Denver Law Review Forum

Volume 93 Article 37

5-9-2016

Conflict Between Pretexting in M&A Investigative Due Diligence and the ABA Model Rules of Ethics

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I. INTRODUCTION

The purpose of due diligence in a merger and acquisition (M&A) transaction is to determine the appropriate purchase price to be paid by the buyer. In order to determine the purchase price there should be a thorough investigation and analysis of legal and financial risks, including the discovery of liabilities that may be deal-breakers. The due diligence process typically encompasses legal, financial, and commercial due diligence. Another aspect of due diligence is investigative due diligence, which utilizes a wide range of intelligence gathering techniques including covert activities that are used to perform thorough background checks on a target and its key employees.[1] The investigative due diligence team should be an outside investigative firm that can offer an unbiased review of the potential target and expose any derogatory information such as a history of violating the law, fraud, bribery or any unethical behavior that can ultimately affect the purchase price or possibly terminate the transaction.[2]

Corporate investigative due diligence firms have the ability to uncover facts about a potential target that conventional due diligence teams cannot. One example of this ability occurred when undercover investigators discovered that half of the top executives of a target company were unindicted co-conspirators in a fraudulent deal and the company had changed its name in order to conceal that fact.[3] It is unlikely that conventional due diligence methods would uncover corporate intelligence of this type. Most intelligence gathering is legal, but it is usually done covertly, often without the knowledge of the targeted company.[4] The investigative work may be legal but is it ethical and will the investigator's practices run counter to the Model Rules of Professional Conduct resulting in disciplinary proceedings and sanctions, including civil and criminal liability for the lawyer that hired the investigative firm? Also, is it

1. Chris Brady and Scott Moeller, INTELLIGENT M&A: NAVIGATING THE MERGERS AND ACQUISITIONS MINEFIELD (West Sussex: John Wiley and Sons, Ltd, 2014), (accessed December 8, 2015) http://booksupport.wiley.com.

2. *Investigators: Compliance, M&A, JV, Due Diligence and More*, METROPOLITAN CORPORATE COUNSEL, (May 1, 2008), http://www.metrocorpcounsel.com/articles/9863/investigators-compliance-ma-jv-due-diligence-and-more.

3. *Id.*

4. *Id.*

ethical for an undercover investigator to misrepresent his or her identity and purpose, and the identity of the client that hired him or her?

Although lawyers face an ethical obligation to pursue various tactics in M&A due diligence in order to represent adequately their client's interests in structuring and pricing the transaction, competing ethical limitations prevent lawyers and those who work for them from engaging in certain controversial investigative techniques employed by private investigators. One such investigative technique is pretexting. Pretexting, also referred to as dissemblance, can be defined as conduct involving misrepresentation of one's identity and purpose in order to obtain information not otherwise available.[5] Pretexting is an investigative technique that is widely used by criminal, intellectual property, and civil rights lawyers. However, it is in direct opposition to the ABA Model Rules of Professional Responsibility and the Colorado Rules of Professional Conduct (CRPC), Rule 8.4(c), which strictly prohibits any lawyer in Colorado from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation with no exception.[6]

This article will examine the relevant Rules of Professional Conduct that create conflict for lawyers and undercover investigators that utilize pretexting techniques during M&A investigative due diligence. This article will also analyze and compare Rule 8.4(c) of Colorado and Oregon, two states at opposite ends of the ethics spectrum, and offer a proposed amendment to Colorado Rule 8.4(c) as a solution to the ethical limitations placed on lawyers and undercover investigators.

What ethical responsibilities does a lawyer and a private investigator have while performing investigative due diligence during an M&A transaction? The following section will discuss the relevant ABA Model Rules of Professional Conduct that affect both lawyers and investigators ethics responsibilities while performing pretext investigations.

II. RELEVANT ABA RULES OF PROFESSIONAL CONDUCT THAT AFFECT LAWYERS AND PRIVATE INVESTIGATORS DURING M&A INVESTIGATIVE DUE DILIGENCE.

