Unobvious Misconduct Under "Catch-All" Rules 8.4(c) and (d)

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This article discusses interpretation of Colorado Rules of Professional Conduct 8.4(c) and (d), which are "catch-all" provisions that may prohibit conduct not explicitly addressed elsewhere.

Like the sign on eastbound I-70 at Dead Man's Curve warning truckers that they are not yet down the mountain, lawyers should not be fooled if no specific Colorado Rule of Professional Conduct prohibits some questionable activity. Such conduct may be prohibited by one of the two "catch-all" rules designed to catch what the specific rules do not.

No ethics code can possibly address all forms of lawyer misconduct. As stated in an 1856 US Supreme Court case, "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed."[1] For that reason, the ABA Model Rules of Professional Conduct include, and Colorado and most other states have adopted, two broad catch-all rules to cover conduct not addressed in a specific rule.[2] In Colorado, these rules are Colo. RPC 8.4(c), which, in relevant part, prohibits conduct "involving dishonesty, fraud, deceit, or misrepresentation," and Colo. RPC 8.4(d), which prohibits conduct "prejudicial to the administration of justice." These rules have survived constitutional challenge.[3]

It is not always obvious whether certain conduct violates these rules. Nonetheless, Colorado attorneys are "presumed to be aware of the Rules of Professional Conduct and their impact."[4] Thus, lawyers cannot defend themselves against a disciplinary charge by arguing they didn't know their conduct violated a rule of professional conduct[5] or saying they relied on another lawyer's advice regarding their ethical obligations.[6] For these reasons, lawyers need to know that certain conduct violates, or may violate, these rules. This article discusses the interpretation of these rules in ways that may not be obvious.

Colo. RPC 8.4(c)

Rule 8.4(c) does not specifically prohibit lawyers from recording conversations surreptitiously, holding client funds in the lawyer's trust account to hide them from creditors, or acquiring the nonexclusive use of another law firm's name as a keyword so that the lawyer's name will pop up when someone searches for the competitor's firm online. But Colo. RPC 8.4(c) nonetheless prohibits the first two activities and may prohibit the third.

Engaging in Surreptitious Audio Recordings

A lawyer's surreptitious audio recording of another person may not be obviously dishonest—and may even be legally permissible—but it violates Colo. RPC 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation. As the Colorado Supreme Court stated in 1989, "The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound."[7]

Some lawyers assume that they may engage in surreptitious recording as long as it does not violate the criminal statute making it illegal.[8] Under that statute, if one party—which would include the party doing the surreptitious recording—has authorized the recording, it is not illegal.[9] A lawyer's covert recording still may be unethical, even if not illegal.

The prohibition against surreptitious recording by lawyers may be absolute. In 2003, the CBA Ethics Committee (Committee) suggested in a formal opinion that surreptitious recording should not be prohibited under two circumstances: (1) in "connection with

actual or potential criminal matters, for the purpose of gathering admissible evidence"; and (2) in "matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life."[10] The opinion, however, goes on to state that the "Committee recognizes that the Colorado Supreme Court has yet to recognize either of these exceptions to the general rule against surreptitious recording, and that the Committee's endorsement of the exceptions arguably is inconsistent with the Court's decisions in *Selby* and *Smith*."[11] Consequently, the Committee cautioned, "attorneys should exercise particular care in relying on this ethics opinion, which, like all CBA ethics opinions, is advisory only."[12]

Even if the prohibition against a lawyer engaging in surreptitious recording remains absolute, Colo. RPC 8.4(c) does not prohibit a lawyer from directing agents to surreptitiously record conversations, provided doing so is part of "lawful investigative activities."[13] That is because, in 2017, the Colorado Supreme Court amended Colo. RPC 8.4(c) to add an exception permitting a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities." After the rule change, the Committee considered the amended rule's scope and limitations in a formal opinion. That opinion, CBA Formal Opinion 137, provides guidance to lawyers on what activities constitute "lawful investigative activities" under Colo. RPC 8.4(c).[14] Generally, the opinion advises that criminal investigations are likely to be considered lawful investigative activities as long as they are not "designed to mislead courts or other tribunals," and in civil matters, "investigative activities are likely to be considered lawful if they are designed to ferret out violations of constitutional, statutory, or common law."[15]

