

# “Lawful Investigative Activities” and Rule 8.4(c)

BY JOSEPH G. MICHAELS

---

*This article discusses the meaning of “lawful investigative activities” in the 2017 amendment to Colorado Rule of Professional Conduct 8.4(c) and recommends core considerations for appropriate investigative activities under the Rule.*

---

A lawyer should be “professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”<sup>1</sup> This is so because “[n]ot every lawyer misstatement poses th[e] risk” of jeopardizing the public’s trust in the integrity and trustworthiness of lawyers.<sup>2</sup> Thus, a sanction is required only

where a deception “reflects adversely on the lawyer’s honesty, trustworthiness, or fitness” to practice law.<sup>3</sup>

#### **The Rule and the 2017 Amendment**

Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) previously provided that “[i]t is professional misconduct

for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>4</sup> 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.*<sup>5</sup>

This 2017 amendment reflects the exact language recommended in a majority report by a 2011 subcommittee of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, although no action had previously been taken on that proposal.<sup>6</sup> Before adopting the amendment, the Colorado Supreme Court received many written comments largely, but not universally, in favor of the rule change.<sup>7</sup> At a public hearing, the court heard significant testimony—again, largely championing the change—before adopting the amendment.<sup>8</sup> The amended rule does not include any accompanying comment.<sup>9</sup>

Other states have adopted similar amendments authorizing and defining deception in pursuit of covert activities. Some states' rules 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.<sup>10</sup> Other states limit deception exceptions to government lawyers.<sup>11</sup> Finally, several states' ethics committees have come to similar conclusions without amending their analogous rules.<sup>12</sup>

Amended Rule 8.4(c) raises a central question: What is a lawful investigative activity? This article addresses that question by analyzing cases and other authorities from around the country that evaluate both civil and criminal investigations, the investigative objectives, and the personal involvement of attorneys in the investigations. The article identifies circumstances where the investigative activity overstepped the mark and where investigative situations were ethically acceptable, and it synthesizes common threads to suggest standards for assessing investigative activity.

Ultimately, Rule 8.4(c) conveys that a lawyer acts ethically by advising, directing, or supervising—but not personally participating in—otherwise authorized lawful investigations.<sup>13</sup> Indeed, proper advice, direction, and supervi-

“  
Ultimately, Rule  
8.4(c) conveys  
that a lawyer  
acts ethically by  
advising, directing,  
or supervising—  
but not personally  
participating  
in—otherwise  
authorized lawful  
investigations.  
”

sion prevents harm that otherwise might occur when an investigation exceeds the bounds of lawful investigative activities, which happens, for example, when the investigation

- unnecessarily intrudes into individuals' privacy,
- entraps innocent parties,
- violates an individual's constitutional rights,
- intercepts confidential or otherwise privileged communications, or
- negatively impacts a jury's view of a case.<sup>14</sup>

The proper use of pretext in lawful investigative activities thus promotes trust in the legal profession and allows lawyers to ethically fulfill their obligations to clients and the profession.<sup>15</sup> In this respect, amended Rule 8.4(c) is consistent with a lawyer's general ethical obligations.<sup>16</sup>

#### **Pretext as a Necessary Tool**

A “commitment to total truthfulness” can imperil “attorney involvement in undercover investi-

gations and other strategies used . . . to root out evil or even to save lives.”<sup>17</sup> 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.”<sup>18</sup> Likewise, a lawyer's involvement advising, directing, or supervising a lawful investigative activity can protect an investigation's target by ensuring the investigation honors the target's rights.<sup>19</sup>

Both the U.S. Supreme Court<sup>20</sup> and the Colorado Supreme Court<sup>21</sup> have long recognized that deception and pretext are entirely permissible tools of lawful investigations. 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.”<sup>22</sup>

