"Lawful Investigative Activities," Pretext, and Rule 8.4(c) of the Colorado Rules of Professional Conduct

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Lawyers in government practice, from attorney general offices to prosecutors to agency counsel, may have occasion to oversee investigations where deceit or pretext is used. But is advising, supervising, or directing pretextual investigations consistent with a lawyer's general ethical obligations? Changes to state rules of professional conduct, including a 2017 amendment to Colorado Rule of Professional Conduct 8.4(c), indicate that a lawyer's oversight is preferable to foregoing law enforcement activities or preventing investigators from receiving guidance from their lawyer-supervisors.[1] But there are important considerations to ensure a lawyer's oversight complies with local ethics rules. This article addresses Colorado's rule and provides practical considerations for lawyers to consider in conducting their own such investigations.

A "lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[2] This is because "[n]ot every lawyer misstatement poses th[e] risk" of jeopardizing the public's trust in the integrity and trustworthiness of lawyers.[3] On the contrary, a "commitment to total truthfulness" can actually imperil "attorney involvement in undercover investigations and other strategies used . . . to root out evil or even to save lives."[4] For this reason, it should "seem obvious that an attorney's obligation to be truthful does not foreclose her participation in undercover investigations designed to expose wrongdoing."[5] Thus, a sanction is appropriate only where the deception "reflects adversely on the lawyer's honesty, trustworthiness, or fitness" to practice law.[6]

The United States Supreme Court has long recognized that deception and pretext are permissible tools of lawful investigations.[7] This is because the Constitution does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[8] Indeed, given the clandestine nature of criminal activity, "[p]rosecutors and police often need to use deceit to find the truth."[9] Likewise, a lawyer's advice, supervision, or direction of a lawful investigative activity can protect an investigation's target by ensuring the investigation honors the target's rights.[10]

This is equally true of discrimination testers and for investigations into civil, intellectual property, or consumer-related violations because pretext, deception, and "the use of undercover investigators and discrimination testers is an indispensable means of detecting and proving violations that might otherwise escape discovery or proof."[11] The Supreme Court has approved of deception and pretext in using housing testers to misrepresent both their identities and purpose to pose as renters or purchasers to gather evidence of and determine whether a landlord or seller is engaging in housing discrimination.[12] Even the Federal Trade Commission tasks investigators to pose as consumers to gather evidence of possible law violations.[13]

Colorado's Original Rule 8.4(c) and the 2017 Amendment

Before September 2017, Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) provided that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[14] But in September 2017, the Colorado Supreme Court amended Rule 8.4(c) to add an exception concerning lawful investigative activities:

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

participate in lawful investigative activities.[15]

What prompted this change? The immediate impetus stemmed from an ethics complaint filed by a defense attorney against a district attorney whose office housed (and thereby supervised) an investigative unit that rooted out child predators on the internet—like that defense attorney's client—by having the investigators present themselves online under fictitious identities.[16] The district attorney agreed to close the unit, and Colorado's Office of Attorney Regulation Counsel (OARC) ended the investigation.[17] But because of OARC's investigation, the Colorado Attorney General suspended all in-house undercover investigations.[18] Colorado's Attorney General then filed an original action in the Colorado Supreme Court seeking injunctive relief to prevent OARC from interpreting Colo. RPC 8.4(c) in a way that would prevent government lawyers from providing advice to lawful undercover investigations or punish them for doing so.[19] The supreme court denied the petition. Instead, it proposed the above rule change, which it adopted without accompanying comment.[20]

Colorado is not the only state to allow lawyer oversight in pretextual investigations. Approximately twenty states have adopted similar amendments authorizing and defining deception in pursuit of covert activities. Some states' rules only authorize lawful investigations involving violations of criminal law or civil or constitutional rights, particularly where the lawyer has a good faith belief 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.[21] Other states limit deception exceptions to government lawyers.[22] Finally, several states' ethics committees have interpreted their rules consistently with Colorado's amended Rule 8.4(c) but without amending their analogous rules.[23]

Colorado's amended Rule 8.4(c) raises a crucial question: What *is* a lawful investigative activity? This article addresses that question by analyzing cases from around the country that evaluate both civil and criminal investigations, the investigative objective, and any personal involvement by attorneys in the investigations. The article identifies circumstances where the investigative activity overstepped the mark and where investigative situations were ethically acceptable. Finally, it synthesizes common threads to suggest standards for assessing investigative activity. While the following collection of authorities is not exhaustive, they provide guideposts for handling the unique facts of individual investigations. Undertaking any such investigation, however, requires a full reckoning of the facts and law, as well as the lawyer's professional and ethical obligations.