Hiding Money from Creditors in a Trust Account

Another example of dishonest conduct that may not be an obvious ethical breach involves the use of trust accounts. A lawyer's trust account is not a safe haven for client funds.[16] Nothing prevents a judgment creditor from garnishing client funds held in a lawyer's trust account.[17] However, creditors may not think to look for a client's funds in a lawyer's trust account. For that reason, a lawyer who uses the trust account to *conceal* a client's funds from creditors almost certainly exhibits dishonest conduct in violation of Colo. RPC 8.4(c).[18] A variation on this theme is a lawyer who deposits personal funds into a trust account to hide them from the lawyer's own creditors.[19]

Using Potentially Misleading Search-Engine Optimization Techniques

Certain search-engine optimization techniques may violate Rule 8.4(c). These techniques are typically designed to ensure that a lawyer's name appears high on the list of results that appear when potential clients search for a lawyer on the Internet. One such technique is for a lawyer to acquire the nonexclusive use of the name of a competitor lawyer or law firm as a keyword so that the lawyer's name will pop up when someone searches for the competitor by name.

Other states' ethics committees have reached varying conclusions on the propriety of this technique, but a slim majority concludes that the technique does not violate those states' equivalent of Rule 8.4(c).[20] A Texas ethics opinion, for example, concludes that since businesses of all kinds use this technique, it is not dishonest or deceitful for Texas lawyers to use it.[21] Ethics opinions from North Carolina and Ohio, however, reach the opposite conclusion.[22] The Ohio opinion, for example, concludes that by purchasing and using a competitor law firm's name as a keyword for advertising, the advertising lawyer is attempting to deceive the consumer into selecting the advertising lawyer instead of the intended law firm, which constitutes deceitful conduct in violation of Rule 8.4(c).[23] Even if the consumer is not deceived, the advertising lawyer's attempt to deceive the consumer violates the prohibition in Rule 8.4(a) against attempting to violate a Rule of Professional Conduct, namely Rule 8.4(c).[24] There is no Colorado legal authority addressing this particular technique. The only thing that is clear is that other controversial search-engine techniques are bound to arise.[25]

Colo. RPC 8.4(d)

Rule 8.4(d) does not specifically prohibit a lawyer from being involved in a settlement agreement that requires a party not to file or to withdraw a grievance, from threatening to sue a witness or the complainant in a disciplinary proceeding, from failing to pay a court reporter or other litigation service provider despite the lawyer's legal liability to do so, from recording a notice of charging lien, or from associating with a lawyer in a case solely to force the judge's recusal. The rule has nonetheless been interpreted to prohibit these activities.

Conduct Prohibited in Connection with Settlement Agreements

Most Colorado lawyers know that Colo. RPC 4.5(a) prohibits a lawyer from threatening to present "criminal, administrative or disciplinary charges" to obtain an advantage in a civil matter or helping to present such charges "solely to obtain an advantage in a civil matter."[26] Fewer know that Colo. RPC 8.4(d) prohibits a lawyer from participating in, entering into, or even proposing a settlement agreement that requires a party—usually the lawyer's client or the opposing party—to withdraw a pending disciplinary complaint against a lawyer or to refrain from filing one.[27] Such conduct frustrates lawyers' duty to report misconduct and interferes with the attorney discipline system.[28] For this reason, "once a request for investigation has been filed, nothing short of deliberate misrepresentation by the complaining witness could affect grievance proceedings once they have been initiated."[29]

Despite the clear prohibition on lawyer involvement in settlement agreements that require a party to withdraw or refrain from filing a grievance against a lawyer, the same may not be true of settlement agreements that require the client or the opposing party to refrain from reporting a crime. (Notably, though, a provision to "withdraw" a previously filed criminal complaint would be beyond the settlement party's control and therefore illusory.) No Colorado case or ethics opinion has addressed this issue, so looking to authorities from other jurisdictions is instructive.

