



colorado**lega**lethics



**EVERYTHING YOU WANTED TO KNOW
ABOUT PRETEXT . . .**

BUT WERE AFRAID TO ASK.

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RULE 8.4(c)

- “It is professional misconduct for a lawyer to . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

...**except** that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities.”

INTRODUCTION

Part 1: ***Background***

- A. Efforts for change, efforts for clarification.
- B. “CHEEZO” & law enforcement response.

Part 2: ***The Rule Change & CBA Formal Opinion 137***

- A. “Lawful investigative activities.”
- B. Relationship to other rules.

Part 3: ***Social Media & Surreptitious Recordings***

FRAMING THE CHANGE

- *In re Pautler* (2002).

“[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.*”

“Purposeful deception by lawyers is unethical and will not go unpunished.”

- “CHEEZO” (2016).

PART 1: BACKGROUND

Historical Approval

- “[I]n the detection of many types of crimes, the Government is entitled to use decoys and to conceal the identity of its agents.”

Lewis v. United States, 385 U.S. 206, 209 (1966);
People in Interest of M.N., 761 P.2d 1124, 1135 (Colo. 1988).

- Failing to advise, supervise, or control “can result in police being deprived of critical legal guidance or, in a civil case, an unsupervised investigation in which important matters may have been overlooked.”

Va. Legal Ethics Op. 1738 (Apr. 13, 2000).

- Covert investigations have been used as the basis for lawyer disciplinary actions.

People v. Morley, 725 P.2d 510, 514–15 (Colo. 1986).

EFFORTS TO CHANGE

- Federal prosecutors' efforts to change/clarify.
- In 2011, the CBA IP Section requested clarification on whether RPC 8.4(c) prohibited lawyers from supervising or advising lawful undercover investigations.
- The Standing Committee on the Rules of Professional Conduct responded by appointing a "pretexting subcommittee," which expanded its consideration to state and federal government attorneys.

THE SUBCOMMITTEE RESPONSE

- The subcommittee majority proposed this amendment to Rule 8.4(c):
“(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;**”
- A minority report proposed:
 - Limiting majority proposal to lawyers “**representing the government;**” or
 - Taking no further action.

“No further action” won the day.

REANIMATING THE CALL FOR CHANGE: “CHEEZO”

- ● **CHEEZO**: Jefferson County DA’s in-house investigative team identifying suspects using the internet to lure/entice children.
 - In use for over a decade, CHEEZO yielded prosecutions of over 900 online sexual predators.



THE “CHEEZO” CHALLENGE

- In 2015, defense counsel for a CHEEZO convict filed an ethics complaint with Colorado’s Office of Attorney Regulation Counsel.

Argument: employing investigators in the DA’s office, combined with the use of covert investigative tactics, violated Colo. RPC 5.3 and RPC 8.4(c).

- OARC ultimately expressed that the DA could be subject to professional discipline for overseeing the pretextual investigation.

WHO MOVED THE CHEEZO?

- The DA agreed to shut down its CHEEZO program, in exchange for an agreement from OARC to close its ethics investigation.
- In reality, the CHEEZO program remained intact, but was administratively transferred to the Sheriff's office.



FALLOUT

Government law offices & law enforcement agencies scrambled to understand what kind of legal advice—if any—they could give to ensure that covert investigations were carried out legally and within constitutional limitations.

Government lawyers could no longer assist law enforcement agencies with covert investigations.

In-house investigations shuttered.

RULE 21 PETITION TO THE COLORADO SUPREME COURT

- The Colorado Attorney General's Petition requested that OARC be enjoined from interpreting and enforcing Colo. RPC 8.4(c) in a manner that precluded government lawyers from providing critical legal advice to lawful covert investigations.
- Support from multiple amici.

The Colorado Supreme Court denied the Rule 21 Petition.

RULEMAKING

- On the same day, the court posted notice of a proposed amendment to Rule 8.4(c).
- The proposal was identical to the amendment proposed by the pretexting subcommittee majority in 2012.

