SHOULD A LAWYER EVER BE ALLOWED TO LIE? *PEOPLE V. PAUTLER* AND A PROPOSED DURESS EXCEPTION

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INTRODUCTION

Today has been a particularly grisly day for you, the Chief Deputy District Attorney, and the tricky part is just beginning. You arrived on the crime scene earlier this afternoon to see three women lying dead in an apartment.[1] As you waited for the search warrant and got coffee, you were told that the killer was on a cell phone and wanted to negotiate.[2] "Negotiate," you thought to yourself, "negotiate with a man who brutally killed these three women, and is an obvious threat to society?"

For hours, you have stood by as one of the deputies negotiated with this murderer.[3] As you intermittently listened in, you noted the killer admitting to murdering the three women.[4] He also confessed to having raped a fourth hostage,[5] and making her watch as he killed one of the three women with a wood-splitting maul.[6] The killer ranted about the government and the CIA, talked about how he was still armed, and threatened to continue his crime spree. However, he also expressed a will-

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1. *See* People v. Pautler, 35 P.3d 571, 575 (Colo. O.P.D.J. 2001) [hereinafter *Pautler I*], *aff'd en banc In re* Pautler, 47 P.3d 1175, 1176 (Colo. 2002) [hereinafter *Pautler II*, or when collectively referred to, *Pautler*].

2. *See Pautler I*, 35 P.3d at 575–76; *Pautler II*, 47 P.3d at 1177.

3. *See Pautler I*, 35 P.3d at 575–77.

4. *See id.*

5. *See id.* The killer forced this fourth hostage to watch the murder, and then raped her, held her for over 30 hours, and later released her. This hostage then called the police after her release and gave them the killer's pager number, as per the killer's instructions to her, so that the police could call him to negotiate a surrender. *Id.*

6. *See id.* at 576.

ingness to end the situation, under the right circumstances.[7] Before doing anything, he has insisted on talking to his lawyer, or alternatively to a lawyer from the Public Defender's (PD) office.[8] After unsuccessfully trying to contact the lawyer whom the killer requested, the police have asked you whether they should call a PD.[9]

You have dealt with the PD's office your entire career. For better or for worse, you feel like a PD will tell this murderer not to say another word, impeding your ability to persuade him to turn himself in. If that were to happen, this confessed killer would still be out there, and you believe he will kill again. You are charged with protecting the public—and to protect them, you believe it is imperative that the police be able to detain this killer immediately and bring him to justice. You call your boss first, summarize the situation, and explain your idea that you should impersonate a PD to facilitate the surrender.[10] Your boss expresses reservation about the ruse, but defers to your judgment because you are the one on-scene.[11] So instead of calling in a lawyer from the PD's office, you get on the line and give the murderer a fake name, telling him that you are from the PD's office.[12] You talk to the murderer for only a few minutes, and reassure him that everything is all right and that turning himself in is the right thing to do.[13] You then give the phone back to the police to continue the negotiations and bring him in. After three and a half hours of negotiating with the police[14] on the phone, the murderer surrenders. Maybe some will criticize your deceptive conduct; but your ruse worked, and this man is no longer a threat to society.[15] You have done your duty to protect society and keep the streets safe . . . or have you?

When this scenario unfolded in July of 1998 in Jefferson County, Colorado, it was Chief Deputy District Attorney Mark Pautler who lied to William "Cody" Neal to get him to surren-

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7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. Deputy Cheryl Moore negotiated with Neal for three and one-half hours to get him to surrender; Pautler's portion of the discussion with Neal lasted approximately seven minutes. *Id.* at 576, 577 n.2.
15. *See id.* at 577.

der. Neal turned himself in, but Pautler's lie forever soured Neal on any future attorney-client relationship. At the time he surrendered, Neal felt he had spoken with the person who was his defense lawyer.[16] Neal found out Pautler had lied to him when his actual assigned lawyer from the PD's office came to visit him. Neal kept insisting that "Mark Palmer," the fake name that Pautler used, already represented him; his new lawyer repeatedly told him that there was no "Mark Palmer" working in the PD's office.[17] After the ruse came to light and Neal found out he had been lied to, he dismissed his assigned lawyer, saying that he did not feel he could trust any lawyers since Pautler, a lawyer, had lied to him.[18] Neal represented himself at trial, pled guilty to the murders, and was sentenced to death by lethal injection.[19]

Although Pautler's lie might have helped protect lives,[20] the lie directly contributed to the breakdown of the legal sys-

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16. Indeed, Pautler fully intended that his ruse trick Neal into thinking "Mark Palmer" was his lawyer. *Id.* The remaining conversation leading up to Neal's surrender indicates that he did believe "Mark Palmer" was his lawyer; Neal even asked to see or speak to "Palmer" when he surrendered, but was simply told only that "Palmer" was present. *Pautler II*, 47 P.3d at 1178.