The relevant ABA Model Rules implicating professional responsibility for lawyers and private investigators performing covert operations during the due diligence phase of an M&A transaction include Model Rules 4.1(a) truthful communications, 4.2 communications with adverse parties represented by counsel, 4.3 communications with parties unrepresented by counsel, 8.4(c) prohibition of misrepresentation, and 5.3(b) using nonlawyer assistants. Other Model Rules may be applicable be-

5. Jeremy R. Feinberg, *Report on Pretexting: Recent Cases and Ethics Opinions*, NEW YORK LEGAL ETHICS REPORTER, (June 1, 2009), http://www.newyorklegalethics.com/report-on-pretexting-recent-cases-ethics-opinions/.

6. COLO. RULES OF PROF'L CONDUCT R. 8.4(c) (2012) [hereinafter COLORADO RULES].

cause of the interweaving of specific rules depending on the conduct and particular situation.

A. Model Rule 8.4(c) Misrepresentation; and Model Rule 4.1(a) Truthfulness in Statements to Others

> 1. Model Rule 8.4(c). Misconduct: It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> 2. Model Rule 4.1(a). Truthfulness in Statements to Others: In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Model Rules 8.4(c) and 4.1(a) proscribe misrepresentation and knowingly making false statements to others. However, lawyers' use of undercover investigators that misrepresent their client is common practice and indispensable in many M&A transactions, especially in the emerging global economy, where developing countries ideas concerning ethical behavior vary greatly as to what is, and isn't ethical.[7] Investigators retained by legal counsel may fall into a legal gray area. One example is the employment of deceptive conduct in order to protect a client's rights. An acquiring company may covertly obtain negative information from a target company that it is purposefully withholding because of its adverse effect on the value of the target company and the ultimate purchase price. A scenario such as this happened in Colorado where a transportation firm abandoned its plans for the acquisition of a privately held trucking company after a covert investigation revealed that the CEO of the target company was also the CEO of a Utah trucking firm that was in bankruptcy.[8] The acquisition ultimately failed due to the target firm's lack of candor toward the acquiring firm. It has been suggested that lawyers may need to consider resorting to such activities as part of their obligation under ABA Model Rule 1.1 (Colo. Rule 1.3) to provide zealous and competent representation of their clients.[9]

Indeed, conduct involving misrepresentation of one's identity and purpose in order to obtain information not otherwise available, the very definition of the act of pretexting, may be necessary in order to adequately represent clients from target firms that are not forthcoming with negative information, thus creating potentially disastrous financial results. Case in point, MCI's purchase of a controlling interest in Embratel, a state-owned Brazilian communications company for $2.3 billion, several

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7. "Hiring a private investigator is resurfacing as an integral part of due diligence during mergers and acquisitions . . . While Tom Hix, CFO of Cooper Cameron Corp., won't say if he uses private investigators, he does say the practice is common." Joseph McCafferty, DEAL DETECTIVES, CFO 13 (2): 16 (1997), http://search.proquest.com/docview/196855425?accountid=14608.

8. *Id*.

9. *See* Monroe H. Freedman, *In Praise of Overzealous Representation: Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 Hofstra L. Rev. 771, 772 (2006).

months later MCI was assessed $650 million in back taxes from the Brazilian government. MCI ultimately sold its interest in Embratel several years later for $400 million.[10] Thus, the stakes are high and the MCI debacle lends support for Model Rule 1.1's zealous and competent representation of clients as well as the use of pretexting to uncover information not otherwise available to the acquiring company.

Model Rule 8.4(c) bars lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Further, 8.4(a) bars circumventing rules by proxy, such as the case when hiring investigators.[11] According to Model Rule 8.4(c), lawyers who supervise undercover investigations are actually condoning deception indirectly through investigators.[12] Model Rule 8.4(a) specifically states that it is professional misconduct and 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.[13] However, paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, which falls under most activities by undercover investigators.[14] A client has a right to know negative information that is deceptively being withheld from an acquiring company that may ultimately affect the purchase price of the target company.

