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Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation

Adopted May 2019

I. Introduction and Scope

In September 2017, the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) adding this exception:

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.

(Emphasis added.) No comment accompanied this change.

This opinion discusses the implications of this exception, the permissible limits of a lawyer's involvement in investigative activities, the exception's effect on other Rules, and some commonly recurring situations in which the exception may apply.

II. Syllabus

Revised Rule 8.4(c) permits a lawyer to “advise, direct, or supervise others,” including clients, law enforcement officers, and investigators, who participate in lawful investigative activities involving dishonesty, fraud, deceit, or misrepresentation. Left unchanged is the ethical

prohibition against a lawyer personally participating in activities involving dishonesty, fraud, deceit, or misrepresentation, regardless of the lawfulness of those activities.

Whether an investigative activity is “lawful” is a mixed question of fact and law. While this opinion provides some guidance regarding this question, a lawyer asked to advise, direct, or supervise an investigative activity should conduct independent research based on the facts and circumstances of a particular case.

In general, criminal investigations are likely to be considered “lawful investigative activities” even if they involve dishonesty, fraud, deceit, and misrepresentation, provided those activities are not designed to mislead courts or other tribunals. In civil matters, investigative activities are likely to be considered lawful if they are designed to ferret out violations of constitutional, statutory, or common law. This is especially true if the conduct involves posing as customers or other members of the public and does not involve attempts to induce or coerce a subject into making statements or taking action that the subject would not otherwise have taken.

III. Discussion and Analysis

A. Policy Underpinnings of Rule 8.4(c)

Rule 8.4(c) protects against conduct that “jeopardizes the public’s interest in the integrity and trustworthiness of lawyers.” *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Or. 2004). Colorado’s Office of the Presiding Disciplinary Judge has endorsed this view, stating that “dishonesty . . . encompasses fraudulent, deceitful, or misrepresentative conduct evincing ‘a lack of honesty or integrity in principle; a lack of fairness and straightforwardness.’” *People v. Katz*, 58 P.3d 1176, 1189 (Colo. OPDJ 2002) (quoting *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990)); *People v. Schmeiser*, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact). The focus of the Rule is on dishonesty “which encompasses fraudulent, deceitful, or

misrepresentative behavior.” *Shorter*, 570 A.2d at 767 (construing prior DR 1-102(A)(4)); *see also Conduct of Carpenter*, 95 P.3d at 208–09 (“[C]onduct involving ‘dishonesty’ is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity” (internal quotations omitted)).

The United States Supreme Court has long recognized the propriety of using undercover agents, pretext, and deception in lawful investigations. *See Lewis v. U.S.*, 385 U.S. 206, 209 (1966) (“the Government is entitled to use decoys and to conceal the identity of its agents”). The Colorado Supreme Court has similarly approved deception in criminal investigations, observing that many crimes simply “could not otherwise be detected unless the government is permitted to engage in covert activity.” *People in the Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988); *see also People v. Bailey*, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities); *People v. Nelson*, 296 P.3d 177, 184 (Colo. App. 2012) (policeman’s ruse of falsely identifying himself as “maintenance” causing defendant to open apartment door held not to render subsequent entry unlawful); *People v. Roth*, 85 P.3d 571, 574 (Colo. App. 2003) (police use of fictitious drug checkpoint was lawful and did not require suppression of evidence); *People v. Zamora*, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext in asking to inspect apartment for fictitious crime did not render consent to warrantless search involuntary; whether conduct is lawful turns on whether defendant’s consent is voluntary).

The Committee also has recognized that a lawyer’s involvement in lawful criminal or civil regulatory investigations can ensure that the investigation complies with constitutional parameters, “as well as high professional and ethical standards.” CBA Formal Op. 96, “Ex Parte

Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings” (rev. 2012) (CBA Op. 96).

The American Bar Association (ABA) instructs prosecutors to “provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use,” and that ethical rules “should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve ‘deceit.’” *See* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Standard 1.3(g); *see also* H. Morley Swingle & Lane P. Thomasson, Feature: *Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (Mar.-Apr. 2013) (“A prosecutor would not be doing his job effectively if he or she refused ... to help [an] officer prepare to conduct a lawful covert operation[.]”).