Lawful Investigative Activities

The following cases, largely borne in the civil context of intellectual property, as well as government undercover investigations, demonstrate the types of covert activities that courts have concluded are lawful investigations.

In *Gidatex S.r.L. v. Campaniello Imports, Ltd*., the plaintiff's private investigators surreptitiously taped conversations with the defendant's sales associates.[24] Although the court determined that the defendant's sales associates were represented parties under New York's ethics rule analogous to ABA RPC 4.2 (prohibiting counsel from communicating with an opposing party represented by counsel in the matter, absent exceptions), the court determined that no ethical violation occurred because the investigators "did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine . . . ."[25] More important, the court held that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation."[26]

Along with *Gidatex*, *Apple Corps Ltd. v. International Collectors Society* is perhaps the most well-known case addressing lawful investigative activities.[27] In *Apple Corps*, the defendant had been required to stop selling stamps depicting a protected trademark.[28] The plaintiffs' lawyers and investigators called the defendant's sales associates and tried to order those stamps featuring the trademarked image by deceptively presenting themselves as actual customers.[29] The defendant requested sanctions for this "deceitful" conduct, but the court rejected the request because the misrepresentation went only to identity and was made "solely for evidence-gathering purposes."[30] The court highlighted that 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."[31]

Similarly, in *Cartier v. Symbolix, Inc.*, a renowned jeweler-watchmaker believed the defendant, an independent jeweler, was violating its trademark by adding diamonds to cheaper Cartier watches and then passing off those watches as expensive original models.[32] The plaintiff hired a private investigator and tasked an assistant to accompany the investigator to pretend to buy one of the fake watches.[33] The defendant sought an injunction to prevent Cartier from using information discovered in the undercover investigation,[34] but, like the courts in *Apple Corps* and *Gidatex*, the court rejected the request, reasoning again that 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."[35]

In *Turfgrass Group, Inc. v. Northeast Louisiana Turf Farms, L.L.C.*, the court likewise upheld the plaintiff's lawyer's use of undercover investigators who posed as customers to detect whether the target-defendant was properly selling the product it represented.[36] This court, too, repeated that the "prevailing understanding" was that a "public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed."[37]

Finally, in *People v. Morley*, the Colorado Supreme Court upheld the actions of undercover investigators conducting a covert investigation that surreptitiously recorded a lawyer setting up a prostitution ring in Denver.[38] The supreme court recognized that while the undercover investigation was "built on deceit," lawful government activity investigating crime "is not confined to behavior suitable for the drawing room."[39]

Investigative Activities that are Unlawful or do not Authorize Deception

On the other hand, where a lawyer's conduct or the investigation itself so clearly exceeded ethical boundaries, courts have imposed sanctions and deemed the investigation unlawful. In each of these cases, however, the lawyer's behavior would have fallen outside any investigatory exception authorizing deception, including Colorado's amended Rule 8.4(c).

Perhaps the most stunning violations occurred in the companion cases of *In re Crossen*[40] and *In re Curry*.[41] These cases involved facts almost too extreme to be believed. Private attorneys attempted to coerce a judge's law clerk into implicating the judge in a suspected corruption scandal.[42] To coerce the clerk, the attorneys set up an elaborate "sham interview" in which they flew the clerk to Nova Scotia under the pretext of interviewing the clerk for a position as in-house counsel for a fake multinational cooperation.[43] They then conducted a second sham interview in New York.[44] The *Crossen* court explained that even government attorneys, while permitted to conduct undercover investigations, remained "subject not only to ethical constraints, but also to supervisory oversight" and "stringent constitutional requirements of fair and impartial justice."[45]