Model Rule 4.1(a) prohibits a lawyer in the course of representing a client from knowingly making a false statement of material fact to a third person.[15] Generally, both Model Rules 8.4 and 4.1 prevent lawyers from misrepresenting themselves and investigators during the course of an investigation. In our case, in-house counsel conducting an investigation during the due diligence phase of an M&A transaction is considered to be in the course of representing a client and misrepresenting his identity is a false statement of fact. The statement is material because without the misrepresentation, the information sought would not be given, thus violating Rule 4.1(a).

B. Model Rule 4.2 Communication with Person Represented by Counsel; and Model Rule 4.3 Dealing with Unrepresented Person

> 1. 4.2. A lawyer shall not communicate about the subject matter of a representation with a person who 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.

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10. *Id.*
11. *See* Barry Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 Seattle U.L. Rev. 123, 123 (2008-2009).
12. *Id.*
13. ABA MODEL RULES OF PROF'L CONDUCT R. 8.4(A) (2012) [hereinafter MODEL RULES].
14. *Id.* cmt. 1.
15. MODEL RULES R. 4.1.

> 2. 4.3. 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.

Monsanto Co. v. Aetna Cas. & Sur. Co. is an example of the interplay between Rules 4.2 and 4.3 as they apply to interviewing current employees and former employees in undercover investigations during the pendency of litigation. *Monsanto* complained that investigators employed by defendant insurers misled former *Monsanto* employees in the course of investigating claims at issue in the lawsuit. *Monsanto* asserted that the investigators' conduct violated Rules 4.2, 4.3 and 5.3 of the Delaware Lawyers' Rules of Professional Conduct.[16] *Monsanto* submitted affidavits in support of their claims that investigators did not inquire as to whether counsel represented the interviewee, failed to inform the interviewees that they represented insurance companies, or misrepresented the scope of their representation.[17]

The defendant's responded by stating that interviews with former employees do not violate the Rules of Professional Conduct. The court reasoned that Rule 4.2 does not prohibit contacts with former employees since former employees are not parties to the litigation and cannot bind their former employees.[18] However, an attorney has ethical obligations not to imply that the lawyer is disinterested, should reasonably know that the unrepresented person misunderstands the lawyer's role in the matter, and is obligated to correct the misunderstanding.[19] The defendant's response was that "an investigator whose firm has been retained by a lawyer complies with Rule 4.3 by simply stating that he is an investigator seeking information.[20] The court did not agree and reasoned that Rule 4.3, read in conjunction with Rule 4.2, requires more than a simple disclosure by the investigator of his identity, and that former employees who are unrepresented by counsel should be warned of the positions of the parties to a dispute.[21] The court concluded by stating:

> When the investigators did not determine if former employees were represented by counsel, when the investigators did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, when investigators did not clearly state the purpose of the interview

16. Monsanto Co. v. Aetna Casualty and Surety Co., 593 A.2d 1013, 1013–16 (Sup. Ct. Del. 1990).
17. *Id*. at 1016.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at 1018.

> and where affirmative misrepresentations regarding these matters were made, Rule 4.2 and Rule 4.3 were violated.[22]

The court in *Monsanto* proceeded to implement policy and procedures to guide the conduct of interviews with both current and former employees in order to avoid running afoul of Rules 4.2 and 4.3. During pendency of litigation, it is now standard procedure for courts to implement policy and procedures to guide the conduct of both parties to the litigation.

C. Model Rule 5.3(b) Responsibilities Regarding Nonlawyer Assistants; and Model Rule 8.4(a) A lawyer cannot circumvent the Rules through acts of another.

> 1. Rule 5.3(b). Nonlawyer retained by a lawyer having direct supervisory authority over the nonlawyer is responsible for a nonlawyer violation through involvement, knowledge, or supervisory authority if the lawyer orders, directs, or ratifies the conduct.
>
> 2. Rule 8.4(a). A lawyer cannot 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.