Given the clandestine nature of criminal activity, “[p]rosecutors and police often need to use deceit to find the truth.”<sup>23</sup> Despite highlighting the need for caution, defense scholars have also recognized that “criminal defense lawyers often face the same barriers to uncovering the truth as police and prosecutors” and thus the “trend in favor of openly 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.”<sup>24</sup>

This is equally true of discrimination testers and for investigations into civil 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.”<sup>25</sup> The U.S. Supreme Court has unambiguously approved of deception and pretext in the civil context of 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.<sup>26</sup> Even the Federal Trade Commission tasks investigators to “pose as consumers to gather[] evidence of possible law violations.”<sup>27</sup>

Before Rule 8.4(c) was amended, the Colorado Bar Association Ethics Committee also recognized that a lawyer's involvement

in criminal or civil regulatory investigations protects the constitutional rights of the target and ensures adherence to the “high professional and ethical standards” expected of lawyers.<sup>28</sup> The Federal Trade Commission similarly recognizes that “[a]ttorney engagement in the undercover investigative process *increases accountability* and helps to ensure that the investigative activities are, in fact, lawful.”<sup>29</sup> Indeed, a lawyer’s oversight—supervision, direction, or advice—is preferable to foregoing law enforcement activities or quarantining investigators from their lawyer-supervisors.<sup>30</sup>

Nevertheless, these considerations only lay the groundwork for using pretext in undercover investigations. The question becomes: What are lawful investigative activities? Many courts across the country have weighed in on what constitutes lawful investigative activities, addressing rules identical or similar to Colo. RPC 8.4(c), or applying relevant ethics opinions or comments. While the following collection of authorities is not exhaustive, these cases provide guidance for handling the unique facts of individual investigations. Undertaking any such investigation requires a full reckoning of the facts and law, as well as the lawyer’s professional and ethical obligations.

### Lawful Investigative Activities

In *Gidatex S.r.L. v. Campaniello Imports, Ltd.*, the plaintiff’s private investigators surreptitiously taped conversations with the defendant’s sales associates.<sup>31</sup> Although the court determined that the sales associates were represented parties under New York’s ethics rule analogous to Colo. RPC 4.2, 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 . . . .”<sup>32</sup> More important, the court held that “hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation.”<sup>33</sup>

Along with *Gidatex*, *Apple Corps Ltd. v. International Collectors Society* is perhaps the most well-known case addressing lawful investigative activities.<sup>34</sup> In *Apple Corps*, an

intellectual property case, the defendant had been required to stop selling stamps depicting a protected trademark.<sup>35</sup> The plaintiffs’ lawyers and investigators called the defendant’s sales associates and tried to order those stamps featuring the trademarked image by deceptively

“  
The 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.’  
”

presenting themselves as actual customers.<sup>36</sup> 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.”<sup>37</sup> The court recognized 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.”<sup>38</sup>

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.<sup>39</sup> The plaintiff hired a private investigator and tasked an assistant to accompany the investigator to pretend to buy one of the fake watches.<sup>40</sup> The defendant sought an injunction to prevent Cartier from using information discovered in the undercover investigation,<sup>41</sup> but, like the courts in *Apple Corps* and *Gidatex*, the court rejected the request, reasoning 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.”<sup>42</sup>

In *Turfgrass Group, Inc. v. Northeast Louisiana Turf Farms, L.L.C.*, the court similarly 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.<sup>43</sup> The court recognized 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.”<sup>44</sup>

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—thus accepting pretextual investigative tactics in the very arena of investigating professional ethics violations.<sup>45</sup> In fact, the information from this pretextual investigation later served as the basis for a disciplinary action against the lawyer.<sup>46</sup> The 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.”<sup>47</sup>

## Investigative Activities that are Unlawful or do not Authorize Deception

There are, of course, cases where a lawyer's conduct or the investigation itself so clearly eclipsed ethical boundaries that courts imposed a sanction and deemed the investigation to be unlawful. In these cases, it is readily apparent that the lawyer's behavior would have fallen outside the exception authorized by the Rule 8.4(c) amendment.