The *Curry* court noted that

> [w]ith no motive other than his own financial gain . . . [the lawyer] developed and participated in an elaborate subterfuge whose purpose was to induce or coerce [a] judge's former law clerk into making statements that the law clerk otherwise would not have made about the judge and her deliberative process . . . .[46]

The *Curry* court rejected the argument that lawyers regularly use similar undercover techniques; instead, distinguishing the lawyer's tactics from lawful ones, the court ruled that "[the lawyer]'s scheme is different from such investigations not only in degree but in kind."[47] It noted approvingly, however, that discrimination testers or investigators can "pose as members of the public in order to reproduce pre-existing patterns of conduct."[48]

Finally, in *Leysock v. Forest Laboratories, Inc.*, the court, applying the governing principles from *Curry* and *Crossen*, had little difficulty determining that the subterfuge and "investigation" did not fall within any "investigative exception" to the analogous Massachusetts rule.[49] The investigation at issue concerned a fake survey distributed to physicians to gain access to confidential patient treatment files.[50] The court recognized the narrow investigative exception articulated in *Curry* and *Crossen*, which permitted prosecutors and other government attorneys to conduct undercover criminal investigations—typically requiring "some level of deception or misrepresentation"—and civil attorneys to use investigators to obtain information otherwise normally available to any member of the public "making a similar inquiry."[51] Such civil investigations included using "prospective renters," "consumers," or "testers" to pose as actual renters or consumers to gather evidence of improper conduct such as housing or product discrimination.[52]

Turning to the survey materials themselves, the court condemned the deception as "far exceed[ing]" any investigative exception because the surveys were not seeking information otherwise "readily available" to the public who would have been seeking products and services.[53] On the contrary, the deception was extraordinarily invasive, intruding upon "one of the most sensitive and private spheres of human conduct, the physician-patient relationship."[54] The court was especially displeased that the lawyers *published* the survey results.[55]

Targets With Retained Counsel in the Matter

One additional minefield concerns pretextual investigations where the investigative target is represented by counsel in the matter, particularly where litigation already is underway.

In *McClelland v. Blazin' Wings, Inc.*, which predated Colorado's Rule 8.4(c) amendment, the plaintiff's lawyers hired a private investigator after filing a lawsuit alleging personal injuries following an incident at the defendant's bar.[56] Without disclosing that he worked for plaintiff's counsel, the investigator surreptitiously interviewed the defendant's bartender.[57] The United States District Court for the District of Colorado found that the "surreptitiously recorded interview . . . occurring on the day this action was commenced" was improper.[58] Importantly, the court also found a violation of Colo. RPC 4.2.[59]

The timing of the investigation troubled the court, as the lawsuit had already been filed.[60] What's more, counsel represented the defendant in the matter.[61] Under Colo. RPC 4.2, once a lawyer knows a party is represented by counsel, the lawyer cannot communicate with anyone who has the power to bind the opposing party, either directly or indirectly through another, without that opposing party's counsel's consent; this is so regardless of whether the communication involves deception.[62]

Even under Colorado Rule 8.4(c), as amended, the conduct of plaintiff's counsel still would have run afoul of Colo. RPC 4.2, because counsel's investigator contacted someone known to be represented in the matter. However, the plaintiff's investigator could have used deception to talk to a bystander witness, a person who had no authority to bind the defendant. The investigator also could have proceeded if an exception to Colo. RPC 4.2 had applied.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,[63] the defendant's lawyer hired an investigator to pose as a customer and secretly record conversations with the plaintiff's employees to determine that the employees had not suffered a loss of business because of the defendant's conduct.[64] The Eighth Circuit held that where information "could have been obtained properly through the use of formal discovery techniques," doing so using undercover, pretextual investigation was unlawful.[65]

Importantly, in *Midwest Motor Sports*, the investigator was secretly taping employees while trying to induce incriminating statements.[66] Indeed, the investigator endeavored to trick the employees to say something they otherwise would not have said.[67] Further, as in *McClelland*, the *Midwest Motor Sports* court determined that because the investigative target had retained counsel *in that matter*, the investigation no longer implicated only Rule 8.4(c); instead, Rule 4.2 constrained defense counsel's ability to conduct a lawful investigative activity.[68]