Can an undercover investigator employ deceptive tactics ? Model Rule 5.3(b) answers this question by requiring lawyers with supervisory authority over nonlawyers "to make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[23] In essence, a nonlawyer such as an investigator cannot do something that the lawyer would be prohibited from doing. Model Rule 5.3(b) also requires lawyers to give nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment and should be responsible for their work product.[24] Thus, the lawyer is ultimately responsible for his or her ethical behavior and that of the investigators whom he has retained. Comment 1 of Model Rule 5.3 emphasizes a lawyer's responsibility and ultimate liability when supervising nonlawyer employees or independent contractors. Investigation agencies are considered independent contractors and their actions will be imputed to a law firm or in-house counsel. Comment 1 further explains that "measures employed in supervising nonlawyers should take into account of the fact that they do not have legal training and are not subject to professional discipline."[25] So it is the lawyer who will be held accountable for any deceptive behavior on the part of an undercover investigator.

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22. *Id*. at 1020.
23. MODEL RULES R. 5.3(b).
24. *Id*. cmt 1.
25. *Id*.

Under the ABA Model Rules, Rule 5.3 in conjunction with Rules 8.4 and 4.1 clearly do not authorize the use of deceptive tactics in order to obtain closely held information about a potential M&A target. Lawyers that employ such deceptive tactics risk being subject to professional discipline and possible disbarment. However, there is a growing trend in several jurisdictions—where states have either amended or rewritten their legal ethics rules—to permit lawyers to engage in undercover investigations involving deceptive techniques in limited circumstances.[26] Such limited circumstances include cases dealing with criminal law, civil rights or intellectual property law. Some states, such as Oregon, permit the use of indirect deception in undercover investigations. Indirect deception is the lawyer supervision of undercover investigators who engage in deceptive conduct. Oregon's Rule 8.4 is not limited to a lawyer's status such as a criminal or government lawyer, or the substantive nature of the claim, such civil rights or intellectual property. Other states, such as New York, have proposed amendments to their states' version of Rule 8.4 allowing lawyer supervision of undercover investigations. The New York state proposed amendment almost mirrors Oregon's Rule 8.4, and an actual amendment to the rule in New York would be a significant change due to the large volume of M&A transactions that take place in the state.

The following section looks at how the courts view pretexting as applied in various jurisdictions and areas of law. Court opinions widely diverge among the various states regarding the use of pretexting.

III. THE COURTS VIEW OF THE USE OF PRETEXTING

Not surprisingly, most of the court opinions dealing with whether to permit or prohibit pretexting consist of criminal, civil rights, or intellectual property law cases, and the outcomes are highly dependent upon the jurisdiction and facts of each case. In the cases that permit pretexting and admit evidence of the investigation, the courts look to whether it would be difficult to discover the violations by other means. For example, a "tester" that poses as a customer in order to buy goods that infringe on a valid trademark. The courts look most favorably upon pretexting that does not coerce the target and is a part of the normal course of business, as well as investigations conducted indirectly with the supervision of a lawyer rather than conducted directly by a lawyer. The court cases that follow examine the facts and circumstances that allow evidence obtained by pretexting and those that do not allow evidence obtained by pretexting.

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26. *See generally* ASSOC. OF THE BAR OF THE CITY OF NEW YORK, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 8.4 REGULATING LAWYERS' SUPERVISION OF UNDERCOVER INVESTIGATIONS, http://www2.nycbar.org/pdf/report/uploads/20072162-ProposedAmendmenttoProfessionalConduct-tRule8.4lawyerssupervisionofundercoverinvestigations.pdf.