Perhaps the most egregious violations occurred in the companion cases *In re Crossen*<sup>48</sup> and *In re Curry*.<sup>49</sup> Those 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.<sup>50</sup> 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.<sup>51</sup> They then conducted a second sham interview in New York, where the attorneys elicited from the clerk the "desired statements disparaging" the judge.<sup>52</sup> The *Crossen* court recognized that even government attorneys, while permitted to conduct undercover investigations, were "subject not only to ethical constraints, but also to supervisory oversight" and "stringent constitutional requirements of fair and impartial justice."<sup>53</sup>

The *Curry* court determined 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 . . . .<sup>54</sup>

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."<sup>55</sup> 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."<sup>56</sup>

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.<sup>57</sup> The investigation at issue in *Leysock* concerned a fake survey distributed to physicians to gain access to confidential patient treatment files.<sup>58</sup> 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."<sup>59</sup> 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.<sup>60</sup>

Turning to the survey materials themselves, the court emphasized that there was "no dispute" that the surveys involved an "elaborate series of falsehoods, misrepresentations, and deceptive conduct."<sup>61</sup> This deception "far exceeded" any investigative exception because the surveys were not seeking information otherwise "readily available" to the public who would have been seeking products and services.<sup>62</sup> Further, the deception was extraordinarily invasive, intruding upon "one of the most sensitive and private spheres of human conduct, the physician-patient relationship."<sup>63</sup> The court was especially displeased that the lawyers *published* the survey results.<sup>64</sup>

## Targets with Retained Counsel in the Matter

When the target is represented by counsel in the matter, the equation changes. For example, before the Rule 8.4(c) amendment, in *McClelland v. Blazin' Wings, Inc.*, the plaintiff's lawyers hired a private investigator after filing a lawsuit alleging personal injuries following an incident at the defendant's bar.<sup>65</sup> Without disclosing that he worked for plaintiff's counsel, the investigator surreptitiously interviewed the defendant's

bartender.<sup>66</sup> The U.S. District Court for the District of Colorado found that the "surreptitiously recorded interview . . . occurring on the day this action was commenced" was improper.<sup>67</sup> Importantly, the court also found a violation of Colo. RPC 4.2.<sup>68</sup>

The timing of the investigation troubled the court, as the lawsuit had already been filed.<sup>69</sup> What's more, the defendant was represented by counsel.<sup>70</sup> Under Rule 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.<sup>71</sup>

Even under Rule 8.4(c), as amended, the conduct of plaintiff's counsel still would have run afoul of Rule 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 Rule 4.2 had applied.

Finally, in *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

To the extent *Midwest Motor Sports* may suggest a conflict with *Gidatex*, or with the above cases permitting or rejecting certain lawful investigative activities, there are several fundamental differences. First, in *Gidatex*, the investigators were simply recording the "normal business routine."<sup>75</sup> But in *Midwest Motor Sports*, the investigator was secretly taping employees while trying to induce incriminating statements.<sup>76</sup> Indeed, in *Midwest Motor Sports*, the investigator endeavored to trick the employees to say something they otherwise would not have said.<sup>77</sup>

Second, in *Midwest Motor Sports*, the surreptitious recording itself violated the state's ethics rules,<sup>78</sup> whereas in *Gidatex* hiring private investigators was an accepted investigative technique.<sup>79</sup>

Third, in *Midwest Motor Sports*, counsel represented all parties in litigation already underway, and the information sought—whether any actual loss had occurred—could have been discovered through normal channels.<sup>80</sup> In *Gidatex*, in contrast, discovering the trademark infringement required deception in an ongoing lawful investigation to determine the very existence of any injury in the first instance.<sup>81</sup> 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.<sup>82</sup>

Lastly, neither *McClelland* nor *Midwest Motor Sports* addressed a version of Rule 8.4(c) containing an exception for deceit in lawful investigative activities.<sup>83</sup>

### A Lawyer's Personal Participation Remains Prohibited

There remains one lingering concern: Can a lawyer be directly involved in a pretextual investigation? Colorado case law on this is clear: Personal participation is not permitted. And the amended Rule is equally clear—it does not authorize direct, personal participation. In this respect, the amendment does not alter Colorado's well-established jurisprudence prohibiting a lawyer's personal involvement in covert investigations.

