speaking of ethics

By Hope C. Todd

Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)

Mick Wiggins

The act of pretexting, sometimes called dissemblance, generally describes an attorney's participation in, or direction or supervision of others involved in, deception for the purpose of uncovering evidence of unlawful conduct that might otherwise be unattainable. 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 activities taking place in the day-to-day operations of a target company.

Over the past 15 years, lawyers, Bar ethics committees, and courts nationwide have increasingly been called upon to interpret and apply Rule 8.4(c) when an attorney's conduct involves pretexting.[1] The results have been widely divergent and largely irreconcilable.[2]

D.C. Rule 8.4(c) and LEO 323: A Narrow Exception?

D.C. Rule 8.4(c) broadly provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Rule applies to attorney conduct at all times regardless of whether the attorney is acting in a personal or professional capacity. On its face, there would appear to be no exceptions—not for lawyers engaging in general law enforcement activities or seeking to uncover unlawful discrimination, or proving trademark infringement, counterfeiting, or other intellectual property encroachments; or for preventing fraud; assuring truthfulness in advertising; ensuring consumer health or safety; or even preventing substantial bodily harm. Facially, there is no exception because a particular omission is small or because the potential harm that might result from one's failure to deceive is significant.[3]

The District of Columbia Court of Appeals has not directly addressed the ethical propriety of pretexting under Rule 8.4(c).[4] In 2004, however, the Legal Ethics Committee, considering whether attorneys acting as intelligence officers violate the D.C. Rules if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties, concluded that,

> Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.[5]

The committee viewed such misrepresentations as permitted and not within the intended scope of Rule 8.4(c) for three reasons: First, because the committee determined 8.4(c) applies "only to conduct that calls into question a lawyer's suitability to practice law." Second, because it analogized the "authorized by law" language found in Rule 4.2[6] as "expressing a general approval of lawful undercover activity by government agents."[7] The committee supported the proposition that "when an attorney employed by the federal government uses lawful methods . . . as part of his or her intelligence or covert activities, those methods cannot be seen as reflecting adversely on the attorney's fitness to practice law."[8] Third, because the committee recognized that for some official intelligence activities, the law intentionally prohibits the agent/lawyer's disclosure of his or her identity or purpose, and such disclosure would also likely compromise the personal safety of the lawyer or others. The committee concluded that any interpretation of Rule 8.4(c) that would mandate such disclosure was unreasonable.

The committee emphasized "the narrow scope" of its opinion and, significantly, did not reach the broader questions of government attorneys pretexting or directing dissemblance in a representational capacity, or engaging in otherwise lawful deception either in the absence of specific law authorizing the misrepresentations or for nonofficial reasons, nor did it address the question of whether private attorneys could engage in, direct, or supervise any dissemblance whatsoever.

Lack of Judicial Consensus in Interpreting Rule 8.4(c)

A small number of court and ethics opinions and a handful of disciplinary cases have examined questions of whether, and when, a lawyer may permissibly engage in deception, or instruct others to do so, to obtain information that would otherwise be unavailable.[9]

In *Apple Corps Ltd. v. Int'l Collectors Soc'y*, the leading trademark infringement case, the United States District Court for the District of New Jersey found that plaintiff's counsel and investigators' misrepresentations as to their identity and purpose were "necessary to discover defendants' violations . . . and did not constitute unethical behavior."[10] Liberally citing Isbell and Salvi's law review article,[11] the court adopted the authors' "fitness to practice law" interpretation of Rule 8.4(c) and found that posing as a "normal customer" to gather evidence otherwise unavailable about the defendant's "day-to-day practices in the ordinary course of business" did not under such a construction, implicate deceit.[12]

Several other trademark and intellectual property cases have followed the reasoning articulated in *Apple Corps Ltd.* and held that attorneys engaged in pretexting were not engaged in unethical conduct.[13] In *Midwest Motor Sports, Inc.*, however, the 8th Circuit disagreed and, among other things, affirmed sanctions against counsel for deceptive conduct and interviews under false pretenses under Rule 8.4(c).[14]