A. Court Decisions that Allow Evidence Obtained by Pretexting

In *Apple Corps Ltd. v. International Collectors Society*, a trademark infringement case, the owners of the Beatles trademarks sued a stamp producer to enjoin unauthorized reproductions of likenesses of the Beatles on stamps. The court entered an injunction, but the plaintiffs' suspected the defendants violated the injunction and hired investigators that revealed violations of the decree and the plaintiffs' moved for contempt sanctions. The defendant's sought sanctions because the investigators violated Rule 4.2 prohibiting contact with persons represented by counsel. The District Court for the District of New Jersey found no ethical violation and that the investigators' misrepresentations as to their identity and purpose were "necessary to discover defendants' violations . . . and did not constitute unethical behavior."[27] The court also found that posing as a "normal customer" in gathering evidence about the defendant's "day-to-day practices in the ordinary course of business" did not constitute misrepresentation.[28] As for misrepresentations made by the investigators' identity and purpose under Rule 8.4(c), the court stated:

> RPC 4.2 cannot apply where lawyers and their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule.[29]

The court made it clear that New Jersey law extended protection of Rule 4.2 only to the company's "litigation control group," and that the contacted sales clerks , did not fall within that group, thereby allowing the communication.[30] Also, it appears, at least in this jurisdiction, surreptitious contact by investigators of certain employees in the ordinary course of business to determine if corporate misconduct is taking place is not misrepresentation of one's identity and purpose under Rule 8.4(c).

In *Gidatex v. Campaniello Imports, Ltd*, a trademark case in New York, the plaintiff terminated defendant's license to sell its furniture, but the defendant continued to sell the brand. Plaintiff's counsel hired private investigators to pose as interior designers and record incriminating conversations with the defendant's sales staff.[31] Defendant filed a motion to exclude the evidence on grounds that the plaintiffs obtained the evidence unethically and illegally. The court denied the motion stating that the prohibition of contacting adverse parties represented by counsel, Rule

27. Apple Corps Ltd. v. Int'l Collectors Society, 15 Supp. 2d 456, 471 (D. N.J. 1998).
28. *Id.* at 475.
29. *Id.* at 474-75.
30. *Id*.
31. Gidatex v. Campaniello Imports, Ltd, 82 F. Supp. 2d 119, 119-20 (S.D.N.Y. 1999).

4.2, was inapplicable and that the plaintiff's attorneys had not violated the ethics rules even if they did apply.[32] The court explained that the reason for Rule 4.2 was to prevent circumvention of the attorney-client privilege. Again, as in *Apple Corps Ltd.*, the court reasoned that "These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover [investigator] posing as a member of the general public engaging in ordinary business transactions with the target."[33] The facts in *Gidatex* were very similar to *Apple Corps Ltd.* except for the recording of conversations, where the court emphasized that the Model Rules should not apply when investigating corporate misconduct such as unfair business practices.

In a departure from the intellectual property law cases just reviewed, *Hill v. Shell Oil Co.* was a civil rights case in Illinois dealing with racial discrimination allegations. The plaintiffs conducted undercover investigations of gas station employees to prove discriminatory practices and the defendants moved for a protective order under Rules 4.2 and 4.3. The court found for the employees under Rule 4.2 as being represented by counsel, but Rule 4.3 was deemed inapplicable.[34] The court also made a distinction from the previous cases in this area, although counsel represented the defendants, by stating:

> Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course.[35]

The court stressed that the video recordings were proper as long as they were in the "ordinary course of conduct," but investigators cannot trick employees into doing things or saying things they otherwise would not do.

B. Court Decisions that Forbid Evidence Obtained by Pretexting

In *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, the court refused to allow evidence obtained by pretexting and affirmed sanctions against counsel for deceptive conduct for conducting interviews under false pretenses in violation of Rule 8.4(c). The case involved the discontinuance of the sale of a line of snowmobiles at the plaintiff's store.[36] The defendant's counsel hired a private investigator to talk with and find out which snowmobiles the salesperson recommended. The investigator rec-

32. *Id.* at 120.
33. *Id*. at 122.
34. Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002).
35. *Id.* at 880.
36. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003).