Ethics opinions from the ABA, New York, and North Carolina conclude that the rules

do *not* prohibit such agreements, albeit with significant qualifications.[30] The ABA opinion, for example, limits such agreements to the following circumstances: (1) the criminal matter must be related to the client's civil claim; (2) the lawyer must have a "well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts"; and (3) the lawyer may not "attempt to exert or suggest improper influence over the criminal process."[31] Also, the agreement must not constitute a crime itself or compound a crime; otherwise the lawyer would violate Rule 8.4(b)'s prohibition against committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[32] In this context, compounding a crime "means that the amount paid to settle the civil claim may not exceed the amount to which the plaintiff would be entitled under applicable law; in other words, *no* compensation may be paid to the plaintiff for the plaintiff's silence."[33] Likewise, where there is a legal requirement to report certain conduct, such as with child abuse and neglect, a lawyer may not participate in a settlement agreement that includes a non-reporting provision, because such a provision would be illegal.[34]

Unlike the ABA and North Carolina opinions, the New York City Bar Association opinion permits settlement agreements with non-reporting provisions only if the defendant or potential defendant first raises the non-reporting provision.[35] It further encourages lawyers to disclose to their clients that the provision may make the settlement agreement unenforceable as against public policy.[36] The North Carolina opinion also states the obvious: that such provisions may not require a party to testify falsely or to evade or refuse to comply with a subpoena in a criminal proceeding.[37]

No one knows whether the Colorado Supreme Court would hold a civil settlement provision requiring a party to refrain from reporting criminal conduct to be unethical or unenforceable. However, non-reporting provisions may be more justifiable in the criminal context than in the attorney discipline context. To some degree, non-reporting provisions interfere with the criminal justice system even if the parties follow every guideline in the ethics opinions discussed above. However, the public policy favoring the settlement of disputes may outweigh that limited interference.[38] It is often impossible for a lawyer to settle a civil dispute without also resolving the client's related criminal exposure, even if additional considerations beyond the parties' control may yield ongoing criminal exposure. In contrast, non-reporting provisions in the attorney discipline context undermine the high ethical standards lawyers must follow. In addition, even when the client favors such a provision, it can present an obstacle to settlement that elevates the lawyer's interests over the client's.

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Threatening to Sue a Witness in a Civil Action or a Complainant in an Attorney Discipline Matter

Lawyers who threaten to sue a third party are usually doing nothing more than carrying out their obligation under Colo. RPC 1.2(a) to pursue their clients' objectives. Sometimes, however, threats of civil action constitute ethical misconduct.

For example, a lawyer who threatens to sue a witness for testifying in a court proceeding violates Colo. RPC 8.4(d).[39] Another example involves CRCP 242.8, which prohibits a lawyer from suing a person for reporting the lawyer to the Office of Attorney Regulation Counsel (OARC) or for testifying against the lawyer in an attorney discipline case.[40] A lawyer who sues a person in violation of this rule engages in conduct prejudicial to the administration of justice in violation of Colo. RPC 8.4(d) and CRCP 242.8.[41] By extension, a lawyer who *threatens* to file such an action likely violates Colo. RPC 8.4(a), which prohibits a lawyer from violating or *attempting to violate* any rule of professional conduct—in this case Colo. RPC 8.4(d).[42]

Failing to Pay Litigation Service Providers Despite a Legal Obligation to Do So

Lawyers who fail to pay litigation service providers may violate Colo. RPC 8.4(d). In *In re Betterton-Fike*, the Colorado Supreme Court reversed a hearing board decision that concluded a lawyer violated Colo. RPC 8.4(d) by failing to pay a court reporter for transcripts he ordered in a client matter.[43] In reversing, the Court explained that lawyers violate Colo. RPC 8.4(d) in these circumstances only when they have a "legal obligation to pay."[44] In *Betterton-Fike,* the Court held that the respondent lawyer did not have a legal obligation to pay the court reporter because there was no written contract requiring him to pay for the transcripts.[45] Even if there had been a verbal contract, the respondent lawyer was not personally liable for the services because he had acted solely for his clients when he ordered them.[46]

It remains to be seen whether the principles underlying *Betterton-Fike* extend beyond court reporters to other third-party litigation service providers and, if so, which ones. In addition, even when a lawyer has a legal and therefore

ethical obligation to pay a court reporter, a lawyer probably does not violate Colo. RPC 8.4(d) if there is a good faith dispute over the charges. In this instance, the lawyer should promptly pay any undisputed portion.