The Oregon Supreme Court was the first to consider an attorney's pretexting activities in a disciplinary case under DR 1-102(A)(3), Oregon's then-equivalent to Rule 8.4(c).[15] Attorney Gatti suspected ongoing fraud by a medical review company and an insurance company and,

to gather evidence in support of this allegation, he telephoned the medical review company and falsely claimed to be a medical doctor who saw patients and reviewed case files, and falsely represented that he was interested in working for the medical review company and in educational programs for insurance claims adjusters. The court found, among other violations, that Gatti had violated DR 1-102(A)(3) and it flatly refused to find either an investigatory or prosecutorial exception to the rule for either private or government attorneys.[16] In response to *In re Gatti,* Oregon amended its ethics rules to provide a safe harbor for lawyers who advise or supervise others engaged in lawful covert activity in investigations of violations of civil or criminal law or constitutional rights.[17]

To date, the Colorado Supreme Court has taken the most unyielding stance on a lawyer's duty of truthfulness embodied in Rule 8.4(c). Chief Deputy District Attorney Mark Pautler impersonated a public defender in order to secure the surrender of a murder suspect who had brutally bludgeoned three women to death with a wood-splitting maul. The suspect, making clear that he would not surrender without legal representation, asked to speak with an attorney. Attorney Pautler spoke to the suspect while leading him to believe that Pautler was a public defender who represented him. Rejecting the attorney's "noble motive" and his claim of "imminent public harm" as defenses, the court minced no words in its final analysis of Rule 8.4(c):

> Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.[18]

In direct contrast, the Wisconsin Supreme Court rejected such a broad interpretation of Rule 8.4(c). Criminal defense attorney Stephen Hurley represented a defendant who was charged with two counts of sexual assault of a child, two counts of exhibiting harmful material to a child, and sixteen counts of possession of child pornography. These offenses were punishable by imprisonment, with a maximum sentence approaching a life term.[19] Hurley doubted the victim's credibility, believed he was lying about the allegations against his client, and believed that the victim had an independent interest in and ability to access the material he accused his client of showing to him. As such, Hurley, through the use of deception, devised and supervised an otherwise lawful undercover investigation to gather potentially exculpatory evidence from the victim's home computer.

The court limited the applicability of Rule 8.4(c) to deceptive conduct that reflects on the lawyer's fitness to practice law. Taking care to expound upon the particular pressures faced by criminal defense attorneys and right of criminal defendants to effective assistance of counsel, the court noted that Hurley had "a reasonable, factually supported, and good faith belief that [the] home computer contained exculpatory evidence"[20] and was "the lynch pin of [the defendant's case]"[21] and that any prior notice to the victim would have likely resulted in the "destruction of the sought-after evidence." The court not only found that the attorney's deception did not "impact negatively upon his fitness to practice law"[22] but went even further:

> Mr. Hurley faced an extremely difficult calculus: risk violating a vague ethical Rule or risk breaching his duty zealously to represent his client and violating his client's constitutionally protected right to effective assistance of counsel. The decision Mr. Hurley made was not an unfit one; it was a necessary one.[23]

Both the Massachusetts and Vermont Supreme Courts have also addressed attorney deception under Rule 8.4(c) in disciplinary matters and reached opposite conclusions.[24]

Conclusion

The ethical propriety of pretexting under Rule 8.4(c) is an unsettled question in a vast majority of jurisdictions, including the District of Columbia. Courts that have decided the issue have reached conflicting conclusions. The District of Columbia Court of Appeals may ultimately be persuaded by the analysis of the case law and ethics opinions in those jurisdictions that have addressed issues of lawyer pretexting and found certain deceptions permissible under Rule 8.4(c). However, for now, D.C. lawyers who consider engaging in, or directing others to engage in, deception in circumstances falling outside of those narrowly defined in Opinion 323, should exercise great care to carefully weigh the risk of violating the D.C. Rules of Professional Conduct.[25]

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Notes

1 The question of whether attorneys can ethically supervise or direct investigators or testers who engage in otherwise legal dissemblance as to identities/purposes or both, solely to gather evidence, was first broadly explored by David B. Isbell and Lucantonio N. Salvi in their seminal law review article published in 1995. David B. Isbell & Lucantonio N. 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 (1995). The article posits and concludes that such behavior is ethical and "justified in the search for truth." The authors' conclusion is premised largely on the theory that Rule 8.4(c) misrepresentations should be narrowly construed as "[applying] only to conduct of so grave a character as to call into question the lawyer's fitness to practice law." *Id.* at 816.