THE RULE CHANGE

- Significant support emerged, both via written comment and oral testimony, for the rule change.
- Only modest opposition by comment or testimony.
- On 28 September 2017, the court amended Rule 8.4(c) as follows:

It is professional misconduct for a lawyer to:

(a) – (b) [NO CHANGE]

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

(d) – (h) [NO CHANGE]

IP GROUPS' COMMENTS

- International Trademark Ass'n
 - Does not implicate integrity or fitness to practice
 - Does not go far enough: US has stricter rules on pretext than other countries
- CBA IP Section
 - Would impact ability to investigate trademark/patent/copyright infringements
 - Would impede legally required pre-suit investigations (such as collecting samples of the infringing product)
- Testimony – Charles F. Luce, Jr.

PRETEXTING SUBCOMMITTEE REBORN

•The Standing Committee on the Rules of Professional Conduct reestablished its “pretexting subcommittee” and charged it with two tasks:

1. Draft a comment addressing the phrase “lawful investigative activities”; and
2. Consider whether the rule itself should be amended to replace the word “or,” as it appears before the word “investigators,” with the word “and.”

SUBCOMMITTEE RESPONSE

- The subcommittee:

1. Recommended that “or” should be replaced with “and” in the text of amended Rule 8.4(c);
2. Did not recommend that a comment be added defining the term “lawful investigative activities”; and
3. Suggested that if a comment were to be adopted, it should be limited to clarifying that an attorney may not directly engage in covert or undercover activities.

No Action Taken

(except that “and” replaced “or” in 12/19)

CONCERNS

- Will this lead to a new “wild west” of unethical conduct?
- Will it erode public confidence in trusting lawyers?

UNLIKELY.

PART 2:

CBA FORMAL ETHICS OP. 137

- An Opinion in five parts:
 1. Background
 2. Lawful Investigative Activities
 3. Interaction with Other Rules
 4. Common Scenarios
 5. Bibliography

WHAT ARE “*LAWFUL INVESTIGATIVE ACTIVITIES*”?

- One state (Wisc.) has defined “lawful investigative activity:”

“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.

WHAT ARE “*LAWFUL INVESTIGATIVE ACTIVITIES*”?

- Several states added comments to define “covert activity”:
 - **Iowa:**
 - “Covert activity” means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.”
 - **Oregon:**
 - “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.

ACCEPTABLE

“LAWFUL INVESTIGATIVE ACTIVITIES”

- *Gidatex S.r.L. v. Campaniello Imports*
 - Plaintiff investigators surreptitiously taped defendant’s salespersons.
 - No ethics violation (despite RPC 4.2 issue) because they did not interview the clerks OR trick them into saying something they otherwise would not have.
 - Litigation not underway.
- *Apple Corps Ltd. v. International Collectors Society*
 - Defendant had been ordered to stop selling stamps w/a protected TM.
 - Plaintiff sent undercover buyers.
 - Court: deceit made purely for “evidence gathering” in “ongoing violations.”

ACCEPTABLE “LAWFUL INVESTIGATIVE ACTIVITIES,” *cont’d*

- *Cartier v. Symbolix, Inc.*
 - Famous jeweler-watchmaker believed defendant was adding diamonds to cheap watches and selling them as authentic brand watches.
 - Court: “prevailing understanding ... is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed.”

ACCEPTABLE “LAWFUL INVESTIGATIVE ACTIVITIES,” *cont’d*

- *Turfgrass Group, Inc. v. Northeast Louisiana Turf Farms, L.L.C.*
 - Plaintiff hired undercover investigators to pose as consumers.
 - Record and observe if the product Defendant was selling was actually the product represented.
 - Defendant was selling particular brand of trademarked grass seed w/out authorization (or paying \$\$).
 - Court highlighted that surreptitious recording by lawyer w/out other party’s consent is not, standing alone unethical.
 - BUT: it is NOT permitted in Colorado.
 - Using undercover investigator or tester is essential to uncover evidence of trademark and patent infringement before suit is filed.