orded the conversation with the salesperson with the intention that the salesperson would offer information about the lawsuit.[37] The investigator also admitted in a deposition that his purpose was to elicit evidence rather than to reveal evidence of how salespeople treat typical consumers.[38] The court addressed Rule 4.2 by stating that its purpose was to prevent adverse party statements by circumventing opposing counsel and to protect the attorney-client relationship. The court also stated that not all corporate employees fall under Rule 4.2, but that the salesperson's conduct would be imputed to the plaintiff and thus fall under the protection of Rule 4.2 .[39] The investigator's purpose was to elicit information rather than to reveal evidence of how typical consumers would be treated, thereby departing from the reasoning in other cases. Additionally, the court found the no contact provision of Rule 4.2 protected the salesman. .

In *Monsanto Co. v. Aetna Casualty and Surety Co.,* an insurance defense case, the defendants hired investigators during pendency of litigation to interview former employees of Monsanto to investigate possibility of alleged dumping of toxic waste.[40] The investigator's misrepresented their identity and purpose for the interviews, and the lawyers' for the defense were found to have violated Rules 4.2, 4.3, and 5.3 of professional conduct. Since the interviews were conducted during the pendency of litigation, the court, following precedent, implemented procedures to "guide the conduct of interviews with both current and former employees" in order to prevent the behavior from "tainting" the trial.[41] The court further stated, "attorneys who are officers of this court must realize that they are accountable and must supervise the investigators in order to assure that the type of misleading conduct that has previously occurred will not happen in the future."[42] Additionally, under comment one of Rule 5.3, a lawyer must give investigators appropriate instruction and supervision concerning ethical aspects of their engagement with a lawyer and should be responsible for their work product.[43] The last statement reinforces the idea that lawyers should closely supervise indirectly-conducted investigations.

In re Gatti, Oregon lawyer Daniel Gatti represented chiropractors who had been charged with racketeering and fraud as a result of undercover investigations conducted by the SAIF Corporation (SAIF).[44] Gatti filed a complaint with the Oregon Bar claiming that the lawyers involved with the SAIF investigations had advised SAIF investigators to pose as

37. *Id.* at 694.
38. *Id.* at 696.
39. *Id*. at 698.
40. Monsanto Co. v. Aetna Casualty and Surety Co., 593 A.2d 1013, 1013-16 (Sup. Ct. Del. 1990).
41. *Id*.at 1020.
42. *Id.*
43. MODEL RULES R. 5.3, cmt. 1.
44. *In re* Gatti, 8 P. 3d 966, 966 (Or. 2000).

injured patients and janitors in order to gather evidence of fraudulent workers' compensation claims.[45] Gatti's complaint to the bar accused the prosecutors involved with giving supervisory advice to SAIF investigators, thereby violating several rules of the Code of Professional Responsibility. The state bar disciplinary board declined to take action and concluded that, "Our preliminary conclusion is that if SAIF is considered to have public authority to root out possible fraud, then attorneys assisting SAIF in this endeavor are not acting unethically in providing advice on how to conduct a legal undercover operation. It is our understanding that no court has found [SAIF] to have been illegal or to constitute prosecutorial misconduct."[46] The state bar responded to Gatti by stating that they were not aware of any prosecutorial powers that "have more latitude in carrying out the agency's regulatory powers in a surreptitious fashion than members of the Bar in the private sector."[47]

This comment led Gatti to begin his own investigation into a California company, Comprehensive Medical Review (CMR) that was suspected of falsely denying medical claims of patients. Gatti telephoned CMR and identified himself as a chiropractor, recorded his conversations with the agency, and used this information to file a civil lawsuit alleging fraud against CMR.[48] In the recorded conversations, Gatti lied about his identity and purpose and CMR learned about his deception and filed a grievance against him for violating the Oregon Code involving dishonesty, fraud, deceit, or misrepresentation.[49] Gatti defended his actions by stating that he relied on the bar counsel's written response that the use of deception in undercover investigations was appropriate by either government or private lawyers.[50] Gatti's case eventually made it to the Oregon Supreme Court, which held that Gatti's reliance on the bar counsel's letter was not reasonable.[51] The court ultimately found that Gatti misrepresented his identity to CMR and sanctioned Gatti.

