

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania (the “Board”) is considering recommending to the Supreme Court of Pennsylvania an amendment to the Comment to Pennsylvania Rule of Professional Conduct (“RPC”) 8.4, as set forth in Annex A.

EXPLANATORY REPORT

RPC 8.4(c) governs misconduct and prohibits a lawyer without exception, from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.” RPC 8.4(a) makes it misconduct for a lawyer to violate the rules “through the acts of another.”

Pennsylvania’s RPC 8.4 poses a problem for lawyers who may have occasion to oversee lawful investigations where deceit or pretext is used, as the rule does not make an exception for supervising lawful investigations.¹ It is not only criminal prosecutors who are involved in such investigations; they are common in housing discrimination investigations and lawsuits and among intellectual property lawyers. Examples of pretexting include employing “testers” who misrepresent their identity or purpose, or both, to apply for housing or job openings to uncover discriminatory practices, or directing investigators to pose as business customers to identify potential trademark infringement activity taking place in the daily operations of a target company. The United States Supreme Court has recognized that deception and pretext are permissible tools of lawful investigations. *See, e.g., Lewis v. United States*, 385 U.S. 206, 209 (1966) (recognizing the propriety of concealing and misleading agents’ identities in investigations); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (approving deception and pretext in determining housing discrimination).

While Pennsylvania’s rule prohibits a lawyer from engaging in dishonesty, fraud, deceit or misrepresentation, or doing so through the acts or others, such that supervising or directing lawful investigations, and certainly participating in such activity, violates a lawyer’s ethical obligations,² other jurisdictions have addressed this issue in their conduct rules, and their amendments indicate that a lawyer’s oversight is preferable to foregoing law enforcement activities or preventing investigators from receiving guidance from their supervising lawyers.

Approximately 20 states have adopted amendments to their Rules of Professional Conduct to authorize and define deception in pursuit of lawful undercover activities,

¹ Likewise, Pennsylvania does not have an investigative exception in RPC 3.8 (governing special responsibilities of a prosecutor) to allow a prosecutor to engage in deception while supervising a lawful undercover investigation.

² In *Office of Disciplinary Counsel v. Stacy Parks Miller*, No. 32 DB 2017 (D. Bd. Rpt. 12/6/2018) (S. Ct. Order 2/8/2019), Miller, while serving as Centre County District Attorney, personally set up a Facebook sting operation in an effort to combat the sale of bath salts in Centre County, participated in the operation and directed and supervised others in the operation. In concluding that Miller engaged in professional misconduct, the Board stated that while covert activity is permitted in criminal investigations, attorneys are prohibited from participation in such activity, as RPC 8.4(c) “broadly prohibits an attorney from engaging in dishonest, fraud, deceit or misrepresentation.” D. Bd. Rpt. at p. 31.

so that lawyers who supervise such lawful investigations do not run afoul of ethics rules prohibiting dishonesty, deceit, fraud, and misrepresentation. 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.³ Other states limit deception exceptions to government lawyers.⁴ The great majority of these states prohibit the lawyer’s personal participation in the undercover activity.⁵

An example of the consequences of a strict interpretation of RPC 8.4(c) can be found in Colorado, which amended its RPC 8.4(c) in 2017. Like Pennsylvania’s current rule, Colorado’s version of the rule prior to September 2017 provided that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” But in September 2017, the Colorado Supreme Court amended the rule to add an exception concerning lawful investigative activities as follows: “[i]t 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.” The change stemmed from an ethics complaint filed with the Colorado Office of Attorney Regulation Counsel (OARC) by a defense attorney against a district attorney whose office housed (and thereby supervised) an investigative unit that rooted out

³ *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 “participating directly”); *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 a 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 and 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).

⁴ *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. 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”).

⁵ An exception is Florida. *Fla. St. Bar. R.* 4-8.4(c) provides 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 lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.”

child predators on the internet—like the complainant's client—by having the investigators present themselves online under fictitious identities. The district attorney agreed to close the unit and OARC ended the investigation. However, because of OARC's investigation, the Colorado Attorney General suspended all in-house undercover investigations and filed an original action in the Colorado Supreme Court seeking injunctive relief to prevent OARC from interpreting RPC 8.4(c) in a way that would prevent government lawyers from providing advice to lawful undercover investigations or disciplining the government lawyers for doing so. The Colorado Supreme Court denied the petition, but adopted the above rule change.

The Board is considering a proposal to amend the comment to RPC 8.4 to provide guidance to Pennsylvania practitioners that notwithstanding the general restrictions against engaging in deceit, the rule is not interpreted as prohibiting a lawyer from advising or supervising another who engages in an otherwise lawful and ethical undercover investigation, in which the investigator does not disclose his or her true identity and motivation, regardless of the nature of the matter or substantive area of law involved. The proposal emphasizes that the lawyer, while supervising or advising, must take reasonable measures so that the investigator does not communicate with a represented party in violation of the ethical rules, does not seek to elicit privileged information, and otherwise acts in accordance with the conduct rules, court orders, and civil and criminal law. The proposal does not permit lawyers to participate personally in the undercover activity.

This proposal is of value to the profession because it recognizes the reality that lawful undercover investigations are common and occur in this Commonwealth, and lawyers need guidance as whether and to what extent they may be involved in such investigations. The Board proposes adding the new comment so that Pennsylvania lawyers may advise and supervise lawful undercover investigations to ensure ethical behavior on the part of the investigators without engaging in professional misconduct through this activity.

Interested persons are invited to submit written comments, suggestions or objections by mail, email or facsimile to the Executive Office, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, facsimile number (717) 231-3381, email address Dboard.comments@pacourts.us on or before December 7, 2022.

*By The Disciplinary Board of the
Supreme Court of Pennsylvania*

JESSE G. HEREDA,
Executive Director

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

Subchapter A. RULES OF PROFESSIONAL CONDUCT

§ 81.4. Rules of Professional Conduct.

The following are the Rules of Professional Conduct:

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

* * * * *

Comment:

(1) Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

(2) Notwithstanding the general restriction against engaging in deceit, this Rule does not prohibit a lawyer from advising or supervising another who engages in an otherwise lawful and ethical undercover investigation, in which the investigator does not disclose his or her true identity and motivation, regardless of the nature of the matter or substantive area of law involved. This Rule does not change the scope of a lawyer's obligations under Rule 4.2 and thus a lawyer must take reasonable measures so that the investigator does not communicate with a represented party in violation of Rule 4.2, does not seek to elicit privileged information, and otherwise acts in compliance with these Rules, court orders, and civil and criminal law.

[(2)] (3) Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[(3)] (4) For the purposes of paragraph (g), conduct in the practice of law includes (i) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (ii) operating or managing a law firm or law practice; or (iii) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar

association activities where legal education credits are offered. The term “the practice of law” does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (i)—(iii).

[(4)] (5) “Harassment” means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). “Harassment” includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[(5)] (6) “Discrimination” means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to

cause interference with the fair administration of justice based on one or more of the listed characteristics.

[(6)] (7) A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[(7)] (8) Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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