Recording a Notice of Charging Lien Against a Client

A lawyer may violate Colo. RPC 8.4(d) by recording a charging lien against a client's real property. On the one hand, the charging lien statute grants lawyers a lien on "any money, property, choses in action, or claims and demands in their hands, on any judgment they may have obtained or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit for any fees or balance of fees due or to become due from any client."[47] If the lawyer files a notice of the lien in the court file, that notice constitutes notice to third parties that the lawyer has a first lien on the property for the amount of the fees.[48]

On the other hand, in a 1992 attorney discipline case, *People v. Smith*, a lawyer recorded a notice of charging lien in the clerk and recorder's office—not the court file—against the marital residence owned by his client and his client's soon-to-be ex-wife.[49] When he did so, he had not yet sent his client an invoice.[50] A day later, the lawyer withdrew from the case by a substitution of counsel.[51] A disciplinary hearing board found that by recording and refusing to release the lien, the lawyer violated the predecessor rule to Colo. RPC 8.4(d), noting that the charging lien statute did not authorize him to record the notice of lien.[52] The Colorado Supreme Court affirmed.[53] OARC has historically interpreted *Smith* to prohibit a lawyer from recording a notice of charging lien and to permit the lawyer to record only a judgment obtained against the client (i.e., a judgment lien).[54] Considering OARC's position, whether the charging lien statute prohibits a lawyer from recording a notice of lien and whether this position is consistent with the recording statute[55] are points of only academic interest.

Entering an Appearance in a Case to Force the Judge's Recusal

Rule 2.11 of the Colorado Code of Judicial Conduct requires judges to disqualify themselves if, among other circumstances, they have a "personal bias or prejudice concerning a party or a party's lawyer,"[56] or if the judge's spouse, domestic partner, or close relative[57] (or the spouse or domestic partner of the close relative) is acting as a lawyer in the case.[58] In numerous reported decisions across the country, lawyers have entered an appearance in a case, or arranged for another lawyer to do so, solely or primarily to prompt the judge's recusal, usually on one of these grounds.

For example, at the time of *Grievance Administrator v. Fried*,[59] there were only three judges in one particular judicial district in Southeast Michigan. Two of the three judges had reputations as tough sentencing judges. The third was considered more lenient. Each of the two "tough-sentencing" judges had a relative who practiced law in the district—a cousin of one judge and a brother-in-law of the other judge. Because of these relationships, a Michigan rule required the judges to automatically recuse themselves in any case in which their relative appeared as counsel. In criminal cases filed in that district, these lawyers accepted compensation from other lawyers to act as co-counsel solely to force the recusal of their relatives by entering an appearance. One lawyer forced the recusal of his cousin in 24 criminal cases. The other lawyer forced the recusal of his brother-in-law in 39 criminal cases and one civil case. In one criminal case, the lawyers filed successive entries of appearance until the case was assigned to the third judge in the district with the more lenient sentencing reputation.[60]

Two lower tribunals found for the lawyers on the grounds that no rule of professional conduct specifically prohibited their conduct.[61] Then the Michigan Supreme Court reviewed the case. It distinguished this conduct from "permissible" legal maneuvers having a "degree of similarity to the charged conduct," such as filing a motion for change of venue to move the case to a more favorable jurisdiction, accepting a case because of the lawyer's record of success against opposing counsel or before the assigned judge, or even entering an appearance where the "client's subjective motive is one that the lawyer would be loath[] to share, such as an explicit desire to avoid lawyers of one gender or the other."[62] However, these situations "involve[d] a lawyer actually practicing law," in contrast to the respondent lawyers, who were "selling, not their professional services, but their familial relationships."[63]

The Michigan Supreme Court ultimately explained that "the rules do not prohibit a lawyer from taking a case that might lead to a recusal," but determined that "[a]n appearance filed principally to obtain the recusal (or de minimis activity as co-counsel to a lawyer who is handling the case, with the co-counsel designation serving principally to obtain the recusal) is a ground for discipline."[64] It found that the lawyers' conduct unduly interfered with the proper assignment of cases and therefore fell squarely within the purview of a Michigan rule identical to Colo. RPC 8.4(d), as well as two other rules not found in Colorado.[65] The Michigan Supreme Court reversed and remanded the case to the disciplinary tribunal.[66]

Similarly, the US Circuit Court of Appeals for the Fifth Circuit determined that both lawyers who sell their relationship with the judge and lawyers who purchase or arrange to purchase such a relationship are subject to discipline. The underlying case in *In re Mole*[67] arose from a "failed relationship formed to build and manage a hospital and medical office building in Kenner, Louisiana."[68] In one of several civil cases against the defendant, six weeks before trial, the defendant hired two lawyers who were close friends with the trial judge.[69] The plaintiff's lawyer filed a motion to disqualify the judge and, when it was denied, subsequently filed a writ of mandamus to the Fifth Circuit, which was denied.[70]

