsuit by a party.*** Such limitations may ***also*** exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

OTHER RULES FOR WHICH CROSS-REFERENCES TO THE PROTECTED NEGOTIATION ACT WOULD BE APPROPRIATE

- C.R.C.P. 11(b)
- C.R.C.P. 16(b)(6)
- C.R.C.P. 16.2(b), (c), (e), (g) and (i)
- C.R.C.P. 121, § 1-1
- C.R.C.P. 121, § 1-17
- C.R.C.P. 311(b)
- C.R.P.C. 1.2
- C.R.P.C. 1.6
- C.R.E. 408
- C.R.S. 13-22-305/306
- Office of Dispute Resolution Practices and Procedures.