17. *Pautler II*, 47 P.3d at 1178. After the assigned lawyer started asking around to the officers on-scene during the surrender, he found out it was DA Mark Pautler who had impersonated a PD to facilitate the surrender. *See* Transcript of Pautler Hearing, *available for public inspection at* State of Colorado, Office of the Presiding Disciplinary Judge, 600 Seventeenth Street Suite 510-S, Denver, Colorado, 80202 [hereinafter *Hearing Transcript*]. Presumably, he then told his client that the DA on-scene was the lawyer with whom he spoke, not a defense lawyer.

18. *Pautler I*, 35 P.3d at 577.

19. *Id.*; *see also* COLO. REV. STAT. § 18-1.3-1202 (2003) (mandating that a death sentence will be carried out by lethal injection in Colorado). Neal has appealed both his conviction and his sentence. Unrelated to the Pautler issue, Neal's death sentence is under review for a possible constitutional violation, since he was sentenced by a three-judge panel and not by a jury. *See* Ring v. Arizona, 536 U.S. 584 (2002); Woldt v. People, 64 P.3d 256 (Colo. 2003). That sentence review is being held, however, awaiting his primary appeal regarding possible fault in his plea. One of the primary appeal issues surrounding his plea is the weight and ramification of Neal's dismissal of counsel directly caused by Pautler's actions. *See Hearing Transcript*, *supra* note 17.

20. Although Pautler argued before the PDJ and the Colorado Supreme Court that his actions *saved* lives, he nonetheless admitted that Neal did not actually have any hostages at the time of his surrender, nor was anyone in immediate life-threatening danger from Neal at the time of his surrender. *Cf. Pautler I*, 35 P.3d at 576–77 (in description of negotiation between Neal and police, no mention of any hostages still being held by Neal); *accord Hearing Transcript*, *supra* note 17.

tem with regard to Neal's case.[21] Neal felt he could not trust his own lawyers and dismissed them, a scenario directly contrary to the fundamental concept of representation in our legal system. Was it ethical for Pautler to unilaterally determine that the public's interest in safety outweighed Neal's right to counsel? Was Pautler justified in lying to protect the public? Irrespective of the suspect's possible rights, was it unethical for Pautler to nudge the process along in order to serve the greater good?

Because of this lie, a state Disciplinary Hearing Board[22] ("Hearing Board") found that Pautler had violated Colorado Rule of Professional Conduct 8.4(c), which mandates that a lawyer may not lie.[23] One of Pautler's defenses in that hearing, and in his appeal to the Colorado Supreme Court, was that he was protecting the public from "imminent harm."[24] Pautler also argued the defenses of justification and choice of evils.[25] Both the Hearing Board and the Colorado Supreme Court rejected these defenses, but the Colorado Supreme Court hinted in a footnote that there may be some circumstances that warrant excusing a violation of Rule 8.4(c).[26]

Part I of this comment identifies the historical background and reasoning behind Rule 8.4(c). It examines the debate surrounding the inclusion of Rule 8.4(c) during the revision process, and why the American Bar Association (ABA) ultimately

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21. The term 'breakdown' refers to Neal's dismissal of his assigned lawyer, his eschewing any legal representation, counsel or advice throughout his case, and his subsequent inability to adequately represent himself during his case. Although defendants are certainly allowed to represent themselves *pro se* in the American legal system, there is a clear preference throughout American legal history for representation of a defendant by a lawyer. *See generally* MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 1–2, 13 (1983) [hereinafter MODEL RULES]. Neal's outright rejection of the preference because of Pautler's lie, in this author's opinion, constitutes a breakdown of the system.

22. In Colorado, a pool of people selected by the Colorado Supreme Court exists who are charged with hearing grievances against lawyers. COLO. R. CIV. P. 251.17(a). When a grievance trial is scheduled, a Hearing Board is formed from this pool, consisting of the PDJ and two random members from the pool. COLO. R. CIV. P. 251.18(b). No two Hearing Boards are alike, and the decision of the Hearing Board in a particular case is not binding precedent upon future Hearing Boards. *See In re* Roose, 69 P.3d 43, 47–48 (Colo. 2003).

23. *Pautler I*, 35 P.3d at 581.

24. *Id.* at 578 (alluding to fear that Neal might kill others); *Pautler II*, 47 P.3d at 1180–81.

25. *Pautler I*, 35 P.3d at 578–79; *Pautler II*, 47 P.3d at 1181.

26. *Pautler II*, 47 P.3d at 1181 n.6.

retained the Rule from the previous Model Code. The part concludes by briefly looking at Colorado's adoption and enforcement of the Rule. Part II proposes the idea of a duress exception to Rule 8.4(c). It identifies elements necessary for the defense, as well as how those elements should be analyzed. The part also briefly examines why this new exception would not have applied in *Pautler*. Part III contrasts this new duress exception with the more general defense of justification, and analyzes why justification is not a successful defense against prosecutions for Rule 8.4(c) violations. Part III also examines why Pautler's justification defense was not successful. Part IV concludes the comment by briefly speculating on what Pautler might have done differently, with an eye toward helping a practitioner understand the applicability of a duress defense.

