

**Before the
COLORADO SUPREME COURT
Denver, Colorado 80203**

In the Matter of Rules Governing Professional Conduct, Rule 8.4

COMMENT OF THE FEDERAL TRADE COMMISSION

September 5, 2017

The Federal Trade Commission (“FTC” or “Commission”) submits this comment in support of the Colorado Supreme Court’s proposed revision to the state’s Rules of Professional Conduct, which would clarify that it is not a violation of those Rules for an attorney to advise or supervise law enforcement officers and others engaged in lawful undercover activities.¹ The proposed revision, which is consistent with the approach taken by the majority of jurisdictions that have considered the issue, implicitly recognizes the importance of evidence collected through such methods and the attorney’s responsibility to ensure its legality and integrity.

A. Federal Trade Commission’s Interest and Expertise

The Commission, as the nation’s primary consumer protection agency, is charged with stopping unfair and deceptive practices that harm consumers. The Commission is responsible for implementing and enforcing the Federal Trade Commission Act and other consumer protection statutes and regulations.² The Commission accomplishes its mission in many ways, including collecting consumer complaints, conducting investigations, and bringing law enforcement actions. One of the FTC’s core missions is to combat fraud. Since the 1980s, pursuant to its authority under Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), the Commission has obtained hundreds of injunctions in federal district courts against fraudulent businesses and returned billions of dollars to harmed consumers.

B. Undercover Investigations Provide Valuable and Credible Evidence

The Commission’s experience in investigating and enforcing consumer protection laws for many decades unequivocally demonstrates that fraudsters do not operate in the light of day. Instead, they typically attempt to avoid detection by operating through a confusing web of shell companies and different websites, phone numbers, and payment processors. When fraudsters get

¹ The revision would amend RPC 8.4(c) as indicated: “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.”

² See, e.g., the Telemarketing Sales Rule, 16 CFR Part 310, and the Mortgage Assistance Relief Services Rule, 16 CFR Part 322 (rules targeting fraudulent practices).

wind of a law enforcement action, they move quickly to destroy evidence and hide their ill-gotten gains. The Commission has documented these evasive tactics in affidavits filed in hundreds of federal court actions.

The Commission has developed and utilized a variety of techniques to investigate and prosecute consumer fraud cases, as well as to obtain redress and other relief for injured consumers. For example, FTC staff investigators sometimes pose as consumers and purchase a product on a website or sign up for a service promoted by a telemarketer. The investigator stands in the shoes of consumers, observes the conduct consumers observe, and gathers evidence of possible law violations.

The interactions captured by FTC investigators often provide the most probative evidence of how a business actually treats consumers, exposing deceptive and unfair practices that might otherwise go undetected or unprosecuted. Courts have recognized and relied on this evidence. For example, in *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 635 (6th Cir. 2014), a panel of the Sixth Circuit affirmed summary judgment in the FTC's favor based in part on evidence that a sales agent failed to make required disclosures to an undercover investigator. Similarly, in *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1231 (11th Cir. 2014), the Eleventh Circuit held that the district court did not err in entering a preliminary injunction against a company where its representatives falsely "assured the investigators that IAB's medical-discount plans were functionally equivalent to major medical insurance." Investigators also provided critical evidence based on undercover work in *FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1268 (M.D. Fla. 2012), *aff'd*, 704 F.3d 1323 (11th Cir. 2013) (telephone calls recorded by undercover investigators confirmed defendants' use of deceptive telemarketing scripts); *FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1326 (M.D. Fla. 2010) (undercover investigator's account confirmed that company told consumers that it would lower their credit scores); and *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1073 (E.D. Mo. 2007) (recorded phone calls between FTC investigators posing as consumers and sales agents confirmed deceptive sales claims).

In these and other cases, the evidence obtained by investigators corroborated consumer testimony. Often, an investigator's careful account of a series of transactions provides the most accurate information about a disputed business practice. *See, e.g., FTC v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *8 (M.D. Fla. July 18, 2013) (investigator's testimony largely tracked that of consumer witnesses, but investigator testified to receiving disclosure email that consumers did not recall). In other instances, undercover work may fail to corroborate consumer complaints, leading the Commission to close an investigation. Whether inculpatory or exculpatory, the information obtained in undercover investigations is highly probative.

This Court, in the criminal context, has recognized the necessity of undercover work in law enforcement:

It is common knowledge that the nature of illicit drug traffic is such that the laws could not be enforced without undercover agents. The drug laws have forced the market place for illicit drugs underground, where sales are effected by stealth by those who reap

financial gain at the cost of the drug victim and society. Without undercover agents, it would be virtually impossible to prosecute those who cause the sale and distribution of illicit drugs.

People v. Bucher, 182 Colo. 211, 214 (1973). In the civil context, the Tenth Circuit has similarly recognized the importance of undercover investigations, noting “[i]t would be difficult indeed to prove discrimination in housing without [using a tester for] gathering evidence.” *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973); see also *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984) (“Undercover work is a legitimate method of discovering violations of civil as well as criminal law.”)

C. Attorney Oversight Helps to Ensure the Integrity of Undercover Investigations and Adds to Existing Protections

Attorneys play an important oversight role in the collection of evidence from undercover operations by, for example, advising investigators not to cross the line between capturing and instigating a law violation. See, e.g., *Bucher*, 182 Colo. at 214 (acknowledging defense of entrapment). Similarly, attorneys can advise investigators about the relevant state and federal statutes governing the recording of telephone or live interactions.³ Such legal advice is particularly important because illegal operations often cross state lines, and it is not always clear which jurisdictions’ law will govern the investigation. As recent experiences in Colorado illustrate, attorney oversight appears preferable to the alternatives – foregoing law enforcement activities⁴ or cordoning off investigators from their supervising attorneys.⁵ Attorney engagement in the process increases accountability. If, as the revised rule contemplates, attorneys oversee this aspect of gathering evidence, then they also are responsible for any problems, potentially facing discipline for any misconduct related to the investigation. Permitting attorney supervision of “lawful investigative activities,” as this Court has proposed, helps to ensure that the investigative activities are, in fact, lawful.