Of course, neither *McClelland* nor *Midwest Motor Sports* addressed a version of Rule 8.4(c) containing an exception for deceit in lawful investigative activities.[69]

Another case, *Hill v. Shell Oil Co.*, confirmed that pretextual investigations are acceptable in the context of having investigators pose as ordinary customers to discover whether the investigative target is discriminating in its selling practices—particularly against minorities or based on immutable characteristics. In *Hill*, the class action plaintiffs alleged that the defendant oil company and dealerships required African-American customers to prepay for gasoline but allowed Caucasian customers to pump first then pay.[70] Importantly, the defendants alleged violations of Illinois Rules of Professional Conduct 4.2 and 4.3—which the court rejected—and not a violation of Rule 8.4(c).[71] The court determined that although the defendant's station employees were represented parties under Illinois's Rule 4.2, it declined to find that *any* contact with such represented employees constituted a violation, particularly where the investigators-posing-as-customers interacted with the station employees in the course of normal customer business transactions.[72] The court recognized a "discernable continuum" of acceptable conduct.[73] It explained that while investigators "cannot trick protected employees into doing or saying things they otherwise would not do or say" or "interview protected employees or ask them to fill out questionnaires," they could, as the plaintiff-investigators did here, be "employ[ed as] persons to play the role of customers seeking services *on the same basis as the general public.*"[74] Investigators even could "videotape protected employees going about their activities" in a normal course of business.[75]

A Lawyer's Personal Participation Remains Prohibited (in most jurisdictions)

There remains one lingering concern: Can a lawyer be personally involved in a pretextual investigation? The answer, as a general matter, is a firm *no*. Courts and states' rules take a dim view of a lawyer's personal participation. The language of Colorado's amended Rule 8.4(c) is clear, as is its jurisprudential backdrop: Personal participation is not permitted.

Among the best-known cases involving unethical personal participation in deceptive investigative activities is *In re Pautler*.[76] In *Pautler*, a district attorney in Colorado personally presented himself as a public defender to achieve the peaceful surrender of a barricaded axe murder suspect.[77] The Colorado Supreme Court held that "[p]urposeful deception by an attorney licensed in our state is intolerable," even under those circumstances.[78] It further stated that the then-unamended Rule 8.4(c) was "devoid of any exception" for law enforcement investigations.[79] It rejected *Pautler*'s proposed "imminent public harm" and "duress and choice of evils" exceptions.[80]

The result in *Pautler* would not change under Colorado's amended Rule 8.4(c), first and foremost because of the lawyer's personal participation.[81] But equally fatal is that there was no lawful investigative activity; rather, Pautler fraudulently impersonated an opposing counsel, thereby lying directly to a suspect and eviscerating that suspect's trust in subsequent defense counsel (to say nothing of the legal system on the whole).[82] None of these effects is sanctioned by Colorado's Rule 8.4(c), and the spirit of the Rule does not embrace such collateral damage.

Likewise, in *People v. Reichman*, the Colorado Supreme Court disapproved of a lawyer's personal involvement in deceit.[83] But the crux of *Reichman* is mind-boggling: A district attorney, in attempting to establish a police officer's undercover identity while investigating drug trafficking, filed fake criminal charges, staged a fictitious arrest, and had the officer appear in court and make false statements to the judge, all without the judge's knowledge.[84] Yet, the propriety of the undercover investigation itself was never contested.

Finally, two social media-related cases bear mentioning. In *Disciplinary Counsel v. Brockler*, an assistant district attorney *personally* created a fake Facebook persona to contact a defense alibi witness to elicit information to refute the defendant's alibi defense.[85] As in *Pautler*, the Ohio Supreme Court held that attorneys could not personally participate in covert investigative activities, although it recognized that lawyers could supervise such investigations.[86] Most recently, the Pennsylvania Supreme Court suspended a district attorney for creating a fake Facebook page and urging her office's attorneys and investigators to use the fake page "to befriend defendants or witnesses if you want to snoop."[87] Citing *Pautler*, the court emphasized that lawyers cannot personally participate in covert investigations, and—unlike Colorado—Pennsylvania had no "investigation exception that allows prosecutors to engage in activity prohibited by RPC 8.4(c)."[88]

