

## SELECTED TOPICS IN LEGAL ETHICS

This presentation will discuss one of the most common sources of controversy or complaints about lawyers: communication, and also investigative ethics.

### COMMUNICATION

The 2006 changes to the Wyoming Rules of Professional Conduct brought about a reorganization to the provisions concerning communication. In an excellent article in **29 June Wyo. Law. 36**, Professor Burman describes the changes with regard to communication as follows:

Rule 1.4(a) has been substantially reorganized. The reorganization clarifies a lawyer's obligation to (1) have the client make informed decisions about certain matters; (2) consult with the lawyer about the means to be used to attempt to achieve the client's objectives; (3) keep the client informed about a matter; (4) comply with a client's requests for information; and (5) consult with the client about relevant limitations on the lawyer's behavior. The first four concepts were implicit in former Rule 1.4(a). The fifth was formerly codified in Rule 1.2(e).

**RETURN PHONE CALLS!** Rebecca Lewis, the Wyoming bar counsel suggested in **29 – FEB Wyo. Law. 31**, that roughly half of the complaints received by the bar stem from or are related in some way to an attorney failing to appropriately communicate with a client. That means not just returning phone calls, but failing to provide information. Ms. Lewis suggests regular communication with the client and certainly not less than every three months. Rather than look at the problem that way (although it certainly is valid), go back a few steps. Try not to represent anyone that you don't like, with the exceptions of those who have suffered a brain injury, or to satisfy your conscience or

ethical responsibilities under **Rules 6.1** and **6.2** regarding *pro bono* work and acceptance of appointments from a Tribunal. The comment to **Rule 6.2** provides, “An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients”. Just because their cause may be unpopular, doesn’t mean that you won’t like them. In that initial interview, if you don’t like your potential client, consider sending him or her to someone else who may appreciate them more and thus do a better job for them. If you don’t have empathy for that client, how are you going to convincingly seek empathy and justice for him or her from a jury? If you don’t like the client, you are less likely to return phone calls, and want to deal with the issues, or write letters or work on the case, and that will show. If you like your clients, that will make the communication easier to do.

One of the models I use is to listen to the client to try and find out what he or she wants to do, and get them on the right path. Some clients think that lawyers are only interested in the money. If the primary focus in personal injury work becomes restoring as much function for the client as possible, some things can change. A good life is better than a good lawsuit. The image of the client changes from a “victim” to a “striver and survivor” who has done all that he or she can to restore himself or herself to the way they were, and the rest is up to the jury to make it right – to pay the rest of the debt that remains unpaid showing the lack of personal responsibility of the defendant. The P.T. or O.T. can speak to the effort and character of the mutual client to effect the best possible rehabilitative efforts. I ask the client to call me after each visit to the doctor. That way YOU know the course of treatment and can help the client celebrate his or her successes and you know more easily how to make that course explainable to a jury.

As the physician, Sir William Osler suggested, “Listen to the patient, he is giving you the diagnosis.” Listen to your client he or she is giving you your case. An important tool for listening is the inter-active listening model of Carl R. Rogers. Restate what the client has said, so that you can show that YOU have understood. If you understand it, then you can more easily explain it to a jury. When your client calls after each doctor visit, then it is easier to compare what the client tells you with what the physician has recorded in his or her notes, when you get them. The client also gets more used to reporting his or her symptoms by going over them with you, and even making lists of those symptoms when they occur, or what aggravates them, which helps him or her better prepare for office visits, and also for deposition and trial. The before and after testimony becomes much smoother. David Ball suggests that even bad plaintiff jurors will come to the support of a plaintiff who shows persistence. The striver/survivor model shows how your client kept going even when his or her efforts were made harder because he or she lacked the needed resources – because of the defendant’s refusal to meet his or her responsibility. Jurors often see this as mean-spiritedness.

The ethical rules require:

#### **RULE 1.4 COMMUNICATIONS**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, except that a lawyer appointed to act as a guardian ad litem shall be ultimately responsible for making decisions in the best interests of the individual.

The Comments to the above provisions suggest how the above Rule should be applied.