The plaintiff company then insisted that its lawyer associate with a lawyer familiar with the judge, too.[71] The plaintiff's lawyer found a lawyer who fit that qualification but otherwise had no relevant experience in the type of case before the court.[72] The plaintiff's lawyer prepared a letter agreement between the plaintiff and the new lawyer that required the plaintiff to pay a retainer of $100,000 and, if the judge recused or the case settled before trial, a $100,000 "severance fee."[73] When the new lawyer entered his appearance in the

case, the judge did not recuse himself. At trial, he found for the defendant. The Fifth Circuit reversed him on appeal, and he was eventually impeached by Congress for engaging in criminal and unethical conduct during the hospital litigation, including his failure to recuse.[74]

Two judges filed a disciplinary complaint in the trial court against both the plaintiff's and the defendant's lawyers. In the disciplinary case against the plaintiff's lawyer, the district court, sitting en banc, found clear and convincing evidence that the plaintiff's lawyer's intent was to prompt the judge's recusal.[75] On appeal to the Fifth Circuit Court of Appeals, the plaintiff's lawyer argued that the new lawyer's role was not to force the trial judge's recusal but to "provide insight into [the judge's] temperament and thought processes."[76] Disagreeing with the plaintiff, the Fifth Circuit upheld the en banc district court's finding, in part because the severance fee was "unrelated to any labor [the new lawyer] may have performed on the case or any opportunity cost he may have incurred in time away from his own practice."[77]

The Fifth Circuit also rejected the plaintiff's lawyer's argument that he should not be subject to discipline because another lawyer, not he, entered an appearance to force the judge's recusal.[78] The court reasoned that "[i]f a lawyer may not enter a case to force the presiding judge's recusal, then it would be irrational to argue that a lawyer could simply hire *another lawyer* to force the recusal."[79] The Fifth Circuit concluded that hiring another lawyer to motivate the judge's recusal is conduct prejudicial to the administration of justice in violation of a Louisiana rule identical to Colo. RPC 8.4(d).[80]

Numerous other cases have addressed similar issues of improperly forced recusals. They have routinely found that where counsel has entered an appearance solely or primarily to force a judge's recusal, such entry goes against the governing ethics rule.[81]

Conclusion

Bodies of law have grown around the broad principles set forth in Rules 8.4(c) and (d) to proscribe, or at least call into question, certain activities not explicitly prohibited by a specific Colorado Rule of Professional Conduct. These bodies of law may not be covered in law school legal ethics classes, and they are not self-evident from the text of Rules 8.4(c) and (d).

Some lawyers subscribe to the view that if a lawyer must ask a colleague or their mother whether a proposed activity is unethical, the lawyer should not undertake the activity. Would that it were so simple. Sometimes lawyers do not know enough to ask; they don't know what they don't know. In other circumstances, they know enough to ask but not where to look for answers. If this article highlights these unobvious types of misconduct and educates a few lawyers about the danger or controversy surrounding the activities it has addressed, it will have served its purpose. CL