For example, in *People v. Smith*, the Colorado Supreme Court took a dim view of a Colorado attorney's surreptitious recording of a tele-

phone conversation with a former client while attempting to purchase cocaine, even though the attorney's participation was conducted under the direction of the Colorado Bureau of Investigation and advised by an assistant attorney general.<sup>84</sup> The court found that "[t]he 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."<sup>85</sup> The court recognized that "important public policy considerations [may] permit executive officials to rely upon techniques involving fraud and misrepresentation about criminal conduct."<sup>86</sup> But in *Smith*, the lawyer was "a private attorney, not a prosecuting attorney."<sup>87</sup> Given the attorney's personal involvement in conducting the deception, amended Rule 8.4(c) simply would not authorize this conduct, and the result would be the same.

Likewise, in *People v. Reichman*, the Colorado Supreme Court again disapproved of a lawyer's personal involvement in deceit.<sup>88</sup> But the crux of *Reichman* is mind-boggling: A district attorney, in attempting to establish a police officer's undercover identity and credentials 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.<sup>89</sup> The court ruled that because the deception was "of a type which results in directly misleading a court," the action was not exempted by the ethics rules.<sup>90</sup> Yet, the propriety of the undercover investigation was never contested.

This outcome, too, likely holds under amended Rule 8.4(c). Rule 8.4(c) would not authorize the lawyer's personal involvement in perpetrating a fraud on the court; however, supervising, directing, and advising an ongoing undercover investigation into drug trafficking not only would be authorized, but also would be wholly consistent with a prosecutor's ethical and professional duties.

Perhaps the best-known Colorado case involving unethical personal participation in deceptive investigative activities is *In re Pautler*.<sup>91</sup> In *Pautler*, a district attorney personally presented himself as a public defender to



**Our Courts** is a joint activity of the Colorado Judicial Institute and the Colorado Bar Association that provides nonpartisan information programs to adult audiences around the state to further public knowledge and understanding of the state and federal courts in Colorado.

For more information or to schedule a presentation, visit [ourcourtscolorado.org](http://ourcourtscolorado.org)

achieve the peaceful surrender of a barricaded murder suspect.<sup>92</sup> The Colorado Supreme Court held that “[p]urposeful deception by an attorney licensed in our state is intolerable,” even under these circumstances.<sup>93</sup> It further stated that the then-unamended Rule 8.4(c) was “devoid of any exception” for law enforcement investigations.<sup>94</sup> It rejected *Pautler*’s proposed “imminent public harm” and “duress and choice of evils” exceptions.<sup>95</sup>

The result in *Pautler* would not change under amended Rule 8.4(c), first and foremost because of the lawyer’s personal participation. But equally fatal is that there was no lawful investigative activity; rather, the lawyer 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).<sup>96</sup> None of these effects is sanctioned by Rule 8.4(c), and the spirit of the Rule does not embrace such collateral damage. The *Pautler* court further recognized that the question of lawyer supervision of undercover investigations was “inapposite” due to *Pautler*’s personal involvement.<sup>97</sup>

Finally, two cases from other jurisdictions involving social media and a lawyer’s personal involvement bear mentioning. In *Disciplinary Counsel v. Brockler*, an assistant district attorney used a fake Facebook persona to contact a defense alibi witness to elicit information to refute the defendant’s alibi defense.<sup>98</sup> The Ohio Supreme Court determined that this “prejudiced the administration of justice, because it had the potential to induce false testimony.”<sup>99</sup> Ohio’s Rule 8.4(c) contains a comment similar to Colorado’s Rule 8.4(c) amendment.<sup>100</sup> 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.<sup>101</sup>