2 Attorney pretexting often implicates other ethics rules, most commonly Rules 3.7, 4.1, 4.2, 4.3, and 5.3. Space limitations preclude a discussion of those rules here; however, attorneys must also assess pretexting under those rules. The court decisions, articles, and ethics opinions cited herein provide fertile ground for such analysis.

3 Admittedly, carrying the language of Rule 8.4(c) to an extreme would prohibit a lawyer from lying, for example, to avoid a social engagement or from providing a false

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reason for not returning a spouse's phone call. However, such a conclusion would evidence a lack of common sense, much less reasonableness. *See also* D.C. Legal Ethics Comm., Op. 323 (2004); Isbell & Salvi, *supra* n. 1; *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009).

4 *In re Richard B. Sablowsky*, 529 A.2d 289 (D.C. 1987). The Court of Appeals reprimanded the Office of Bar Counsel for deputizing two private lawyers to go undercover to negotiate with Mr. Sablowsky to facilitate catching him in the act of selling witness testimony. The court held that it was not the function of Bar Counsel to engage in this type of undercover work, but rather, "Bar Counsel has a responsibility to educate the bar with the hope of preventing violations, if possible, not of encouraging them." *Sablowsky*, 529 A.2d at 291. This case did not address Rule 8.4(c) (or its predecessor DR 1-102(A)(3)); rather, it focused on the lack of authority for OBC to deputize others to engage in covert activities under the court's Rules Governing the D.C. Bar (citing D.C. Bar R. XI § 4(3)(b)).

5 D.C. Legal Ethics Comm., Op. 323 (2004).

6 "This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The 'authorized by law' proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time." D.C. Rules of Prof'l Conduct R. 4.2 cmt. [12].

7 "We do not think that the Court of Appeals intended to authorize legitimate law enforcement activity while proscribing covert activity in the aid of our national security." D.C. Legal Ethics Comm., Op. 323 (2004).

8 *Id.* (quoting Va. Standing Comm. on Legal Ethics, Op. 1765 (2004)). In 2003, Virginia expressly amended Rule 8.4(c) to prohibit "dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Va. Rules of Prof'l Conduct R. 8.4(c).

9 *See, e.g.*, *In re Gatti*, 8 P.3d 966 (Or. 2000); *In re Pautler*, 47 P.3d 1175 (Colo. 2002); *In re Hurley*, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 5, 2008); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 737 (2007); Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); Va. Standing Comm. on Legal Ethics, Op. 1765 (2004); Va. Standing Comm. on Legal Ethics, Op. 1845 (2009); Oregon Legal Ethics Comm., Op. 2005-173 (2005); Alabama State Bar Office of Gen. Counsel, Op. 2007-05 (2007); Arizona Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Utah Ethics Advisory Op. Comm., Op. 02-05 (2002).

10 *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 471 (D. N.J. 1998).

11 *See* Isbell & Salvi, *supra* n.1.

12 *Apple Corps Ltd.*, 15 F. Supp. 2d at 475.

13 *See Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 136 (S.D.N.Y. 2000); *A.V. By Versace, Inc. v. Gianni Versace, S.p.A*, 87 F. Supp. 2d 281 (S.D.N.Y. 2000); *Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp.*, No. 04 Civ. 5002, 2005 WL 357125 (S.D.N.Y. Feb. 14, 2005); *Chloe v. Designersimports.com USA, Inc.*, No. 07-CV-1791, 2009 WL 1227927 (S.D.N.Y. Apr. 30, 2009). For a fuller discussion of these cases, and general considerations for engaging in dissemblance in this area, *see* Phillip Barengolts, *The Ethics of Deception: Pretext Investigations and Trademark Cases*, 6 Akron Intell. Prop. J. 1 (2012). *See also*, Jeannette Braun, *Comment: A Lose-Lose Situation: Analyzing the Implications of Investigatory Pretexting Under the Rules of Professional Responsibility*, 61 Case W. Res. L. Rev. 355 (2010).

14 *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003).