#### COMMENT

[1] In making a decision to create or to continue an attorney-client relationship, a lawyer shall respond truthfully to inquiries from prospective clients regarding the lawyer's experience, scope of representation, and financial responsibility, including whether the lawyer has legal liability insurance.

[2] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### Communicating With Client

[3] If these Rules require that a particular decision about the representation be made by the client, paragraph [\(a\)\(1\)](#) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who

receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule [1.2\(a\)](#).

[4] Paragraph [\(a\)\(2\)](#) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph [\(a\)\(3\)](#) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[5] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph [\(a\)\(4\)](#) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[6] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. Similarly, when a lawyer and a client agree to limit the scope of representation pursuant to Rule 1.2(c) or Rule 6.5, the lawyer's obligations pursuant to this rule are limited by the terms of the agreement. In any lawyer-client relationship, however, the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule [1.0\(f\)](#).

[7] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. When the lawyer is appointed to act as a guardian

ad litem, the lawyer is ultimately responsible for making reasonable decisions about the best interests of the individual, and shall consult with the individual to the extent reasonably possible, unless the attorney reasonably determines that consultation would be contrary to the individual's best interests. See Rules 1.2 and 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13](#). Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

#### Withholding Information

[8] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. A lawyer appointed as a guardian ad litem may withhold information when the attorney reasonably believes that communication of the information to the individual would not be in the individual's best interests. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule [3.4\(c\)](#) directs compliance with such rules or orders.

When the issue to improve client communications is reframed to an improved case preparation model, you will be doing the right thing and be better at presenting your

client's story. You are becoming a more effective advocate rather than doing a chore. Also, the more you practice the interactive listening model, the better you will become at jury selection and the examination of witnesses. The above seems preferable to considering returning phone calls as an unpleasant chore, or even more unattractive alternatives.

In *Board of Professional Responsibility, Wyoming State Bar v. Keenan*, 148 P.3d 1 (Wyo.,2006.), respondent's failure to diligently pursue the case violated **Rule 1.3** of the **Wyoming Rules of Professional Conduct**, and his failure to properly communicate with his client violated **Rule 1.4**. Respondent was publicly censured and suspended for two years. Rebecca Lewis also suggests that to avoid potential conflicts between a potential new client and a client for whom you have not done work for a significant period of time to write a "disengagement" letter which clearly tells the then current client that the legal matter which you have been handling is complete and that you are no longer acting as his or her attorney. However, it is done as a cover letter, which she suggests putting on the check list before closing a file. (**28 AUG Wyo. Law. 33**).

### THREE DIFFERENT ETHICAL MODELS

Let's run through three different ethical models. Ben Franklin said, "Honesty is the best policy." This could be described as the voice of human experience. Immanuel Kant said, "Honesty rather than a policy." Whether it works or not, honesty is a noble end in itself. In the East, they have a similar prohibition against theft, but the spin is different. The zen master, Robert Aitken, says that we shouldn't steal, but the thing that is most precious is not to steal our own time, by doing things we don't really want to do.

If you like your clients, and you like your work, that too will show and make you and your ethical obligations easier.

### CONVENTIONAL WISDOM ITEMS

The more you listen, the better a listener you become, and the more real communication will occur. For example, when a client calls you in the middle of the night, and says, "I want you to do this, and I don't care how much it costs!" a reason for the lack of proper boundaries and professed disinterest in the amount of fees could well show no intent to ever pay those fees. A basic rule of criminal defense used to be, "It's what's up front that counts!" That may well be all you will ever get. The first unwritten rule of criminal defense is that clients may go to jail, but lawyers never should. The chances are that you know the difference between right and wrong, and if you are not sure, ask for help, from other lawyers, a listserve, or a seek an advisory opinion.

For civil practice, remember and put into practice the basic rule for damages attorneys as David Ball suggests: "The only goal of trial is to get money for your client." My variant on the above is this: My job is to get as much money as soon as possible, or as much money as possible. However, to get to that point sometimes you need to figure out what the unspoken agenda of your client or your opponent is. In the old Country Joe and the Fish song, he asks: "One, Two, Three, what are we fighting for?" Sometimes, it will not be money, but if you inquire, you can find out how to get the case back on track to the David Ball agenda.