While Gatti's case was on appeal, the U.S. Attorney for the District of Oregon filed an amicus curiae brief asking for an exception in undercover law enforcement operations and civil rights organizations asked for their own exceptions for undercover operations.[52] The court rejected all claims and stood fast by stating, "this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentations, or false statements."[53] However, the court's stance did not last long after the Justice Department filed suit to

45. *Id.*
46. *Id*. at 969.
47. *Id*. at 974.
48. *Id*. at 970.
49. *Id*. at 972.
50. *Id*. at 973.
51. *Id*. at 979.
52. *Id*. at 975.
53. *Id*. at 976.

enjoin the Oregon Bar from enforcing its ethics rule against undercover operations. Oregon ultimately amended its ethics rules permitting indirect deception in undercover operations by all practicing lawyers whether public or private.

The following section will look at the current ethics rules regarding Rule 8.4(c) in Colorado and Oregon. The Colorado Supreme Court has endorsed a zero tolerance approach to the use of deceptive tactics in undercover investigations, whereas Oregon's Rule 8.4(c) prohibits direct deception by a lawyer but allows indirect deception by a lawyer to advise and supervise undercover investigations. Therefore, each state is at opposite ends of the ethics spectrum concerning Rule 8.4(c) and its prohibition of conduct involving dishonesty, fraud, deceit, or misrepresentation.

IV. COLORADO AND OREGON AT OPPOSITE ENDS OF THE ETHICS SPECTRUM

A. No Exception for Any Deceptive Conduct by Lawyers in Colorado

Under CRPC Rule 8.4, 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.[54] Colorado places a categorical prohibition on the use of deceptive tactics by lawyers and allows for no exceptions to the Model Rule, including civil, criminal, and constitutional rights.[55]

People v. Pautler reaffirmed the Colorado Rule, when the Colorado Supreme Court upheld disciplinary sanctions for a state prosecutor who posed as a public defender to help apprehend a suspect that had confessed to killing three women and raping another woman with whom he was also holding as a hostage.[56] Pautler claimed that his deception was justified because of his belief that the suspect would kill his hostage and possibly harm others. The Colorado Disciplinary Court and the Colorado Supreme Court disagreed with Pautler and held that Pautler had lied to the suspect in violation of CRPC 8.4(c), prohibiting fraud, deceit, or misrepresentation.[57] The court in Pautler proclaimed, "that members of our profession must adhere to the highest moral and ethical standards and that those standards apply regardless of motive."[58] In 2012, the Pretexting Subcommittee of the Colorado Supreme Court Standing Commit-

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54. COLORADO RULES R. 8.4(a) (2012);

A. SSOC. OF THE BAR OF THE CITY OF NEW YORK, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 8.4 REGULATING LAWYERS' SUPERVISION OF UNDERCOVER INVESTIGATIONS, http://www2.nycbar.org/pdf/report/uploads/20072162-ProposedAmendmenttoProfessionalConductRule8.4lawyerssupervisionofundercoverinvestigations.pdf.

55. *See* People v. Dunlap, 35 P.3d 571 (Colo.O.P.D.J. 2001), *aff'd In re* Pautler, 47 P.3d 1175 (Colo. 2002).

56. *See* COLORADO RULES R. 8.4(c) (2012) (citing Temkin, *supra* note 9, at 123).