B. Lawyers May Not Personally Participate in Dishonesty, Fraud, Deceit, or Misrepresentation

While recognizing the value of deception as a tool for law enforcement and of lawyer oversight of such investigations, courts have drawn a clear line between a lawyer advising and supervising covert activities and personally participating in them.

Prior to the revision of Rule 8.4(c), the Colorado Supreme Court refused to recognize any exception that would allow a lawyer to personally engage in deceptive activities, even under the most extenuating of circumstances. In *In re Pautler*, 47 P.3d 1175 (Colo. 2002), a prosecutor was disciplined for impersonating a public defender in an attempt to achieve the peaceful surrender of a barricaded axe murderer who had demanded to speak to a public defender as a condition of his surrender. *Id.* at 1176–77. The Colorado Supreme Court held that then-existing Rule 8.4(c) made no exception for investigatory activities. *Id.* at 1179. Instead, the court repeatedly emphasized that lawyers must not personally engage in behavior “that involves deceit

or misrepresentation” even during investigative activities. *Id.* at 1180; *see also In re Gatti*, 8 P.3d 966 (Or. 2000) (reaching a similar result under an older version of Oregon’s counterpart to Rule 8.4(c)).

Revised Rule 8.4(c) does not alter the result in *Pautler*, but makes clear that a lawyer may “advise, direct, or supervise others,” including clients, law enforcement officers, and investigators, who participate in “lawful investigative activities” involving dishonesty, fraud, deceit, or misrepresentation.

C. *Lawful Investigative Activities*

Revised Rule 8.4(c) applies to all Colorado lawyers. Whether the exception created by revised Rule 8.4(c) applies in a particular circumstance turns on a legal question: “What constitutes a lawful investigative activity?” In cases determining whether deception was used in pursuit of “lawful investigative activities,” there is a “discernable continuum” of conduct ranging “from clearly impermissible to clearly permissible” actions. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

Existing case law on what constitutes “lawful investigative activities” may be distilled into several guiding principles. Caution must be exercised in applying existing law, however, as material differences exist between revised Rule 8.4(c) and the Rules in other jurisdictions.

First, hiring investigators to pose as customers or consumers is a proper, lawful investigative technique. Such a ruse is designed to ferret out ongoing wrongdoing, such as discrimination or inappropriate use of a product or trademark infringement that would be otherwise difficult, if not impossible, to discover without the deception. Courts traditionally have allowed pretextual or undercover investigations in civil rights cases and, somewhat less consistently, in intellectual property investigations. Lawyers “can employ persons to play the

role of customers seeking services on the same basis as the general public.” *Hill*, 209 F. Supp. 2d at 880.

Second, investigators must take care not to induce or coerce the target of an investigation into making statements he or she otherwise would not have made to a member of the public. Investigators “cannot trick employees into doing things or saying things they otherwise would not do or say.” *Id.* A proper investigation should merely “note or reproduce” a witness’s usual behavior. An operation designed to induce someone into doing or saying something he or she would otherwise not do or say, would likely not qualify as a lawful investigation. *In re Curry*, 880 N.E.2d 388, 405 (Mass. 2008).

Third, any deception should not *impede* a lawful investigation. *See In re Malone*, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel); *accord In re Friedman*, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding an ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

Fourth, lawyers may not affirmatively mislead a court or other tribunal. *See People v. Reichman*, 819 P.2d 1035, 1036 (Colo. 1991) (holding that a lawyer may not knowingly deceive the judicial system by filing false criminal charges to bolster an undercover investigator’s credibility); *see also* Colo. RPC 3.3(a).

Fifth, relevant considerations in a civil investigation include whether the investigation was a “straightforward effort to gather evidence”; whether the investigation is “designed to reproduce the subject’s usual behavior” or was designed to “trick” the subject into doing something atypical; whether the investigation is gathering information “readily available to the public”; the degree of intrusiveness of the investigation (with less intrusive investigations less

likely to run afoul of constraints on permissible lawful investigative activities or ethical rules); whether those targeted by the investigation are “suspected wrongdoers”; whether there are other ways to collect evidence of the wrongdoing; and whether a supervisory lawyer has reviewed and approved the investigation. *See* Judy Z. Kalman & Mariya Treisman, *Pretextual Investigative Techniques and the Rules of Professional Conduct*, NAGTRI J., Vol. 3, Issue 1 (Feb. 2018) (collecting cases).