Considerations for Assessing Investigations

While each investigation requires careful consideration of its own unique circumstances and goals, the above cases provide guidance to attorneys when handling any contemplated investigation. Key takeaways include:

- Personal involvement is prohibited. Colorado's amended Rule 8.4(c) is clear on this point, as are most other states' approaches, and case law routinely takes a critical view when lawyers are themselves involved. While some states may authorize it, care should be exercised.
- When assessing the lawfulness of the underlying investigation, whether it is being conducted by a prosecutor or government attorney versus a civil practitioner makes a difference. In civil matters, additional factors may include whether the investigation is simply trying to collect evidence generally available to members of the public; whether the investigation is designed to reproduce a target's behavior; the investigation's degree of intrusiveness; and whether other avenues for gathering the evidence exist. Note, however, that Colorado's amended Rule 8.4(c) does not distinguish between public and private lawyers. Nor do the overwhelming majority of states that permit private civil practitioners to oversee pretextual investigations. Rather, it is in the context of assessing the "lawful investigative activity" that such a distinction can arise.
- A number of lawful investigative activities have received court approval, including undercover police operations, housing and product discrimination testers, and certain intellectual property/trademark infringement investigations. Studying these cases to determine what has gone right (or wrong) can be helpful.
- Investigations designed to re-create situations where a member of the public could pursue a similar inquiry and receive an inappropriate or discriminatory response are more likely to be approved than investigations designed to entrap a target.
- Investigations that perpetrate a fraud on the court are generally unlawful.
- Investigations designed to circumvent proper discovery procedures or to gain access to otherwise confidential or privileged information generally meet with disapproval.
- Pretext or no, a lawyer must comply with Rule 4.2 when the investigative target is represented by counsel in the matter, particularly if a legal proceeding is already underway.
- Many states with similar exceptions consider investigations lawful where 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. Colorado's Rule 8.4(c), however, does not contain such a qualification.

Conclusion

Court and ethics opinions provide significant guidance on what constitutes unlawful investigative activities, but each lawyer must use his or her own best professional and ethical judgment in determining how to proceed. While the above considerations can assist the analysis, these factors are just a starting point.[89] Ultimately, the responsibility to ensure ethical compliance is the lawyer's own.

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[1] *See* American Bar Association, Standards for Criminal Justice: Prosecutorial Investigations (hereinafter Standards for Criminal Justice) at Standards 26-1.2 and 26-1.3; *see also id.* at Standard 26-1.3, Commentary to Subdivision 26-1.3(g) (Ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations."), Comment, Federal Trade Commission, In the Matter of Rules Governing Professional Conduct, Rule 8.4, 2017 WL 4631427 (F.T.C.) (Sept. 5, 2017); *see also* Minutes of Meeting of Standing Committee on the Rules of Professional Conduct (hereinafter Minutes) at 5 (July 13, 2012), www.courts.state.co.us/userfiles/file/7- 13-12%20minutes(1).pdf. (recognizing that absent an amendment, to "choose not to know what their investigators are actually doing in the field" government lawyers would "distance[] themselves from the actual investigations").

[2] Colo. RPC 8.4, cmt. [2].

[3] *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Ore. 2004).

[4] Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. Legal Ethics 31, 75 (Winter 2018).

[5] *Id.* at 75--76.

[6] ABA Standards for Imposing Lawyer Sanctions, Standard 5.1 (amend. Feb. 1992), www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.auth *see also In re PRB Docket No. 2007-046*, 989 A.2d 523, 528 (Vt. 2009) (recognizing that a broad reading of Model Rule of Professional Conduct Rule 8.4(c) would render Rule 4.1 "entirely superfluous"). Rule 4.1 provides for a lawyer's responsibility of truthfulness in statements to others. Specifically, in the course of representing a client, a lawyer "shall not" knowingly make a false statement or fail to disclose a material fact when necessary. Of course, as discussed later in the article, Colorado's amended Rule 8.4(c)—as with almost every other state that has adopted an investigatory exception—still prohibits a lawyer from *personally* engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. In this respect, the investigatory exception under Colorado's amended Rule 8.4(c) does not alter the requirements under Rule 4.1.