³ Recordings of telephone calls made by FTC investigators comply with the federal wiretap statute, 18 U.S.C. §§ 2510-2522, which permits recordings made by a party to a telephone call. 18 U.S.C. § 2511(2)(c). Evidence of intercepted communications that conforms to this provision is admissible in federal court proceedings without regard to state law. *United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982).

⁴ See Pet. for Original Writ at 1, 3, *In Re: Cynthia H. Coffman v. Office of Attorney Regulation Counsel*, No. 2017SA92 (May 5, 2017) (Attorney General abandoned all of her pending undercover investigations because of fear that her attorneys would be subject to ethics complaints for supervising them).

⁵ See Pet. for Original Writ, *supra* note 3, at 2-3 & Ex. 3 (Jefferson County’s Child Sex Offender Internet Investigations team was dissolved and reconstituted in a sheriff’s office in response to ethics complaint).

FTC investigators, whose work is critical to effective enforcement of the FTC Act and other statutes that protect consumers, conduct their undercover investigations with skill, integrity, and professionalism. Neither FTC investigators nor the attorneys who supervise them, however, operate without constraint. FTC attorneys are subject to the Rules of Professional Conduct of their licensing state and the choice of law provisions therein (pre-complaint) and the conduct rules and choice of law provisions in which the case is filed (post-complaint). The Rules of Professional Conduct also reach attorneys' supervision of investigators and other staff. *See, e.g.*, Colo. RPC 5.3. As FTC employees, investigators as well as attorneys must comply with the agency's own procedures as well as federal ethics laws and regulations. Persons injured by illegal acts of government employees may seek remedies through *Bivens* actions in appropriate cases or against the United States under the Federal Tort Claims Act, and litigants may raise relevant defenses such as unclean hands. All of these restrictions and remedies protect citizens from improper investigatory practices and limit the risk of harm, if any, that might be caused by the proposed revision of Rule 8.4.

The Court's proposed revision appears to be a limited clarification; it is not a license to engage in abusive investigative tactics. For example, had the proposed revision been in place at the time of *In re Pautler*, 47 P.3d 1175 (Colo. 2002), it would not have altered the outcome, in which this Court affirmed sanctions against a prosecutor who violated Rule 8.4(c) by impersonating a public defender to persuade a suspect to surrender to authorities. Indeed, it is notable that the only other state supreme court to approve sanctions against attorney conduct similar to what occurred in *Pautler* permits (through a comment to its rules) attorney supervision of lawful covert activity in the investigation of criminal activity and other unlawful conduct. *Disciplinary Counsel v. Brockler*, 145 Ohio St. 3d 270, 48 N.E.3d 557 (2016) (prosecutor violated 8.4(c) by creating a fictitious social networking account to contact defendant's alibi witnesses). The proposed revision retains the core prohibitions of Rule 8.4 and offers no protection to attorneys who engage in abusive investigatory practices.

Evidence obtained through undercover investigations is significant to civil and criminal justice. Attorneys can help protect the legality of evidence gathered. Thus, it is not surprising that the majority of jurisdictions that have considered the issue have permitted attorney oversight of undercover investigations, whether through ethics opinions,⁶ comments,⁷ or amending the relevant professional conduct rule itself,⁸ as this Court has proposed.

⁶ *See, e.g.*, D.C. Bar Opinion 323 (2004) (attorney is not precluded from misrepresenting identity or other matters in support of covert activity as part of official duties for government agency); Va. Legal Ethics Op. 1765 (2003) (attorney employed by the federal government may use lawful undercover methods without violating 8.4(c)); Utah State Bar Ethics Advisory Op. Comm. Op. 02-05 (2002); D.C. Bar Opinion 229 (1992) (per se rule against attorneys tape recording conversations is not appropriate); *see also* Ariz. Bar Op. 99-11 (1999) (private attorney's direction to tester to make misrepresentations "solely about their identity or purpose in

This Court’s proposed revisions to the Colorado Rules of Professional Conduct recognize the attorney’s unique role as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Colo. RPC Preamble [1]. Moreover, the revision promotes the continued development of the rules as a “framework for the ethical practical law.” *Id.* at [16].

For these reasons, the Commission supports the Colorado Supreme Court’s proposed revision to the Colorado Rules of Professional Conduct.

By direction of the Commission.

Donald S. Clark
Secretary

contacting the subject of investigation for fact-gathering purposes does not violate any provision of the model rules.”)

⁷ *See, e.g.*, Iowa RPC 32:8.4(c), cmt. [6]; N.C. RPC 8.4(c) cmt. [1] (government lawyer may advise investigatory personnel); Tenn. RPC 8.4(c), cmt. [5] (8.4(c) does not prohibit prosecutors from directing investigative techniques that may be regarded as deceitful).

⁸ Ala. RPC 3.8(2) (special provision allowing prosecutor involvement in government undercover and sting operations); Fla. RPC 4-8.4(c) (“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[.]”); Mo. RPC 4-8.4(c) (2012) (law enforcement undercover investigations are not professional misconduct); Or. RPC 8.4(b) (exception for “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.”); Wi. SCR 20:4.1(b) (2013) (lawyer may advise or supervise others with respect to lawful investigative activities).