

MEMORANDUM

TO: Joni Jones

From: Jacob Mortensen

RE: Rule 8.4 exceptions for undercover work

Date: 6/06/2023

I. UTAH'S CURRENT RULE

Utah, UT R RPC 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;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

II. COLORADO'S CURRENT RULE – WITH EXCEPTION LANGUAGE

Colorado Rules of Professional Conduct – 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, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities;
- (d)** engage in conduct that is prejudicial to the administration of justice;
- (e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f)** knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g)** engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;
- (h)** engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law; or
- (i)** engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.

III. OTHER STATES WITH EXCEPTION

Alaska.

AK R RPC Rule 8.4 cmt. 4: “This rule prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law. This rule does not, for example, prohibit a lawyer from advising and supervising a lawful covert investigation into matters involving criminal law, civil law, or constitutional rights, though the lawyer may not participate directly in the covert investigation. See Rule 9.1 for the definition of “lawful covert investigation.” This rule additionally does not prohibit a lawyer from engaging in lawful forms of deception if the conduct is among their duties of employment as a non-lawyer by a government agency, a law firm, or other entity.”

California

RPC 8.4 cmt. 5: “Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, 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 the State Bar Act.”

Florida

BAR Rule 4-8.4(c): “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except 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;”

Comment 4: “Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.”

Iowa

R. Civ. P. 32:8.4: “It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. “Covert activity” means an effort to obtain information on unlawful activity through the use of misrepresentations 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. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.”

Missouri

MO R BAR Rule 4-8.4: “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, 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, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations;”

Comment 3: “Rule 4-8.4(c) recognizes instances where lawyers for criminal law enforcement agencies, regulatory agencies, or the state attorney general advise others about or supervise others in undercover investigations and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these entities. This exception is not intended to state or imply that an entity has the authority to conduct undercover investigations unless that authority is separately granted to the entity by law. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3. This exception does not authorize conduct otherwise prohibited by Rule 4-4.2. Nothing in the rule allows the lawyer to advise others about or supervise others in undercover investigations unless the criminal law enforcement agency, regulatory agency, or state attorney general is authorized by law to engage in such conduct.”

Ohio

OH ST RPC Rule 8.4 cmt. 2A: “Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.”

Oregon

OR R PROF COND Rule 8.4(7)(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 misrepresentations 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.”

Tennessee

TN R S CT Rule 8, RPC 8.4, cmt. 5: “Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.”