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NOTES

1. *Ex parte Secombe*, 60 U.S. 9, 14 (1856).
2. If a specific rule addresses certain conduct, it "should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated ground for a violation." *Restatement (Third) of the Law Governing Lawyers* § 5, cmt. c (2000), *quoted with approval in In re Gadbois*, 786 A.2d 393, 400 (Vt. 2001).
3. *See generally* Sheppard, "The Ethics Resistance," 32 *Geo. J. Legal Ethics* 235, 277 (Spring 2019).
4. *In re Fisher*, 202 P.3d 1186, 1198 (Colo. 2009).
5. *Id.*
6. *People v. Katz*, 58 P.3d 1176, 1187 (Colo. O.P.D.J. Nov. 22, 2002). Opinions of disciplinary hearing boards "serve to instruct and guide, but not bind, future Hearings Boards in their decisions; and serve to inform the public of the proceedings." *In re Roose*, 69 P.3d 43, 48 (Colo. 2003).
7. *People v. Smith*, 778 P.2d 685, 687 (Colo. 1989) (decided under the former, but analogous, DR1-102(A)(4), which prohibited conduct involving dishonesty, fraud, deceit, or misrepresentation).
8. CRS § 18-9-304(1)(a).
9. *Id.*
10. CBA Ethics Comm., Formal Op. 112, *Surreptitious Recording of Conversations or Statements*, at 1, 5 (July 2003).
11. *Id.* at 5 (citing *People v. Selby*, 606 P.2d 45, 47 (Colo. 1979), and *Smith*, 778 P.2d at 686–87).
12. *Id.*
13. *See* CBA Ethics Comm., Formal Op. 137, *Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation*, at 8–9, 13–14 (May 2019).
14. *Id.* at 2–7.
15. *Id.* at 2. *See also* Michaels, "'Lawful Investigative Activities' and Rule 8.4(c)," 48 *Colo. Law.* 36 (June 2019) (discussing cases).
16. *In re Marriage of Rubio*, 313 P.3d 623, 625 (Colo.App. 2011) (citing CRS §§ 13-54.5-101 to -111; CRCP 103).
17. *Id.*
18. *Cf. Coppock v. Cal. State Bar*, 749 P.2d 1317, 1323–27 (Cal. 1988) (upholding discipline for attorney opening trust account for purpose of defrauding client's creditors); *In re Pritikin*, 959 N.Y.S.2d 162, 164–66 (N.Y.App.Div. 2013) (per curiam) (imposing discipline for lawyer-accountant setting up trust account to assist client in sheltering funds as conduct involving dishonesty, fraud, deceit, or misrepresentation). *See also United States v. Zimmerman*, 943 F.2d 1204, 1206–10 (10th Cir. 1991) (reversing on other grounds lawyer's conviction for conspiracy to defraud based on use of trust account to conceal client funds from bankruptcy court and clients' creditors); *In re Aaron*, 72 N.Y.S.3d 589, 590–92 (N.Y.App.Div. 2018) (per curiam) (four-year suspension for lawyer who hid client funds in trust account).
19. *People v. Alster*, 221 P.3d 1088, 1090–91 (Colo. O.P.D.J. Mar. 12, 2009) (imposing discipline for placing personal funds into COLTAF account and using COLTAF account to hide personal assets from creditors, as, inter alia, conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Colo. RPC 8.4(c)). *See also In re Disciplinary Action Against Overboe*, 745 N.W.2d 852, 862–63 (Minn. 2008) (violation of analogous state Rule 8.4(c) for lawyer to label personal account containing only lawyer's personal funds as a trust account to conceal them from lawyer's creditors).

20. *See* S.C. Bar Ethics Advisory Comm., Op. 20-01 at 1 (Jan. 2020) (determining that a "lawyer may use internet competitive keyword advertising that includes the names of competing lawyers and law firms" but should avoid advertising with implied "derogatory or uncivil statements"); N.J. Advisory Comm. on Prof'l Ethics, Op. 735, *Lawyer's Use of Internet Search Engine Keyword Advertising*, at 1–2 (June 2019) (permitting lawyer to purchase advertisements to display the lawyer's own law firm in search results when a person searches for a competitor law firm but inserting a hyperlink to re-direct a user from a competitor's website to the lawyer's own is purposeful conduct intended to deceive in violation of Rule 8.4(c)); Texas Prof'l Ethics Comm., Op. 661 at 3 (July 2016) (hereinafter Texas Op. 661) (lawyer does not violate rules of professional conduct by using name of competing lawyer or law firm in implementation of advertising service offered by major search-engine company). *See also Habush v. Cannon*, 828 N.W.2d 876, 878–84 (Wisc.App. 2013) (lawyer's use of competitors' names as keywords in Internet searches does not violate Wisconsin right of privacy statute).

21. *See* Texas Op. 661 at 2–3. ("[S]ince a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on web pages showing search results, it appears highly unlikely that a reasonable person using an internet search engine would be misled into thinking that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer whose name was used in the search.")

22. N.C. State Bar Council, 2010 Formal Ethics Op. 14, *Use of Search Engine Company's Keyword Advertisements*, at 1 (Apr. 2012) (hereinafter 2010 N.C. Ethics Op. 14); Ohio Bd. of Prof'l Conduct, Advisory Op. 2021-04, *Competitive Keyword Online Advertising* (June 11, 2021) (hereinafter Ohio Op. 2021-04).