[7] *See, e.g.*, *Lewis v. United States*, 385 U.S. 206, 209 (1966) (recognizing the propriety of concealing and misleading agents' identities in investigations).

[8] *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

[9] Kevin C. McMunigal, *A Discourse of the ABA's Criminal Justice Standards: Prosecution and Defense Functions: Investigative Deceit*, 62 Hastings L.J. 1377, 1392 (2011). Defense scholars also recognize that "defense lawyers often face the same barriers to uncovering the truth as police and prosecutors" and "allowing lawyers to supervise undercover investigations is generally a positive one," in no small part because doing so "not only help[s] uncover the truth, but [is] unlikely . . . to generate a negative public reaction." Peter A. Joy and Kevin C. McMunigal, *Deceit in Defense Investigations*, 25 (3) Crim. Just. 36, 39 (2010).

[10], *See* Standards for Criminal Justice, *supra* note 1, Standards 26-1.2, 26-2.2, and 26-2.3 (3d ed. ABA 2014).

[11] *See* David B. Isbell and Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 802 (1995).

[12] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

[13] Trade Regulation Reports, Letter No. 1529, Trade Reg. Rep. 4168475 at 16 (2017).

[14] Colo. RPC 8.4(c) (2016).

[15] Colo. RPC 8.4(c) (emphasis added). *See* Rule Change 2017(09), www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2017/Rule%20Chang The court has since amended the rule, changing the word "or" in "including clients, law enforcement officers, *or* investigators" to ". . . *and* investigators." *See* Rule Change 2019(17), www.court.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2019/Rule%20Change (emphasis added).

[16] Brief of Petitioner at 1--3, *In re*: Coffman v. Office of Attorney Regulation Counsel, No. 17SA92 (Colo. May 5, 2017) (hereinafter "*Coffman v. OARC*"); *see also* Kieran Nicholson, *Rules complaint leads JeffCo DA to disband child sex offender internet unit*, The Denver Post, Dec. 16, 2016, *available at* https://www.denverpost.com/2016/12/16/jeffco-da-child-sex-offender-internet-cheezo/.

[17] *Coffman v. OARC*, at 3.

[18]. *Id.* at 3-4; *see also* Jesse Paul, *Colorado AG halts all in-house undercover investigations amid ethics questions about "CHEEZO" unit*, The Denver Post, May 12, 2017, *available at* https://www.denverpost.com/2017/05/12/jeffco-cheezo-unit-ethics-concerns/. The Denver Post published editorials calling for a rule change and urging that law enforcement be allowed to continue using pretext in undercover investigations to stop online sexual predators. *See* DP Opinion, *Continue undercover investigations to stop online sexual predators*, The Denver Post, May 16, 2017, *available at* https://www.denverpost.com/2017/05/16/continue-undercover-investigations-to-stop-online-sexual-predators/; *see also* Denver Post Editorial Board, *CHEEZO closure a wake-up call for rule change*, The Denver Post, Dec. 30, 2016, *available at* https://www.denverpost.com/2016/12/31/cheezo-closure-a-wake-up-call-for-rule-change/.

[19] *See Coffman v. OARC*.

[20] *See* Rule Change 2017(09), *supra* note 15; *see also* Jesse Paul, *Colorado Supreme Court clears lawyers to participate in investigations involving deceit, subterfuge*, The Denver Post, Sept. 29, 2017, *available at* https://www.denverpost.com/2017/09/29/lawyers-cleared-investigations-involving-deceit-subterfuge/.

[21] *See, e.g.*, Alaska RPC 8.4 cmt [4] (allowing lawyers to advise and supervise "lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights" where 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," but prohibiting the lawyer from "participat[ing] directly"); Fla. St. Bar R. 4-8.4(c) (providing exception 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"); Iowa RPC 32:8.4(c), cmt [6] (permitting lawyers to advise clients or to "supervise or participate in lawful covert activity or in the investigation of violations of civil or criminal law or constitutional rights in lawful intelligence-gathering activity" where 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"); Ohio RPC 8.4(c), cmt. [2A] (exception permits lawyer to supervise or advise about "lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law"); Ore. RPC 8.4(b) ("[I]t 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," and defining "covert activity" as an investigation employing "misrepresentation or other subterfuge" that requires a good faith belief about the existence or imminence of unlawful activity); Wis. SCR 20:4:1(b) and Committee Comment (2007) (authorizing lawyer to advise or supervise others with respect to lawful investigative activities, including where the "conduct involves some form of deception" such as using discrimination testers or undercover detectives investigating theft in the workplace, 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," but recognizing that "serious questions arise" if the lawyer personally participates in the deception).