### INVESTIGATIVE ETHICS – RULE 4.2

#### RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the

representation with a person 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.

#### COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See

Rule [8.4\(a\)](#). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the

organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule [3.4\(f\)](#). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule [4.4](#).

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule [1.0\(f\)](#). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3

Professor Burman, *supra*, states that while Rule 4.2 remains largely unchanged, the significant additions are in the comments – [4] through [9] are brand new. Burman notes:

Comment [5] addresses communications “authorized by law.” Such communications may include constitutional or other legal rights to contact the government (the First Amendment includes the right to petition the government for redress of grievances, and courts have consistently held that the right may be exercised through and attorney). FN 21 For a discussion of the right to petition the government, see, ABA Formal Op. 97-408

(Communication with Government Agency Represented by Counsel).

Permissible communications may also include investigative activities, during which an attorney or someone acting on behalf of an attorney, such as an investigator, may have contact with a person who has an attorney. Many courts, including the Tenth Circuit, have allowed such contacts, finding that to hold otherwise would unfairly hamper law-enforcement activities. [FN 22] Such opinions, and this Comment, have been very controversial. [FN 22] For a discussion of contacting a person who is represented by counsel as part of an investigation, see, ABA Formal Opinion 95-396 (Communications with Represented Persons).

Comment [7] addresses communications with an organization that is represented by counsel. The Comment reflects the holding of the Wyoming Supreme Court in *Strawser v. Exxon*, [FN23] both regarding current and former employees of the organization. 843P.2d 613 (1992).

#### CURRENT EMPLOYEES

In *Strawser v. Exxon Co., U.S.A., a Div. of Exxon Corp.*, 843 P.2d 613

(Wyo.,1992), Exxon had argued for a “bright line” rule prohibiting all contact with any past or present employees, and the district court entered such an order. The Strawssers contended that their *ex parte* contacts did not breach the ethical duty imposed by Rule 4.2 for two reasons. First, the statements made by those employees do not constitute admissions under W.R.E. 801(d)(2)(D). Second, under *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981), the attorney-client privilege only protects *communications* – and not underlying *facts*. Therefore, their interviews did not violate Rule 4.2 as the ethical rule differs from the privileged communication rule, and

the test for the ethical rule should be the “managerial-speaking test” found in **Wright by Wright**, 691 P.2d 564. The Supreme Court held that: “(1) employee, spouse, and counsel were entitled to conduct informal *ex parte* interviews with present and former employees, and (2) Rule 4.2 on communication with person represented by counsel permits *ex parte* contacts with former employees and managers, but proscribes inquiry into matters subject to attorney-client privilege.” (843 P.2d at 613). The Wyoming Supreme Court discussed the flaws in Exxon’s arguments and the various approaches to Rule 4.12, and cited with approval, **Niesig v. Team I**, 559 N.Y.S. at 498, 558 N.E.2d at 1035, as follows:

The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines “party” to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation’s “alter egos”) or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. *All other employees may be interviewed informally.* (Emphasis added by the Wyoming Supreme Court). (843 P.2d at 621).

The court held that “the Strawsers and their counsel are entitled to conduct informal *ex parte* interviews with all present Exxon employees except: (1) those who may legally bind Exxon by their having acted or failed to act in the alleged course of defaming Strawser or having invaded the Strawsers’ privacy; (2) those whose actual conduct in the claimed incident(s) may be imputed to Exxon; and (3) those employees implementing the advice of Exxon’s counsel.” (843 P.2d at 618). The Wyoming Court recited the **Niesig** operational standard:

In practical application, the test we adopt thus would prohibit direct communication by adversary counsel “with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation.” \* \* \*

This test would permit direct access to all other employees, and specifically-as in the present case-it would clearly permit \*622 direct access to employees who were merely witnesses to an event for which the corporate employer is sued.