23. Ohio Op. 2021-04.

24. *Id.* at 2. *See* 2010 N.C. Ethics Op. 14 at 1 (concluding that it is a violation of the rules of professional conduct to "select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program").

25. *See generally* Russell, "Search Engine Optimization (SEO) Innovations: Navigating the Lawyer Advertising Rules," 1 No. 1 *Legal Innov. & Ethics* 4 (Jan. 2020).

26. Colo. RPC 4.5(a).

27. *See People v. Vsetecka*, 893 P.2d 1309, 1310 (Colo. 1995) (decided under the former rule, DR1-102(A)(5), which prohibited engaging in conduct prejudicial to the administration of justice). *Accord* CBA Ethics Comm., Formal Op. 143, *Foundations of a Fee Agreement*, at 20 (Apr. 2022) ("A fee agreement also may not bar a client from filing a request for investigation with the Office of Attorney Regulation Counsel.").

28. *See Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct v. Miller*, 568 N.W.2d 665, 667 (Iowa 1997).

29. *Vsetecka*, 893 P.2d at 1310.

30. *See* ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 92-363, *Use of Threats of Prosecution in Connection with a Civil Matter* (July 1992) (hereinafter ABA Op. 92-363); NYC Bar Ass'n Comm. on Prof'l and Jud. Ethics, Formal Op. 1995-13, *Threatening Criminal Prosecution; Agreements to Forbear from Presenting Criminal Charges in Connection with Civil Settlements* (Nov. 1995) (hereinafter NYC Op. 1995-13) (determining that lawyer who represents a client facing both a civil suit and criminal charges out of the same facts may ethically offer to settle the civil claim on condition that the criminal matter not be brought to the attention of law enforcement, but recognizing that non-reporting agreements may not be enforceable); N.C. State Bar Council, 2008 N.C. Formal Ethics Op. 15, *Civil Settlement that Includes Agreement not to Report to Law Enforcement Authorities* (Jan. 2009) (hereinafter 2008 N.C. Op. 15) (determining that lawyer may participate in settlement agreement with a provision prohibiting reporting defendant's conduct to law enforcement so long as the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal).

31. *See* ABA Op. 92-363 at 1.

32. *See* Colo. RPC 8.4(b). *See also* 2008 N.C. Op. 15 at 2–3 (non-reporting provision may be illegal if party has legal obligation to report certain conduct to authorities).

33. 2008 N.C. Op. 15 at 1 (emphasis in original).

34. *Id.* at 2–3.

35. NYC Op. 1995-13 at 4. *See also Reddy v. Mihos*, 76 N.Y.S.3d 13, 16 n.2 (N.Y.App.Div. 2018) (citing, inter alia, NYC Op. 1995-13, and stating in dictum that a "substantial question" exists as to the enforceability of a promise to forbear from filing a criminal complaint).

36. *Reddy*, 76 N.Y.S.3d at 16 n.2.

37. *See* 2008 N.C. Op. 15 at 2. *See generally* Colo. RPC 3.3 (requiring candor to the tribunal).

38. *E.g., Davis v. Flatiron Materials Co.*, 511 P.2d 28, 32 (Colo. 1973).

39. *See People v. Maynard*, 275 P.3d 780, 784–85 (Colo. O.P.D.J. May 27, 2010) (imposing suspension for attorney-respondent who threatened to sue witness if witness testified against her at attorney fees hearing). *See also In re Whitney*, 820 N.E.2d 143, 143 (Ind. 2005) (mem.) (imposing six-month suspension for multiple violations, including Rule 8.4(d) violation for threating to file defamation case if client filed a grievance), *cited with approval in Maynard*, 275 P.3d at 791 n.27 (collecting cases).

40. "A lawyer may not institute a civil lawsuit against any person based on a request for investigation, testimony in a proceeding under this rule, or other written or oral communications made in a proceeding under this rule to entities within the legal regulation system, those entities' members or employees, or persons acting on their behalf, including

monitors and health care professionals." CRCP 242.8(a). Another subsection of the same rule extends civil immunity to "[a]ll entities within the legal regulation system and all individuals working or volunteering on behalf of those entities . . . for conduct in the course of fulfilling their official duties under this rule." CRCP 242.8(b).