Finally, a number of states have defined the scope and contours of “covert activity” for purposes of lawful investigations. For example, Oregon has specifically stated that “lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights” is acceptable, “provided the lawyer’s conduct is otherwise in compliance” with the Rules. Or. RPC 8.4(b). Further, Oregon permits covert activity to be commenced “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.” *Id.*; *accord* Iowa RPC 32:8.4, cmt. [6] (same).

Revised Colorado. RPC 8.4(c) is not so explicit and was adopted without any comment providing guidance to lawyers, government or private. In drawing guidance from Oregon, Iowa, and other states that have adopted variants of ABA Model Rule 8.4(c), it is important to keep in mind that the express language of such variants and their comments circumscribe the ethical boundaries of a lawyer’s involvement in investigative activities in those jurisdictions. Lawyers practicing in Colorado who are consulted regarding investigative activities must analyze each situation on a case-by-case basis, and exercise their own sound professional judgment, informed by legal research.

D. Relationship to Other Rules

While revised Rule 8.4(c) may seem to be a significant departure from previous standards, it is better viewed as a narrow governing exception. This section considers other Rules potentially affected by revised Rule 8.4(c), starting with those that, at least on their face, are most likely to be affected. After analysis, however, the Committee concludes that many of these Rules are unaffected, or largely unaffected, by revised Rule 8.4(c).

1. Rule 8.4(a) (Misconduct)

Rule 8.4(a) provides: “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. It is a settled rule of statutory construction that “a specific statutory provision prevails over a general provision.” *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1236 (Colo. 1996). The Committee believes that revised Rule 8.4(c)’s express authorization for a lawyer to “advise, direct, or supervise others” “in conduct involving dishonesty, fraud, deceit or misrepresentation” controls over application of the general anti-circumvention rule, so long as the advice, direction, or supervision occurs in furtherance of a “lawful investigative activit[y].”

Further, it is the opinion of the Committee that, even before the enactment of revised Rule 8.4(c), subsection (a) did not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, even if such action involves conduct involving dishonesty, fraud, deceit, or misrepresentation. For example, in Colorado and other states that have adopted a “unilateral consent” rule, it is generally lawful for a nonlawyer to surreptitiously record a conversation to which he or she is a party, though a lawyer may not. *See People v. Selby*, 606 P.2d 45, 47 (1979) (holding a lawyer may not secretly record a conversation with another lawyer or person); CBA Formal Op. 112, “Surreptitious Recording of Conversations or Statements”

(2003). Even before the adoption of revised Rule 8.4(c), a lawyer could have advised a nonlawyer client of his or her legal right to engage in such a surreptitious recording.

2. *Rule 4.1 (Truthfulness in Statements to Others)*

Rule 4.1 provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Because revised Rule 8.4(c) does not permit a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 4.1 and the result in *Pautler* are unaffected. *See* Colo. RPC 4.1, cmt. [1].

3. *Rule 4.2 (Communication with Person Represented by Counsel)*

Rule 4.2 states:

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.

Although revised Rule 8.4(c) permits a lawyer to “advise, direct, or supervise” a nonlawyer where the investigative activity in question is a “lawful investigative activity,” the Committee believes that revised Rule 8.4(c) does not otherwise alter Rule 4.2’s requirements. Investigation is prohibited once the lawyer knows a party is represented by counsel in a matter unless one of Rule 4.2’s exceptions applies. Rule 4.2’s “authorized by law” exception, however, may include “lawful investigative activity” as referenced in revised Rule 8.4(c). *See generally* CBA Op. 96.

4. *Rule 4.3 (Dealing with Unrepresented Person)*

Rule 4.3 provides:

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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Because Rule 4.3 applies to personal contact by a lawyer with an unrepresented party, it is unaffected by revised Rule 8.4(c), which does not authorize a lawyer to personally engage in deceitful conduct.