ACCEPTABLE “LAWFUL INVESTIGATIVE ACTIVITIES,” – **TAKEAWAYS**

- Where it is otherwise difficult to discover the violation by other means & the deception does not induce target to act as s/he otherwise would not, but rather aims to reproduce or report on an existing behavior, the investigation is lawful.
 - “The prevailing understanding is that public **or** private lawyers’ use of undercover investigators to detect **ongoing** violations of the law is not ethically proscribed.”
 - Especially where it would be difficult to otherwise detect.
- *Of Note:*
 - The major cases addressing pretext, deception, and ethical lawyering come from civil arena, particularly trademark infringement and investigation.

“(UN)LAWFUL INVESTIGATIVE ACTIVITIES”

- *In re Curry & In re Crossen*
 - Defendants attempted to induce a law clerk into revealing incriminating information about the clerk’s judge.
 - Flew clerk first to Nova Scotia then to New York for purposes of “sham” interviews to join a fake multinational corporation.
 - Motive impure: pure financial gain by the defendant-attorneys.
 - Scheme here different both in “degree” and “in kind.”
 - BUT: *reaffirmed* that discrimination testers are permissible to produce “pre-existing patterns of conduct.”

“(UN)LAWFUL INVESTIGATIVE ACTIVITIES,” *cont’d*

- *Leysock v. Forest Laboratories, Inc.*
 - Investigators sent out fake medical surveys to physicians to learn about their patients.
 - “Far exceeded” any investigative exception and intruded on sacrosanct doctor-patient privilege.
 - Court recognized different governing considerations for public v. private and civil v. criminal investigations.
 - **Criminal:** undercover investigations.
 - **Civil:** use investigators to get information normally available to any members of the public “making a similar inquiry.”
 - Including: testers, prospective renters, and putative consumers to ferret out product/housing discrimination.

“LAWFUL INVESTIGATIVE ACTIVITIES”: *Rule 4.2 Changes the Calculus*

Retained Counsel “in the Matter.”

- *McClelland v. Blazin’ Wings*
 - Plaintiff filed suit, hired PI to investigate injuries at Defendant’s bar.
 - Defendant was represented by counsel “in the matter.”
 - Plaintiff surreptitiously recorded defendant’s bartender.
- *Midwest Motor Sports v. Arctic Cat*
 - Defendant’s lawyer hired investigator to pose as customer & record Plaintiff.
 - Trying to *induce* incriminating statements, not simply recreate normal behavior.
 - Litigation already underway.
 - 8th Cir.: This could have been acquired thru discovery.

PERSONAL PARTICIPATION — *PROHIBITED!*

Rule 8.4(c)'s language does not allow personal involvement.

- *Pautler*
 - DA told barricaded murder suspect he was a public defender.
 - “Purposeful deception ... is intolerable.”
- *Reichman*
 - DA lied to the court to establish undercover agent's bona fides.
 - Fictitious arrest, fake charges, hearing and false statements to the judge.
- *Smith*
 - Private attorney surreptitiously recorded client while trying to buy cocaine.

RELATIONSHIP TO OTHER RULES – RPC 8.4(A)

- RULE 8.4(a) Misconduct
 - “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”
 - Revised Rule 8.4(c) provides a **narrow exception** to this anti-circumvention rule.
 - Revised 8.4(c) *authorizes* lawyers to advise, direct, or supervise in context of lawful investigative activities.

RELATIONSHIP TO OTHER RULES— RPC 4.1

- Rule 4.1 Truthfulness in Statements to Others
 - In the course of representing a client a lawyer shall not knowingly (a) *make* a false statement or (b) fail to disclose a material fact when necessary.
- Because Rule 8.4(c) does not permit a lawyer to *personally* engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, **Rule 4.1 (& Pautler) is unaffected.**

RELATIONSHIP TO OTHER RULES— RPC 4.2

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter,
 - unless the lawyer has the consent of the other lawyer *or*
 - is authorized to do so by law or a court order.
- **Rule 8.4(c) does not otherwise alter Rule 4.2's requirements.**
- Investigation is prohibited once (i) the lawyer knows a party is represented by counsel (ii) in that matter, *unless* one of Rule 4.2's exceptions applies.
- Rule 4.2's “authorized by law” exception may include “lawful investigative activity” as referenced in revised Rule 8.4(c).