41. *E.g., In re Smith*, 989 P.2d 165, 172 (Colo. 1999); *People v. Smith*, 830 P.2d 1003, 1005–06 (Colo. 1992) (per curiam); *People v. Rasure*, 202 P.3d 1215, 1221–22 (Colo. O.P.D.J. May 30, 2007).

42. *Cf.* NYC Bar Ass'n Comm. on Prof'l and Jud. Ethics, Formal Op. 2015-5, *Threatening to File a Disciplinary Complaint Against Another Lawyer*, at 3–6 (June 2015) (if Lawyer *A* threatens to file grievance against Lawyer *B* if Lawyer *B* files a grievance against Lawyer *A*, and Lawyer *B* had duty to report Lawyer's *A*'s misconduct under Rule 8.3, Lawyer *A* violates Rule 8.4(a) by "attempting" to violate Rule 8.3).

43. *In re Betterton-Fike*, 459 P.3d 522, 524 ¶ 4 (Colo. 2020).

44. *Id.* at 529 ¶ 37 and n.6.

45. *Id.* at 524 ¶ 17, 528 ¶ 34.

46. *Id.* at 528 ¶ 34. *See also Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003) ("[U]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.") (quoting *Restatement (Second) of Agency* § 320 (1958)).

47. CRS § 13-93-114.

48. *Id.*

49. *Smith*, 830 P.2d at 1004–05.

50. *Id.* at 1005.

51. *Id.* at 1004.

52. *Id.* at 1005.

53. *Id.* at 1006.

54. *See* Sudler, "Improper Recording of an Attorney's Charging Lien," 32 *Colo. Law.* 61, 62–63 (Feb. 2003) (explaining that, given *Smith*, "no attorney should file any lien with a county clerk and recorder" and that "*Smith* does not give OARC the discretion to view the recording of a lien with a county clerk and recorder as being appropriate" under the RPC).

55. CRS § 38-35-109.

56. Colo. Code of Jud. Conduct, R. 2.11(A)(1).

57. The phrase used in the rule is "person within the third degree of relationship," which is defined to include a great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. *See* Colo. Code of Jud. Conduct, Terminology.

58. Colo. Code of Jud. Conduct, R. 2.11(A)(2)(b).

59. *Grievance Adm'r v. Fried*, 570 N.W.2d 262 (Mich. 1997).

60. *Id.* at 263–64.

61. *Id.* at 264–65.

62. *Id.* at 267.

63. *Id.*

64. *Id.* at 267–68.

65. *Id.*

66. *Id.* at 268.

67. *In re Mole*, 822 F.3d 798 (5th Cir. 2016).

68. *In re Liljeberg Enter., Inc.*, 304 F.3d 410, 417 (5th Cir. 2002).

69. *In re Mole*, 822 F.3d at 800.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 801.

75. *Id.* at 803.

76. *Id.*

77. *Id.* at 804–05.

78. *Id.*

79. *Id.* at 804–05 (emphasis in original). *See also* Colo. RPC 8.4(a) (prohibiting a lawyer from knowingly assisting another lawyer in violating the Rules of Professional Conduct).

80. *See id.* at 805–06.

81. *See, e.g., In re BellSouth Corp.*, 334 F.3d 941, 949–50, 956 (11th Cir. 2003); *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055–56 (11th Cir. 1996) (upholding denial of motion to add counsel whose appearance would compel disqualification of trial judge who had overseen cases for 15 months). *See also McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir. 1983); *Valley v. Phillips Cnty. Election Comm'n*, 183 S.W.3d 557, 559–60 (Ark. 2004) (upholding disqualification of plaintiff-candidate's lawyer, whose appearance would force trial judge's recusal because his partner was judge's opponent in upcoming election); *Shen v. Lam*, 2015 WL 4936604, at *2–5 (Ohio App. Aug. 19, 2015) (finding no abuse of discretion in striking attorney's notice of appearance two-and-a-half years into in a civil case where evidence established that a party had hired the attorney to engineer the judge's recusal); *State v. Orville*, 756 N.W.2d 809, 2008 WL 2574458, at *8–10 (Wisc.App. 2008) (unpublished disposition) (upholding trial court's denial of motion for substitution of counsel where counsel's appearance would force judge to recuse based on judge's prior involvement in prosecution of counsel for ethical misconduct) (citing *BellSouth*, 334 F.3d at 955–57, 961).