15 The language of Oregon DR 1-102(A)(3) provided: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

16 The United States Attorney for the District of Oregon, appearing as *amicus curiae*, stated that the U.S. Department of Justice "regularly supervises and conducts undercover operations in Oregon that necessarily involve a degree of deception" and argued strenuously that public policy favors such an exception. *In re Gatti*, 8 P.3d 966, 975 (Or. 2000).

17 Oregon Rules of Prof'l Conduct R. 8.4(b); *see also* Oregon Legal Ethics Comm., Op. 2005-173 (2005). Other jurisdictions have also amended their rules to expressly permit certain behaviors involving dissemblance or deception under Rule 8.4(c), including Alabama, Florida, Iowa, Virginia, Alaska, Tennessee, and North Carolina.

18 *In re Pautler*, 47 P.3d 1175, 1182 (Colo. 2002). The language of Colo. RPC 8.4(c) is the same as D.C. 8.4(c).

19 *In re Hurley*, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 5, 2008).

20 *Id. at *20.*

21 *Id. at *25.*

22 *Id. at *26.*

23 *Id.* at *25–26.

24 *See In re Crossen*, 880 N.E.2d 352 (Mass. 2008) (Finding attorneys' pretexting violated Rule 8.4(c)); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009) (Finding attorneys' deception did not violate Rule 8.4(c)).

25 Although not the focus of this article, the issues of self-help discovery and investigations through social media have been increasingly addressed in legal ethics opinions. *See* N.Y. City Bar Comm. on Prof'l Ethics, Op. 2010-2 (2010); N.Y. State Bar Comm. on Prof'l Ethics, Op. 843 (2010); Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); New Hampshire Bar Ass'n Ethics Comm., Op. 2012-13/05 (2012); San Diego Cnty. Bar Legal Ethics Comm., Op. 2011-2 (2011); PA Formal Opinion 2014-300 (2014). These opinions often conclude that deception in name and/or purpose in this context is an omission that rises to a misrepresentation which violates various ethics rules, including 4.1, 4.2, 4.3, and 8.4(c).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JOHN M. GREEN. Bar No. 476592. October 20, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Green for 90 days, with 30 days stayed, and impose a one-year probation with conditions. While retained to represent a client following an automobile accident with an uninsured motorist, Green failed to respond to his client's insurance company's repeated inquiries regarding settlement and did not attempt to negotiate a settlement with the insurer. In addition, although Green filed suit in D.C. Superior Court against both the driver and the owner of the other car in the accident, he failed to timely serve either defendant, and the case was dismissed for failure to prosecute. Green then made no effort to reinstate the case and failed to communicate with the client regarding the status of the matter. Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.16(d), and D.C. Bar R. XI, § 19(f).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE ADRIAN CRONAUER. Bar No. 427503. October 9, 2014. The D.C. Court of Appeals disbarred Cronauer by consent, effective forthwith.

IN RE CHARLES MALALAH. Bar No. 978801. October 30, 2014. The D.C. Court of Appeals disbarred Malalah. As a condition of reinstatement, Malalah shall return to his client $33,333.33 plus interest at the legal rate of 6 percent calculated from the date he withdrew the funds from his IOLTA account. Malalah intentionally misappropriated client funds and violated other rules of professional conduct. Rules 1.4(a), 1.5(c), 1.15(a), 8.4(c), and 1.19(a).

IN RE HERBERT T. NELSON. Bar No. 254730. October 23, 2014. The D.C. Court of Appeals granted Nelson's petition for reinstatement.

IN RE JOSEPH J. O'HARA. Bar No. 362581. October 23, 2014. The D.C. Court of Appeals disbarred O'Hara. O'Hara pleaded guilty in the United States District Court for the Western District of Texas to one count of conspiracy to commit mail fraud and the deprivation of honest services, in violation of 18 U.S.C. §§ 1341, 1346, and 1349. The court previously has held that violations of 18 U.S.C. §§ 1341 and 1346 involve moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a)(2001).

Informal Admonitions Issued by the Office of Bar Counsel

IN RE RICHARD E. ST. PAUL. Bar No. 494622. October 3, 2014. Bar Counsel issued St. Paul an informal admonition. In a personal matter in family court, St. Paul failed to obey court orders to appear and to pay child support. Rules 3.4(c) and 8.4(d).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.