Most recently, the Pennsylvania Supreme Court suspended a district attorney for creating a fake Facebook page to contact potential defendants in ongoing and prospective criminal investigations.<sup>102</sup> The district attorney urged attorneys and investigators in her office to use the fake page “to befriend defendants or witnesses if you want to snoop.”<sup>103</sup> 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).”<sup>104</sup>

In both of these cases, the outcome in Colorado would have been the same for the simple reason that Colorado’s amended Rule 8.4(c) does not allow a lawyer’s personal participation in creating a fictitious account.

### Considerations for Assessing Investigations


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

- Personal involvement is strictly prohibited. The Rule is clear on this point, and case law routinely takes a critical view when lawyers are themselves involved.
- 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 or 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.<sup>105</sup> That said, Colorado’s amended Rule 8.4(c) does not distinguish between public and private lawyers; rather, it is in the context of assessing the “lawful investigative activity” that 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 cases. These are good cases to study what has gone right (or wrong).
- 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. Of course, Colorado’s Rule 8.4(c) 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.<sup>106</sup> Ultimately, the responsibility to ensure ethical compliance is the lawyer’s own. 



**Joseph G. Michaels** is a senior assistant attorney general in the Criminal Appeals Section of the Colorado Attorney General’s Office—joseph.michaels@coag.gov. The views expressed in this article do not reflect those of the Colorado Attorney General.

**Coordinating Editor:** Stephen G. Masciocchi, smasciocchi@hollandhart.com

### NOTES

1. Colo. RPC 8.4, cmt. [2].
2. *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Ore. 2004).

# GOT KNOWLEDGE?

## *Pass It On!*

Every CBA member is an expert at something, and we encourage you to share this expertise with your colleagues. Writing for *Colorado Lawyer* is a great way to:

- Build your résumé**
- Earn CLE credits**
- Flex your writing muscles**
- Connect with others**
- Promote your expertise**
- Become even more of an expert**

Best of all, your contributions promote competence and professionalism among your peers.

**Turn to page 102 to contact a coordinating editor today and share your ideas!**



3. ABA Standards for Imposing Lawyer Sanctions, Standard 5.1 (amend. Feb. 1992), [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sanction\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf).

4. Colo. RPC 8.4(c) (2016).

5. 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%20Change%202017\(09\)%20.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2017/Rule%20Change%202017(09)%20.pdf).

6. See Minutes of Meeting of Standing Committee on the Rules of Professional Conduct (hereinafter Minutes) at 3-4 (July 13, 2012), [www.courts.state.co.us/userfiles/file/7-13-12%20minutes\(1\).pdf](http://www.courts.state.co.us/userfiles/file/7-13-12%20minutes(1).pdf).

7. See Written Comments, Notice of Public Hearing and Request for Comments, Rules Governing Professional Conduct, Rule 8.4, [www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2017%20Proposed%20Rule%20Changes/Combined%20Comments%20Rules%20of%20Prof%20Conduct.pdf).

8. See Public Hearing—Rules of Professional Conduct, Rule 8.4 (Sept. 14, 2017), <https://cojudicial.ompnetwork.org/sessions/37202?embedInPoint=1&embedOutPoint=5922&shareMethod=link>.

9. See Rule Change 2017(09), *supra* note 5.

10. 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).

11. 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”).

12. 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.”). See 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.”).

13. See American Bar Association, Standards for Criminal Justice: Prosecutorial Investigations (hereinafter Standards for Criminal Justice), Standard 26-1.3, Commentary to Subdivision 26-1.3(g) (3d ed. ABA 2014) (Ethical rules “should not be read to forbid prosecutors from participating in or supervising undercover investigations.”).