[22] *See, e.g.*, Ala. RPC 3.8(2) cmt. (allowing exception for prosecutors to "order, direct, encourage and advise with respect to any lawful governmental action" involving pretext or "the making of false statements," although they may not personally do so); D.C. Bar R. 4.2, cmt. [12] ("This rule is not intended to enlarge or restrict the law enforcement activities . . . authorized and permissible under the Constitution and law of the United States," and stating that the "authorized by law" provision is "intended to permit government conduct that is valid . . . and is meant to accommodate substantive law as it may develop"); Mo. Sup. Ct. RPC 4-8.4(c) and cmt. [3] (providing exception for lawyers employed by criminal law enforcement agency, regulatory agency, or state attorney general to participate in undercover investigation if authorized by law to conduct such investigation); N.C. RPC 8.4, cmt. [1] (rule "does not prohibit 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"); Tenn. RPC 8.4(c), cmt. [5] (allowing prosecutors to use or direct investigative agents to use "deceitful" investigative techniques); Wyo. RPC 3.8(b), cmt. [2] (authorizing

prosecutors to participate “directly or indirectly in constitutionally permissible investigative actions” and permitting prosecutors to “ethically advise law enforcement” about the “full range of constitutionally permissible investigative actions”).

[23] *See, e.g.*, Ariz. Ethics Op. 99-11 (Sept. 1999) (“It is many times essential for a lawyer to use ‘testers’ in order to meet the attorney’s responsibilities under the ethical rules,” and “when a lawyer directs a tester or investigator to make misrepresentations solely about their identity or purpose in contacting the person or entity who is the subject of investigation” for the purpose of “gathering facts before filing a lawsuit,” the lawyer does not violate the Rules.); Va. Legal Ethics Op. 1738 at 10, 12 (Apr. 2000) (“Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations.”); s*ee also* Utah Ethics Advisory Op. 02-05, ¶ 10 (Mar. 2002) (“[A] state or federal prosecutor’s or other governmental lawyer’s otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation.”).

[24] *Gidatex S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 120--21 (D.N.Y. 1999).

[25] *Id*. at 126.

[26] *Id*. at 122.

[27] *Apple Corps Ltd. v. Int’l Collectors Soc’y*, 15 F. Supp. 2d 456 (D.N.J. 1998).

[28] *Id*. at 460.

[29] *Id*. at 461-65.

[30] *Id*. at 472, 475.

[31] *Id.* (emphasis added).

[32] *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 356--57 (S.D.N.Y. 2005).

[33] *Id*. at 356-57.

[34] *Id.* at 357.

[35] *Id*. at 362 (quoting *Gidatex*, 82 F. Supp. 2d at 123 and citing *Apple Corps*, 15 F. Supp. 2d at 475) (emphasis added).

[36] *Turfgrass Group, Inc. v. Northeast La. Turf Farms, LLC*, 2013 WL 6145294 (W.D. La. Nov. 20, 2013).

[37] *Id.* at *4 (quoting *Cartier*, 386 F. Supp. 2d at 362).

[38] *People v. Morley*, 725 P.2d 510, 514-15 (Colo. 1986).

[39] *Morley*, 725 P.2d at 515 (citation and internal quotations omitted).

[40] *In re Crossen*, 880 N.E.2d 352 (Mass. 2008).

[41] *In re Curry*, 880 N.E.2d 388 (Mass. 2008).

[42] *Crossen*, 880 N.E.2d at 357-58, 384; *Curry*, 880 N.E.2d at 395.

[43] *Crossen*, 880 N.E.2d at 358-59; *Curry*, 880 N.E.2d at 396-97.