[Niesig, 559 N.Y.S.2d at 498-99, 558 N.E.2d at 1035-36](#) (quoting Wolfram, Modern Legal Ethics § 11.6, at 613 (Practitioner's ed. 1986)).[FN12](#) (843 P.2d at 622).

Thus, the Court held that the **Niesig** “alter ego” or “binding admission” test be applied by the litigants and the court. (843 P.2d at 622).

Leaving **Strawser** for the moment, counsel are prohibited by Wyoming Rule 4.2 [7] from contacting constituents of an organization who supervise, direct, or regularly consult with the organization’s lawyer with respect to concerning any matter or act or omission for which civil or criminal liability may attach to that organization without permission of an organization’s counsel.

#### FORMER EMPLOYEES

Returning to **Strawser**, *supra*, the court noted that the trend has been for courts to permit *ex parte* contacts with former employees, but to proscribe inquiry by opposing counsel into matters subject to the attorney-client privilege or attorney-client communications. For both current and former employees, counsel must before inquiry disclose their identity and their role in the litigation.

Contacts with former employees are not prohibited. A former employee is no longer in a position to bind that corporation, but privileged items should not be sought. Rule 4.2 Comment [7] must not use methods of obtaining evidence that violate the legal rights of the organization, referring also to Rule 4.4, Comment [2] on documents or e-mails inadvertently or mistakenly sent and the obligation to notify the sender.

Interestingly, **ABA Opinion 91-359** takes the position, “*The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.*” (Italics in the original). However, the Opinion offers the following:

With respect to *any* unrepresented former employee, of course, the potentially–communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to communications to the extent his or her communications as a former employee with his or her former employer’s counsel are protected by the privilege (a privilege not belonging to or for the benefit of a former employee, by the former employer), Such an attempt could violate Rule 4.4 (requiring respect for third persons).

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer’s dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer’s role in the manner giving occasion for the contact , including the identity of the lawyer’s client and that fact that the witness’s former employer is an adverse party. See, e.g. *Brown v. Peninsula Hospital Centers*, 64 A.D. 2d 685, 407 N.Y.S.2d 586 (App. Div. 1978) (attorneys for defendant

hospital should have disclosed potential conflict of interest before talking to treating physician and producing him for deposition as hospital's representative); ABA Informal Opinion 908 (1966) (attorney for a potential plaintiff may interview as-yet unrepresented defendant provided he advises that he is acting as a claimant's attorney).

The annotation, **57 A.L.R.5th 633**, "Right of attorney to conduct ex parte interviews with former corporate employees" notes a method suggested in several cases is, "to establish a script of statements and questions to be followed in all initial contacts with former employees. [FN3] In such a script, the attorney or investigator advises the interviewee of the existence and nature of the lawsuit and of the identity and interest of their client in the case and asks whether the person remains employed with the corporation and whether he or she is represented by counsel. Upon receiving an affirmative response to either question, the interview would be terminated."

### **CHEAT THE BEATLES**

There is an excellent article in **Trial Preparation and Trial Issues** entitled, "Cheat the Beatles: Ethics in Investigation," where lawyers with the dream job of representing the Beatles were accused of ethical violations when they and their private investigators concealed their identities and did not disclose their purpose to see if the defendant was violating a consent order by unauthorizedly selling stamps with the likeness of the Beatles. Defendants filed a cross-motion to rescind the Consent Order and another motion seeking sanctions on Plaintiff's counsel due claimed unethical behavior in procuring the stamps which were the basis of the Plaintiff's contempt motion. **Apple Corps Limited v. International Collectors Society**, 15 F.Supp.2d 456, 459 (1998). The court held that the Comments to RPC 4.2 made it clear that the only persons

represented by an entity's attorney are those that fall within the “litigation control group”.

The court cited *Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437 (D.Colo.1996) ([Rule 4.2](#) must “remain[ ] a rule of ethics, rather than of corporate immunity” and to read the rule expansively would “stifle[ ] the truth-seeking function of courts and treat[ ] corporate employees as a form of company property”). Thus, the Defendants' sales representatives did not fall within the “litigation control group” as defined by RPC 1.13, and since the sales representatives were “not within the litigation control group and ha[d] not obtained other representation, ex parte contact is permitted.