5. *Rule 4.4(a) (Respect for Rights of Third Persons)*

Rule 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

The Committee believes that conduct in accordance with revised Rule 8.4(c) would not violate the "substantial purpose" clause of Rule 4.4(a). The Committee further believes that, so long as the requirements of revised Rule 8.4(c) are observed, advising, directing, or supervising others in the use of covert or deceitful methods in the course of "lawful investigative activities" cannot be construed to be a violation of another's "legal rights."

6. *Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)*

Rule 5.3 provides:

With respect to nonlawyers employed or retained by or associated with a lawyer:

...

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct *if engaged in by a lawyer* if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added.)

Private investigators hired by a lawyer, whether on a full-time or project basis, as well as government investigators and staff employed by the lawyer, are “nonlawyers employed or retained by or associated with a lawyer.”¹ Rule 5.3 requires a lawyer to make “reasonable efforts to ensure that [such] person’s conduct is compatible with the professional obligations of the lawyer.”

The Committee believes that Rule 5.3’s requirement that a lawyer make “reasonable efforts to ensure . . . conduct is compatible with the professional obligations of the lawyer” includes the determination of whether the conduct the lawyer is recommending, directing, or advising is in furtherance of a lawful investigative activity. Such reasonable efforts may include reviewing the substantive law bearing on whether an investigative activity is lawful, consulting with others on this issue when appropriate, and providing guidance to those the lawyer is advising regarding how to lawfully conduct the activity. For the reasons described in Section III.D.1, revised Rule 8.4(c) provides a narrow exception to Rule 5.3(c) and allows a lawyer to “advise, direct, or supervise” a nonlawyer engaged in “conduct involving dishonesty, fraud,

¹ Process servers, skip tracers, and others hired by a lawyer also fall within the ambit of Rule 5.3, and may fall within the purview of revised Rule 8.4(c) if their tasks include “dishonesty, fraud, deceit or misrepresentation.”

deceit or misrepresentation” so long as that conduct is in furtherance of “lawful investigative activities.”

7. *Rule 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)*

Rule 1.2(d) provides:

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

As discussed above, revised Rule 8.4(c) permits lawyers to advise, direct, and supervise clients in lawful investigative activities that involve “fraud.” To that extent, the revised Rule controls over Rule 1.2(d)’s prohibition on counseling a client to engage in *fraudulent* conduct, but it does not alter the prohibitions on counseling a client to engage or assisting a client to engage in *criminal* conduct.

8. *Rule 3.3 (Candor Toward the Tribunal)*

As noted above in Section III, revised Rule 8.4(c) does not modify a lawyer’s duty of candor to the tribunal under Rule 3.3.

IV. Illustrations

Certain issues regarding investigative activities may arise frequently in a lawyer’s practice, even on a daily basis, such as the supervision of undercover law enforcement investigations.

A. *Private and Government Investigators – Pretextual Investigations*

As noted above, undercover investigations and deceptive investigative techniques are an accepted practice in the detection and prevention of crime. *M.N.*, 761 P.2d 1124, 1135; *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986); *Bailey*, 630 P.2d at 1068. A lawyer’s involvement

in an investigation can ensure that the investigation complies with constitutional standards. CBA Formal Op. 96. Revised Rule 8.4(c) clarifies that a lawyer may advise, direct, or supervise others in lawful criminal investigations, even if those investigations are covert or use deceptive investigative techniques. *See also* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Subdivision 1.3(g).

Revised Rule 8.4(c) also applies in contexts other than criminal investigations. For example, an investigator may pretend to be a homebuyer or renter in order to detect discrimination in housing, pose as a job-seeker to gather evidence of employment discrimination, or purport to be a consumer of certain goods in order to gather evidence of consumer fraud or evidence of trademark or copyright infringement. Pursuant to revised Rule 8.4(c), a lawyer may ethically advise, direct, or supervise such a lawful, albeit deceptive, investigation by an investigator retained by the lawyer or by the lawyer's client. However, the investigation must be "lawful," and the lawyer may not personally participate in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. Surreptitious Recordings

The Committee is aware that in certain situations a lawyer's client or other persons (such as investigators) might wish to record a conversation surreptitiously. For example, a client may want to gather evidence to support a claim for employment discrimination or sexual harassment by recording statements that are being made to the employee in the work place. A party in a dissolution of marriage action may wish to record statements made by the other party that indicate the other party is hiding assets or presents a risk to the safety of the children of the marriage. Or a client may want to record threats of physical harm so that the client can seek a restraining order, support criminal prosecution, or establish evidence to support a civil claim for

intentional infliction of emotional distress. In these situations, it seems unlikely that the person to be recorded would continue to make the statements if they knew they were being recorded.

