Moving the CHEEZO

A week before Christmas, many Coloradoans woke up to news that left them wondering how a grievance filed with the Colorado Supreme Court's Office of Attorney Regulation Counsel, which investigates and prosecutes violations of the Colorado Rules of Professional Conduct, had resulted in the shutdown of a popular and highly successful investigative unit which protects children from Internet predators.

Mike and Cassandra Harris developed the Child Sex Offender Internet Investigations Unit, informally known as "CHEEZO," in 2005. Housed in the offices of the Jefferson County District Attorney, the Harrises and another investigator pose as children online to engage, identify, and arrest pedophiles who use the World Wide Web as their stalking field.

Since its inception, CHEEZO has made 924 arrests, 57 in 2016 alone. Because getting Internet child predators off the streets is generally regarded as a good thing, who could blame the public for thinking that, if attorney ethics rules can be used to make the Internet safe for child molesters, surely "the law is a ass—a idiot." Few Colorado lawyers, however, were surprised by this development. The grating of CHEEZO was merely a logical extension of the case of Mark Pautler[1].

On June 8th, 1998, Chief Deputy District Attorney Mark Pautler arrived at a grisly crime scene. Three women lay murdered in an apartment, their skulls cleaved by blows from a wood splitting maul. A short time later, a few miles away, a similar scene unfolded. There the killer, William Neal, had murdered a fourth victim in the same brutal manner in front of a fifth victim, who he later raped. The fifth victim, together with two of her friends, were held hostage by Neal for over 30 hours.

After recording the details of his rampage on tape, Neal fled the apartment, leaving instructions with the hostages to call police and to have them page him when they arrived. When Pautler

arrived at this second apartment Neal was in the wind, but on the phone – Deputy Sheriff Cheryl Moore kept Neal talking for three-and-a-half hours, hoping to negotiate his surrender before he struck again or disappeared entirely.

Neal told Moore he would not surrender without speaking to legal counsel. Specifically, Neal asked to speak with a particular public defender, Daniel Plattner, who had previously represented him. Plattner, however, could not be found – his phone was disconnected, and Pautler believed Plattner had left the practice of law. Fearful that more deaths could be imminent or that Neal might escape, Pautler decided to impersonate a fictitious public defender, "Mark Palmer," a name Pautler chose himself. After speaking with "Palmer" and negotiating the terms of his surrender, Neal was taken into custody without further incident.

For his deception, Pautler was suspended from the practice of law by the Colorado Supreme Court. Notwithstanding the extreme, exigent circumstances faced by Pautler, the court held "[Rule 8.4] and its commentary are devoid of any exception. Nor do the Rules distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors."[2]

The problem for Pautler was that Colo. RPC 8.4(c), like its ABA Model Rule counterpart, prohibits an attorney from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," even when *not* acting as an attorney. Pautler was also found to have violated Rule 4.3, which provides that "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."

The problem for the Harrises, who are not lawyers, is that CHEEZO was housed in the offices of the Jefferson County District Attorney. Colorado's enactment of ABA Model Rule 5.3(b) provides that "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Thus, while law enforcement officers may lawfully use pretext as an investigative tool, and routinely do, a law enforcement officer who is operating under the direction of an attorney, much less a district attorney, may not.

The hardline approach taken by the Colorado Supreme Court, while not adhered to by all states, is not an aberration. The same year the disciplinary complaint was filed against Mark Pautler, the Oregon Supreme Court considered similar conduct, this time involving a private attorney, in *In re Gatti*.[3]

There, a private attorney misrepresented himself as a chiropractor during the course of an alleged fraud investigation. The United States Attorney for the District of Oregon, appearing as *amicus curiae*, joined by the Oregon Attorney General, urged the court to recognize a "prosecutorial exception" which would exempt "government attorneys who advise, conduct or supervise legitimate law enforcement activities that involve some form of deception or covert operations."[4] The Oregon Supreme Court declined this invitation to create a judicial exception to the traditional view:

> As members of the Bar ourselves--some of whom have prior experience as government lawyers and some of whom have prior experience in private practice--this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, ORS 9.490(1) provides that the rules of professional conduct "shall be binding upon **all** members of the bar." (Emphasis added.) ***Faithful adherence to the wording of DR 1-102(A)(3), DR 7-102(A)(5), ORS 9.527(4), and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements***. In our view, this court should not create an exception to the rules by judicial decree. Instead, ***any exception must await the full debate that is contemplated by the process for adopting and amending the Code of Professional Responsibility***.[5]

The *Gatti* case did lead to such a debate, and to a rule change, in Oregon. Following the adoption of the Model Rules of Professional Conduct by Oregon, this exception was incorporated as Oregon RPC 8.4(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. (Emphasis added.)

The Oregon Rule does not allow an attorney to personally act as the undercover investigator, only to advise and supervise nonlawyers regarding covert activities.

The Oregon rule is refreshingly direct compared with the sometimes Rube Goldberg-like approach and the “then a miracle occurs” logic gaps found in many well-intentioned judicial opinions which struggle to reconcile the inflexible prose of ethics codes with the interests of justice and realities of the modern world. It has the further advantage of involving, or at least not excluding, lawyers — who are and should be held to a higher ethical standard — from the task of advising clients, if not directly supervising, lawful covert activities.

American political experience has repeatedly demonstrated that covert activities have a propensity to run amok. There is no reason to believe that excluding attorneys from advisory or supervisory roles will improve this situation. Further, to the extent the Rules of Professional Conduct are rooted in public expectations regarding the legal profession, most of the public would be shocked to learn that, because lawyers may not supervise law enforcement officers or private investigators in conducting pretextual investigations on peril of suffering professional discipline, no such supervision is occurring.

Other states, by rule or comment, have carved out exceptions similar to the Oregon rule which allow attorneys to oversee investigative activities that may involve pretexting. These include Florida (by rule) and Iowa, Alaska, North Carolina, and Tennessee (by comment to Rule 8.4). However, Colorado and ABA Rule 8.4(c) continue to admit no exception which would allow attorneys to supervise investigators conducting covert activities without risking ethical prosecution.

The offensive use of the Colorado Rules of Professional Conduct by criminal defense lawyers to shackle CHEEZO was predictably short-lived. On Groundhog Day, less than two months after being shut down, the baton for overseeing the CHEEZO investigative unit was figuratively and literally passed to the Jefferson County Sheriff's Office which, not being run by lawyers, is not hamstrung from conducting pretextual investigations by Rule 8.4.

While an obvious, pragmatic, and expeditious solution, the reassignment of the CHEEZO unit has the unfortunate consequence of relieving any public pressure which might have caused the Colorado Supreme Court to reassess its dogmatic approach to Rule 8.4(c), and to consider public policy considerations which favor a role for attorneys in advising clients, law enforcement, and investigators engaged in covert operations. It is a reevaluation long overdue.

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[1] *People v. Pautler*, 47 P.3d 1175 (Colo. 2002).

[2] *Id.* at 1179.

[3] 330 Or. 517, 8 P.3d 966 (Or. 2000)

[4] *Id.* at 974-975.

[5] *Id.* at 976. (Underlined emphasis in original; other emphasis added.)