57. *Pautler*, 47 P.3d at 1176.

tee for the Colorado Rules of Professional Conduct ("Pretexting Committee") rejected the recommendation for a limited exception to Rule 8.4(c) despite the uncertainty resulting from the precedent set in the Pautler case and pleas from stakeholders such as the U.S. Department of Justice, the Colorado District Attorney's Council, the Attorney General of Colorado, and the International Trademark Association to name a few.[59]

The opposition to amend Colorado Rule 8.4(c) to allow a Colorado-specific exception for attorney misrepresentation in certain situations noted the absence of any case in Colorado involving a covert investigation. Additionally, the opposition had concern for public persona of lawyers allowed to direct, or supervise others in lawful covert activity involving misrepresentation.[60]

B. Indirect Deception in Undercover Investigations Allowed by All Lawyers in Oregon

As discussed above, the Oregon Supreme Court approved an amendment to allow for deceptive conduct by lawyers who indirectly supervise investigators in lawful covert activity. The amended Rule 8.4(b) states:

> It shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentation or other subterfuge.[61]

The Rule also states that a lawyer may commence covert activity, but the lawyer can only advise and supervise the investigation and cannot be directly involved. Furthermore, a lawyer must "in good faith believe there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."[62] This last sentence gives a lawyer wide latitude regarding when an undercover investigation can take place and under what circumstances it can take place. Oregon later added 8.4(a)(3) to the Oregon Rules that prohibits only deception "that reflects adversely on the lawyer's fitness to practice law."[63] This amended provision gives even more latitude because almost any civil law violation could be a justification for using deception in investigations. Does this open the door for the use of undercover investigations

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58. *Id*.
59. Supplement to the Final Report of the Pretexting Subcommittee, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct (Dec. 19, 2011).
60. *Id*.
61. OR. RULES OF PROF'L CONDUCT R. 8.4(b) [hereinafter OREGON RULES].
62. *Id*.
63. OREGON RULES 8.4(a)(3).

during the due diligence phase of an M&A transaction? Fraud is a violation of civil law, and there are many M&A transactions where fraud is present, my above example is just one.

V. PROPOSED SOLUTION TO COLORADO ETHICS RULE 8.4(C)

The proposed solution to the Colorado Rules of Professional Conduct, Rule 8.4(c) is an effort to reconcile the conflict between Rule 8.4(c)'s proscription of misconduct involving dishonesty, fraud, deceit, or misrepresentation and the actual practices of lawyers and courts in the State of Colorado. The State of Colorado is in need of an ethics rule that is practical and can realistically guide legal practitioners in responsible supervision of legal pretext investigations. The below proposed amendment is taken from Oregon's amended version of Rule 8.4(a)(3) and 8.4(b).

A. Amendment to Colorado Rule 8.4(c) Misconduct Involving Dishonesty, Fraud, Deceit or Misrepresentation

A proposed amendment to Colorado Rule 8.4(c) should resemble Oregon's Rule 8.4(a)(3) and 8.4(b) as amended in 2002. The Colorado proposed ethics rule would read as follows:

> Rule 8.4 MISCONDUCT
>
> (a) It is professional misconduct for a lawyer to:
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation *that reflects adversely on the lawyer's fitness to practice law;*
>
> (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.
>
> "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentation or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

B. Policy Justification

For the reasons stated above, the proposed amendment will reconcile the conflict between current Colorado Rule 8.4(c) and its zero tolerance for misconduct involving dishonesty, fraud, deceit, or misrepresen-

tation, and the widespread practice of the use of undercover investigations utilizing pretexting to identify and prevent unlawful activity.

VI. CONCLUSION

Investigators are an indispensable tool for lawyers. Lawyers from almost all legal disciplines utilize private investigators in undercover operations such as criminal investigations, discrimination cases, and the protection intellectual property. In the M&A context, covert investigations utilizing legal and ethical techniques such as pretexting can provide strategic insight into operational risks that can be immediately confronted and resolved or avoided before potential catastrophic financial damage occurs.

The ABA Model Rules of Professional Conduct as well as the Colorado Rules Professional Conduct proscribe conduct involving dishonesty, deceit, or misrepresentation, yet practicing lawyers and the courts are in direct conflict with this rule on a daily basis. So, what is going on here? Should we just go about our business and pretend that this conflict does not exist, or should we confront the issue head on and amend the Rules to reflect reality? Personally, I must ethically and responsibly endorse the latter.

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