The court explained:

RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn \*475 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. See, e.g., [Weider, 912 F.Supp. 502](#). Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate [RPC 4.2](#). (15 F.Supp2d at 474-475). The court next addressed the defendants' allegations of a New Jersey RPC 8.4(c) allegation of deceitful behavior as follows:

[\[16\]](#) The attorney disciplinary rules prohibit an attorney from engaging in deceitful conduct. [RPC 8.4\(c\)](#) states that an attorney may not engage in conduct involving “dishonesty, fraud, deceit or misrepresentation.” [RPC 8.4\(c\)](#) is not by its terms limited only to material representations. It applies to lawyers not only when they

are acting as lawyers but also when they are acting otherwise than in a lawyerly capacity. See David B. Isbell & Lucantonina 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, 816 (1995).FN22

However, [RPC 8.4\(c\)](#) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes. [Id. at 812, 816-18](#)...Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. *Id.* at 792-94. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. *Id.* at 794-795, 800; see also Green Declaration ¶ 7.FN23 The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

The court reasoned that if Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business. For a violation of **Rule 4.3** to exist the court asserted that the language of **RPC 4.3** that it is limited to circumstances where an attorney is acting in his capacity as a lawyer—"dealing

on behalf of a client.” and was intended to prevent a lawyer who fails to disclose his role in a matter from taking advantage of an unrepresented third party. .Thus, when Plaintiffs' counsel and investigators tested compliance they were not acting in the capacity of lawyers, and the prohibitions of **RPC 4.3** did not apply.

ICS had argued for the New York Rules of Professional Conduct should apply which presumably were more favorable to it than the New Jersey Rules; the court found the New Jersey Rules to be applicable even for acts occurring in New York. The author of “Cheat the Beatles” suggests that a different result could occur in Colorado for Colo. RPC 4.2 also prohibits *ex parte* communications with non-managerial employees “whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement to the organization may constitute an admission on the part of the organization.” Thus, the “admission restriction” may also include the sales representatives that the “Beatles” sought to use against ICS. The author suggests,

Notwithstanding the admissions restriction and a cogent explanation of its application in CBA Ethics Committee Revised Formal Opinion 69, whether it applies in a given case may depend upon the judge. In *Johnson v. Cadillac Plastic Group*, Judge John Kane, Jr. embraced in *dicta* another court's rejection of the entire admissions restriction. He reasoned that it “stifles the truth-seeking function of courts and ‘treats corporate employees as a form of company property.’” (930 F. Supp1437, 1442 (D. Colo. 1996) quoting *Wieder Sports Equipment v. Fitness First*, 912 F. Supp. 502, 509 (D. Utah 1996).

The author also suggests that considering the hardline the Colorado Supreme Court

took in *In re Paulter*, 47 P.3d (2002), a different result could occur in Colorado under **Rule 8.4(c)**. (p.D3-4). Paulter, a deputy district attorney, who pretended to be a public defender in a telephone call with a murder suspect whom law enforcement were trying to get to surrender, was sanctioned. His sanction was a three-month suspension stayed during 12 months of probation.

For the above reasons, Susan J. Becker in *Discovery from Current and Former Employees* (ABA 2005) recommends: a thorough review of all the disciplinary rules, with priority to the rules where the case is pending, thoroughly review the comments, consult the local rules, any standing orders, and research the court's interpretation and application of the rules being as judge specific as possible. (At page 30). She notes that ethical codes are unsuitable for regulating discovery. Ethical rules should establish acceptable ranges of conduct, and to punish bad behavior. Discovery rules are intended to make a more effective flow of information among and between the parties. She makes the excellent point that the legal profession and the public would be better served by expanding codes of procedure to regulate informal discovery. (At pages 28-29).

## CONCLUSION

There is no substitute for knowing the client. A steady chain of contact throughout the case makes for a better attorney client relations and better case preparation. When conducting informal discovery of organizational employees be sure to identify yourself, and your client, and ask the representation questions. For cases where bad conduct is sought, make a thorough review of the rules, comments, applicable interpretations, as judge specific as possible.