[44] *Curry*, 880 N.E.2d at 410; *see also Crossen*, 880 N.E.2d at 360-62 (in New York, the lawyers had an investigator reprise his role as a fake employee of the fake multinational corporation).

[45] *Crossen*, 880 N.E.2d at 378.

[46] *Curry*, 880 N.E.2d at 392.

[47] *Id*. at 404-05; *see also Crossen*, 880 N.E.2d at 371 ("Far less baroque falsehoods have been sanctioned as violating an attorney's obligation to eschew fraud, dishonesty, and deceit in professional dealings.").

[48] *Id*.

[49] *Leysock v. Forest Laboratories, Inc.*, 2017 WL 1591833 at *8-9 (D. Mass. 2017).

[50] *Id.* at *6-9.

[51] *Id.* at *6-8.

[52] *Id*. at *6.

[53] *Id*. at *8-9.

[54] *Id*. at *10.

[55] *Id*. at *11.

[56] *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1075-76 (D. Colo. 2009).

[57] *Id.*

[58] *Id*. at 1080.

[59] *See id*. at 1077-78.

[60] *Id*. at 1075-76.

[61] *Id.* at 1077.

[62] *See* Colo. RPC 4.2. "Communication with Person Represented by Counsel," which provides that "[i]n 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."

[63] *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 695-96 (8th Cir. 2003).

[64] *Id.* at 695-96.

[65] *Id.* at 699; *but see Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879-80 (N.D. Ill. 2002) (rejecting defendants' reliance on *Midwest Motor Sports* and its challenge, under Rule 4.2, to evidence obtained by undercover investigators investigating racial discrimination in gasoline sales, specifically whether African-American customers were the only customers required to pre-pay) (citing *Gidatex*, 82 F. Supp. 2d at 125-26).

[66] *Midwest Motor Sports*, 347 F.3d at 695, 699. This is one of the many ways *Midwest Motor Sports* is distinguishable from *Gidatex*: in *Gidatex*, the investigators were simply recording the "normal business routine," 82 F. Supp. 2d at 126, but in *Midwest Motor Sports*, the investigator was secretly taping employees while trying to *induce* incriminating statements, 347 F.3d at 695, 699. Further, in *Midwest Motor Sports*, the surreptitious record itself violated the state's ethics rules, *see* 347 F.3d 699--700, but in *Gidatex*, hiring private investigators was an accepted investigative technique, *see* 82 F. Supp. 2d at 122.

[67] *Id*. at 695, 699-700; *accord Curry*, 880 N.E.2d at 392, 404-05.

[68] *Midwest Motor Sports*, 347 F.3d at 696-98.

[69] *See id*. at 699; *McClelland*, 675 F. Supp. 2d at 1079-80.

[70] *Hill*, 209 F. Supp. 2d at 877.

[71] *Id.* at 878-79.

[72] *Id*. at 779--80 (applying *Apple Corps*, 15 F. Supp. 2d 456; and *Gidatex*, 82 F. Supp. 2d 119).

[73] *Id.* at 779.

[74] *Id.* (emphasis added).

[75] *Id.*

[76] *In re Paulter*, 47 P.3d 1175 (Colo. 2002).

[77] *Id*. at 1176--78.

[78] *Id*. at 1176.

[79] *Id*. at 1179.

[80] *Id*. at 1180--81.

[81] *Id*. at 1179 & n.4.

[82] *Id.* at 1183.

[83] *People v. Reichman*, 819 P.2d 1035, 1035--36 (Colo. 1991).

[84] *Id*. at 1036.

[85] *Disciplinary Counsel v. Brockler*, 48 N.E.3d 557, 558--60 (Ohio 2016).

[86] *Id.*

[87] *Office of Disciplinary Counsel v. Mill*er, No. 32DB2017 (Pa. Feb. 8, 2019), www.pacourts.us/assets/opinions/DisciplinaryBoard/out/32DB2017-Miller.pdf, at 19.

[88] *Id.* at 31.

[89] *See also* Colo. Bar Ass'n Comm. on Ethics, Formal Op. 137, *Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation* (May 2019) (addressing amended Colo. RPC 8.4(c), including interaction with other rules of professional conduct and common scenarios).

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