As previously noted in Section III.D.1., in Colorado it is generally lawful for a nonlawyer client to record a conversation to which he or she is a party without the other party's knowledge, even though a lawyer may not do so. A lawyer, however, should advise a client that any recording should not violate state or federal computer crime, wiretap, or eavesdropping statutes. *See, e.g.*, 18 U.S.C. §2511; C.R.S. § 18-5.5-102; C.R.S. § 18-9-303; C.R.S. § 18-9-304.

Although a lawyer may not communicate with a party who is represented in a matter by another lawyer (unless the other lawyer consents), “[p]arties to a matter may communicate directly with each other.” Colo. RPC 4.2, cmt. [4]. Revised Rule 8.4(c) specifically includes “clients . . . who engage in lawful investigative activities” among those persons that the lawyer may advise, direct, or supervise. Therefore, as long as the recording is lawful, revised Rule 8.4(c) permits a lawyer to advise, direct, or supervise other persons with respect to such recordings, even if made surreptitiously.²

C. Public Records and Social Media

Our society increasingly stores data electronically and uses the Internet to gather information. In addition, social media have become so commonplace it is easy to compile a large amount of information about someone from that person's and the person's friends' and colleagues' postings on social media. In short, public records and social media provide fertile ground for investigating a person or organization.

² The Committee recognizes this conclusion is contrary to the holding in *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1079-80 (D. Colo. 2009). However, that opinion, issued several years ago, was based on Colo. RPC 8.4(c) before its amendment in 2017. The court in *McClelland* relied in part on CBA Formal Op. 112, “Surreptitious Recording of Conversations or Statements” (2003), which also was based on the pre-amendment Rule. *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 11-461, “Advising Clients Regarding Direct Contacts with Represented Persons” (2011).

Important information often can be obtained by investigating through public records and social media without deception. For example, no dishonesty, fraud, deceit, or misrepresentation is required to view and record public postings made by a potential criminal defendant about a crime he or she has committed, or by a personal injury plaintiff showing photos of his or her weekend activities which refute claims of pain and physical disability. These examples involve information that has been made public and is available for anyone to see. Therefore, an investigator or a lawyer may gather such information. *See* CBA Formal Op. 127, “Use of Social Media for Investigative Purposes” (2015).

However, in some instances, information cannot readily be obtained without some form of deception or misrepresentation. One example is law enforcement officers pretending to be someone they are not in order to catch sexual predators using the Internet to lure their victims, or to detect human trafficking, drug smuggling, or other illegal activities. In such instances, information may be obtained only by gaining access to a restricted portion of a social media site by misrepresenting one’s identity or the reason for wanting such access, for example, when an investigator asks to “friend” someone on Facebook without revealing the investigation. Revised Rule 8.4(c) clarifies that a lawyer may advise, supervise, or direct law enforcement in such investigations that involve deception or misrepresentation, but may not personally engage in them.

With regard to situations not involving law enforcement, such as investigating witnesses or gathering information about a party to a case, the Committee believes that revised Rule 8.4(c) now permits a lawyer to ethically advise, supervise, or direct others, including investigators or clients, with respect to use of deceptive means to gather information from a restricted portion of a social media profile or website, as long as it is in the course of a lawful investigative activity,

and as long as the lawyer does not personally engage in such conduct. *See* CBA Formal Op. 127, *supra*.

Addendum: Useful References

Case Law

Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (tester has standing to bring Fair Housing Act claim even though “the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home”).

Lewis v. United States, 385 U.S. 206, 209 (1966) (the “government is entitled to use decoys and to conceal the identity of its agents”).

Hoffa v. United States, 385 U.S. 293, 300 (1966) (discussing witness’s failure to disclose his role as a government informer in context of illegal search and seizure under the Fourth Amendment).