RELATIONSHIP TO OTHER RULES— RPC 5.3

- Anti-delegation rule: Lawyer must make “reasonable efforts” to ensure those she supervises complies with professional/ethical obligations.

- Rule 8.4(c) provides a narrow exception to Rule 5.3(c) so long as the non-lawyer’s conduct is in furtherance of “lawful investigative activities.”

This would include providing guidance to those the lawyer is advising about how to lawfully conduct the activity.

RELATIONSHIP TO OTHER RULES— RPC 1.2(d)

- **Scope of Representation/Allocation of Authority Between Client & Lawyer**
 - A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent,
 - *BUT* a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- Rule 8.4(c) permits lawyers to advise, direct, and supervise clients in lawful investigative activities that involve “fraud.”
- Revised Rule 8.4(c) controls over Rule 1.2(d)’s prohibition on counseling a client to engage in *fraudulent* conduct.
 - It does not alter the prohibition on counseling or assisting a client to engage in *criminal* conduct.

PART 3: SOCIAL MEDIA

- Ethics opinions generally agree that lawyers/investigators can view public portions of social media networks without violating the RPCs.

E.g. CBA Comm. on Ethics, Formal Op. 127 (addressing “ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information regarding witnesses, jurors, opposing parties, opposing counsel, and judges”).

- Everyone agrees that a lawyer may not use deception to gain access to the private portion of a social media page.
 - *E.g.* by misrepresenting an identity or status to have a “friend” request accepted.

SOCIAL MEDIA CASES

- No Personal Participation!
- *Disciplinary Counsel v. Brockler*
 - ADA used faked Facebook account to contact defense alibi witness.
 - Ohio's RPC 8.4(c) had analogous comment to Colorado's amended Rule.
 - Ohio: lawyers cannot personally participate (but they *can* supervise).
- *Office of Disciplinary Counsel v. Miller*
 - DA created fake Facebook page, urged office to use it to "snoop" on defendants.
 - PA: no "investigative" exception, but also no personal participation.
- *And remember:* You cannot contact parties represented by counsel in the matter!

EX PARTE COMMUNICATIONS

- Sending a “friend” request for access to a private social media page, especially when using deception, is a communication & may violate prohibitions on ex parte communications with a judge, juror, or prospective juror (RPC 3.5) or with persons known to be represented by counsel (RPC 4.2).
- Public information ≠ private information.

USE OF CLIENT TO ACCESS PRIVATE CONTENT

- Two scenarios:
 - Client already has access to private content; OR
 - Client does not have access or is seeking additional access to private content.
- Under the first scenario, asking the client or other third person to report on what that person already has access to is likely not a violation.
- But asking a client to obtain access, or to gain additional access to private information – through deception or otherwise – may violate RPC 4.2 or RPC 4.3.

SURREPTITIOUS RECORDINGS

- “Parties to a matter may communicate directly with each other.” Rule 4.2, cmt. [4].
- Generally lawful for a nonlawyer client to record a conversation to which he or she is a party without the other party’s knowledge, but a lawyer may not do so.
- Any recording should not violate state or federal computer crime, wiretap, or eavesdropping statutes.

PRACTICE POINTERS

- Personal participation: *verboten!*
- In context of a “lawful investigation,” whether it is conducted in a government or private practice context or in a criminal v. a civil matter makes a difference.
 - *But:* Colo. RPC 8.4(c) does not so distinguish.
- Generally approved: undercover police investigations; housing and product discrimination testers; some IP/trademark infringement cases.

PRACTICE POINTERS, *cont'd*

- Best bet: design investigation to *reproduce* situations where any member of Jane Q. Public could receive a similar response.
- Do not deceive the court.
- Do not circumvent core discovery procedures.
- When the investigative target is represented by counsel in the matter, the lawyer must comply with RPC 4.2.
 - Resource: “*Lawful Investigative Activities*” and Rule 8.4(c), 48:6 COLO. LAW. 36 (June 2019).

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