14. See *generally id.* at Standard 26-2.3(d).

15. See CBA Formal Op. 96, *Ex Parte* Communications with Represented Persons During Criminal and Civil Regulatory Investigations and Proceedings, at 1 (rev. Mar. 17, 2012) (The “trend [of lawyer supervision] has been viewed positively by the general public and the bar because of the perception that a lawyer’s involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards.”).

16. See Standards for Criminal Justice, *supra* note 13 at Standards 26-1.2 and -1.3.

17. Aviel, “Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech,” 31 *Geo. J. Legal Ethics* 31, 75 (Winter 2018).

18. *Id.* at 75-76.

19. See Standards for Criminal Justice, *supra* note 13 at Standards 26-1.2, -2.2, and -2.3.

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

21. *People in the Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988) (Quinn, C.J., dissenting) (recognizing that government must be permitted to engage in deception lest some crimes simply could not be detected).

22. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

23. McMunigal, “A Discourse of the ABA’s Criminal Justice Standards: Prosecution and Defense Functions: Investigative Deceit,” 62 *Hastings L.J.* 1377, 1392 (2011).

24. Joy and McMunigal, “Deceit in Defense Investigations,” 25-FALL *Crim. Just.* 36, 39 (Fall 2010).

25. See Isbell and 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).

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

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

28. CBA Formal Op. 96 at 1. See also Va. Legal Ethics Op. 1738 at 10, 12 (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”).
29. Trade Regulation Reports, Letter No. 1529, Trade Reg. Rep. 4168475, FTC Comments (2017) (emphasis added). See also McMunigal, *supra* note 23 at 1395 (prohibiting lawyers from supervising or advising undercover investigations would not cease undercover investigations but rather “would simply discourage police from seeking prosecutorial involvement and advice”).
30. See 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, *supra* note 6 at 5 (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”).
31. *Gidatex S.r.L. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 119, 120–21 (D.N.Y. 1999).
32. *Id.* at 126.
33. *Id.* at 122.
34. *Apple Corps Ltd. v. Int’l Collectors Soc’y*, 15 F.Supp.2d 456 (D.N.J. 1998).
35. *Id.* at 460.
36. *Id.* at 461–65.
37. *Id.* at 472, 475.
38. *Id.* (emphasis added).
39. *Cartier v. Symbolex, Inc.*, 386 F.Supp.2d 354, 356–57 (S.D.N.Y. 2005).
40. *Id.* at 356–57.
41. *Id.* at 357.
42. *Id.* at 362 (quoting *Gidatex*, 82 F.Supp.2d at 123 and citing *Apple Corps*, 15 F.Supp.2d at 475) (emphasis added).
43. *Turfgrass Group, Inc. v. Northeast La. Turf Farms, LLC*, 2013 WL 6145294 (W.D.La. Nov. 20, 2013).
44. *Id.* at \*4 (quoting *Cartier*, 386 F.Supp.2d at 362).
45. *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986).
46. *Id.* See also CBA Formal Op. 112, Surreptitious Recordings of Conversations of Statements, at 1, 5–6 (July 19, 2003) (noting that surreptitious recording in connection with “actual or potential criminal matters, for the purpose of gathering admissible evidence” does not violate Rule 8.4(c)).
47. *Morley*, 725 P.2d at 515 (citation and internal quotations omitted).
48. *In re Crossen*, 880 N.E.2d 352 (Mass. 2008).
49. *In re Curry*, 880 N.E.2d 388 (Mass. 2008).