United States v. Szycher, 585 F.2d 443, 447 (10th Cir. 1978) (prohibiting pretextual investigation activities “where the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction”).

McClelland v. Blazin’ Wings, Inc., 675 F. Supp. 2d 1074, 1080 (D. Colo. 2009) (private investigator’s conduct in surreptitiously recording defendant’s employee was improper).

In re Pautler, 47 P.3d 1175, 1179 (Colo. 2002) (pre-amendment Colo. RPC 8.4(c) applied to prosecutor’s conduct in impersonating a public defender).

People v. Reichman, 819 P.2d 1035, 1038-39 (Colo. 1991) (pre-amendment Colo. RPC 8.4(c) prohibition against deception applied to criminal prosecutors).

People v. Smith, 778 P.2d 685, 686 (Colo. 1989) (“the undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound”).

People in the Interest of M.N., 761 P.2d 1124, 1130 (Colo. 1988) (“Unlawful activities performed by a government agent in the course of undercover law enforcement do not necessarily subject the officer to prosecution.”).

People v. Morley, 725 P.2d 510, 514–15 (Colo. 1986) (undercover investigator’s action in surreptitiously recording a lawyer setting up a prostitution ring in Denver was not prohibited).

People v. Bailey, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities).

People v. Vandiver, 552 P.2d 6, 10 (Colo. 1976) (rejecting claim of entrapment “[a]bsent outrageous conduct by the officers violating fundamental standards of due process”).

People ex rel. Attorney Gen. v. Ellis, 70 P.2d 346, 347 (Colo. 1942) (attorney suspended for clandestinely installing espionage paraphernalia in the Governor’s office).

People v. Nelson, 296 P.3d 177, 184 (Colo. App. 2012) (policeman’s ruse of falsely identifying himself as “maintenance,” causing defendant to open apartment door, did not render subsequent entry unlawful).

People v. Roth, 85 P.3d 571, 574 (Colo. App. 2003) (defendant’s plain-view disposal of drug paraphernalia in reaction to police ruse of fictitious drug checkpoint did not require suppression of evidence).

People v. Zamora, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext for asking to inspect apartment did not render consent to warrantless search involuntary).

People v. Schmeiser, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of pre-amendment Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact).

Other Jurisdictions

Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 695 (8th Cir. 2003) (where information “could have been obtained properly through the use of formal discovery techniques,” doing so using undercover, pretextual investigation was unlawful).

Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 879–80 (N.D. Ill. 2002) (rejecting challenge to evidence obtained by undercover investigators investigating racial discrimination in gasoline sales).

Holdren v. General Motors Corp., 13 F. Supp. 2d 1192 (D. Kan. 1998) (recognizing a fine line between advising and suggesting that a client engage in direct contact with a represented party, but concluding the attorney had violated Rule 4.2 via the anti-circumvention prohibition of Rule 8.4(a)).

In re Friedman, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

In re Curry, 880 N.E.2d 388, 408 (Mass. 2008) (lawyer sanctioned for his and his investigator’s dishonest conduct in attempting to coerce a judge’s law clerk to implicate the judge in a corruption scandal).

Apple Corps Ltd. v. Int’l Collectors Soc’y, 15 F. Supp. 2d 456, 475 (D. N.J. 1998) (“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”).

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 357 (S.D.N.Y. 2005) (investigator pretending to buy a fake Cartier not ethically proscribed).

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 125 (S.D.N.Y. 1999) (“hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation”).

In re Malone, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel).

Disciplinary Counsel v. Brockler, 48 N.E.3d 557, 560 (Ohio 2016) (district attorney’s conduct in personally creating a fictitious Facebook account to contact witnesses improper).

In re Conduct of Carpenter, 95 P.3d 203, 208-09 (Or. 2004) (“[C]onduct involving ‘dishonesty’ is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity.”).

In re Gatti, 8 P.3d 966, 973 (Or. 2000) (lawyer’s conduct in misrepresenting he was a chiropractor seeking employment to medical record company warranted public reprimand and constituted conduct involving dishonesty, fraud, deceit, or misrepresentation).

Ethics Opinions

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