50. *Crossen*, 880 N.E.2d at 357–58, 384; *Curry*, 880 N.E.2d at 395.
51. *Crossen*, 880 N.E.2d at 358–59; *Curry*, 880 N.E.2d at 396–97.
52. *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).
53. *Crossen*, 880 N.E.2d at 378.
54. *Curry*, 880 N.E.2d at 392.
55. *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.”).
56. *Id.*
57. *Leysock v. Forest Laboratories, Inc.*, 2017 WL 1591833 at \*8–9 (D.Mass. 2017).
58. *Id.* at \*6–9.
59. *Id.* at \*6–8.
60. *Id.* at \*6.
61. *Id.* at \*8.
62. *Id.* at \*8–9.
63. *Id.* at \*10.
64. *Id.* at \*11.
65. *McClelland v. Blazin’ Wings, Inc.*, 675 F.Supp.2d 1074, 1075–76 (D.Colo. 2009).
66. *Id.*
67. *Id.* at 1080.
68. See *id.* at 1077–78.
69. *Id.* at 1075–76.
70. *Id.* at 1077.
71. 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.”
72. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 695–96 (8th Cir. 2003).
73. *Id.* at 695–96.
74. *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).
75. *Gidatex*, 82 F.Supp.2d at 126.
76. *Midwest Motor Sports*, 347 F.3d at 695, 699.
77. *Id.* at 695, 699–700; accord *Curry*, 880 N.E.2d at 392, 404–05.
78. *Midwest Motor Sports*, 347 F.3d at 699–700.
79. *Gidatex*, 82 F.Supp.2d at 122.
80. *Midwest Motor Sports*, 347 F.3d at 696–97, 699–700.
81. *Gidatex*, 82 F.Supp.2d at 123–24.
82. *Midwest Motor Sports*, 347 F.3d at 696–98.
83. See *id.* at 699; *McClelland*, 675 F.Supp.2d at 1079–80.
84. *People v. Smith*, 778 P.2d 685, 686 (Colo. 1989).
85. *Id.* at 687.
86. *Id.*
87. *Id.*
88. *People v. Reichman*, 819 P.2d 1035, 1035–36 (Colo. 1991).
89. *Id.* at 1036.
90. *Id.* at 1037. On the contrary, the Rules expressly prohibit such deception. See Colo. RPC 3.3(a).
91. *In re Paulter*, 47 P.3d 1175 (Colo. 2002).
92. *Id.* at 1176–78.
93. *Id.* at 1176.
94. *Id.* at 1179.
95. *Id.* at 1180–81.
96. *Id.* at 1183.
97. *Id.* at 1179 and n.4.
98. *Disciplinary Counsel v. Brockler*, 48 N.E.3d 557, 558–60 (Ohio 2016).
99. *Id.* at 560 (citing Ohio RPC 8.4(c) and (d)).
100. *Id.*
101. *Id.*
102. *Office of Disciplinary Counsel v. Miller*, No. 32DB2017 (Pa. Feb. 8, 2019), [www.pacourts.us/assets/opinions/DisciplinaryBoard/out/32DB2017-Miller.pdf](http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/32DB2017-Miller.pdf).
103. *Id.* at 19.
104. *Id.* at 31.
105. See generally Kalman and Treisman, “Pretextual Investigative Techniques and the Rules of Professional Conduct, National Association of Attorneys General,” *NAGTRI J.*, vol. 3, no. 1 (Feb. 2018).
106. A CBA Formal Opinion on this subject is expected to be forthcoming in 2019.



## Lost in the Jungle of Charitable Options?

We know there is a lot of competition for your charitable contributions—we have a simple solution. The Colorado Bar Foundation has helped thousands of Coloradans since 1953.

Unite your contributions with those of over 1,000 distinguished attorneys that have chosen to be Bar Fellows in helping advance justice by delivering legal services to the disadvantaged, improving the administration of justice and promoting law-related education.

The combined force of working together has helped grow an endowment of over \$3,000,000 and made grants of nearly two million dollars to over 50 different worthy causes across Colorado possible.

You can become a Bar Fellow with a minimum pledge of just \$250/yr. for 10 years. Contact the CBF at [coloradobarfoundation.org](http://coloradobarfoundation.org). Step up, be recognized and be part of the team today!