I. LAWYERS HAVE AN ETHICAL DUTY NOT TO LIE (MODEL RULE 8.4)

Although each individual state has the power to craft its own professional rules of conduct for lawyers, most have adopted significant parts of the Model Rules of Professional Conduct ("Model Rules"), which were promulgated by the ABA.[27] The rule that prohibits lawyers from lying is Rule 8.4, which states:

> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> *(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*
> (d) engage in conduct that is prejudicial to the administration of justice;
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means

27. Passed by the ABA House of Delegates in 1983, and intended to supercede the Model Code of Professional Responsibility [hereinafter "Model Code"]. Most states have adopted some form of the Model Rules; however, some jurisdictions, most notably New York, still retain significant parts of the Model Code in their professional ethical oversight. *See, e.g.*, Code of Prof'l Responsibility, N.Y. JUD. LAW APPENDIX (McKinney 1992).

> that violate the Rules of Professional Conduct or other law; or
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[28]

The first section of this part will examine the adoption of Rule 8.4 by the ABA. The second section discusses Colorado's adoption of the Model Rules.

A. ABA Adoption and Commentary of Rule 8.4

The American Bar Association adopted the Model Rules in 1983 as a wholesale revision of the Model Code of Professional Responsibility of 1969 ("Model Code").[29] Section DR 1-102(A)(4) of the Model Code, which was later reincorporated as Model Rule 8.4(c),[30] was enacted by the ABA as a means for state disciplinary systems to prohibit lying by lawyers.[31] There was strong debate when the Kutak Commission[32] was discussing DR 1-102(A)(4) during the revision process. The Commission debated whether it should allow the rule to survive the revision and be incorporated into the Model Rules, or whether it should write a new rule regarding lying that was possibly less stringent, more clear and allowed for certain exceptions.[33] Charged with giving the ABA House of Delegates recommendations on what to revise, the Commission stated that a rule against "dis-

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28. MODEL RULES R. 8.4 (1983) (emphasis added). Note that Rule 8.4(c) is a verbatim reiteration of Model Code DR 1-102(A)(4) (1969), the identical predecessor to Rule 8.4(c).

29. Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule with a Future*, 74 OR. L. REV. 665, 671 (1995).

30. *Compare* MODEL CODE DR 1-102(A)(4) (1969) *with* MODEL RULES R. 8.4(c) (1983).

31. *See* Schware v. Bd. of Bar Examiners of N.M., 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring):

> It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'

32. The ABA House of Delegates commissioned the Kutak Commission, chaired by Robert J. Kutak, in 1977 to revise the Model Code. Jarvis & Tellam, *supra* note 29, at 671.

33. Jarvis & Tellam, *supra* note 29, at 671.

honesty, fraud, deceit or misrepresentation" was too vague, and recommended that the rule not be included in the revision.[34] However, the ABA House of Delegates disagreed, and voted to reincorporate DR 1-102(A)(4) in its existing form as a new Rule 8.4(c) in the adopted revision.[35]

Rule 8.4(c)'s policy against lying is based on the greater idea that lawyers are essentially wordsmiths.[36] Where plumbers work with pipes and construct drainage, and engineers work with measurements to design and build structures, lawyers use words to clarify and navigate abstract concepts of law that surround a person's given rights in society. Considering this virtually exclusive focus upon language and word usage, it is critical that those outside the profession be able to consider a lawyer's words trustworthy and reliable. As Peter Jarvis and Bradley Tellam write, "a person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches."[37] For a profession that duels and navigates exclusively through words, any allowance for lying would enable under-handed combat, because the liar would have a distinct advantage over the truth-teller.[38]

Rule 8.4(c) does not contain any explicit conditions or exceptions. Rather, it is cast in imperative language, suggesting that the rule draws a bright line between permissible and impermissible behavior rather than merely suggesting a course of action.[39] Rule 8.4(c) is also one of the few rules in the Model

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34. *Id.*

35. *Id.*

36. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 545 (2002).

37. Jarvis & Tellam, *supra* note 29, at 665 (quoting *In re* Hiller, 694 P.2d 540, 544 (Or. 1985)).

38. *See* Hodes, *supra* note 36, at 545 n.64 (quoting Symposium, *Improving the Professionalism of Lawyers: Can Commissions, Committees and Centers Make a Difference?*, 52 S.C. L. Rev. 481, 538) (comments by Jack Lee Sammons, Professor of Law, Mercer Univ. L. School):

> The primary reason is that dishonesty is more destructive of the quality of the legal conversation than anything else, and the quality of that conversation is the primary good carried by our practice. In other words, honesty is a constitutive rule of our practice; we do not have a practice without it. When we are dishonest, we foul our own nest.

39. *See* MODEL RULES, Scope ¶ 14 (1983): "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for pur-

Rules that applies to both client and non-client action. Courts have applied Rule 8.4(c) beyond the narrow bounds of client-representation conduct; it is generally accepted that the rule covers private conduct, silence or failure to speak, and third party acts.[40]

B. Colorado Follows Model Rules

In 1993 the Colorado Supreme Court adopted the Model Rules.[41] Previously, Colorado adhered to provision DR 1-102(A), Rule 8.4's predecessor in the Model Code.[42] Colorado has been vigorous in prosecuting violations of Rule 8.4. One simple example is the case of *In re DeRose*, where a hearing board disbarred an attorney for structuring transactions to avoid federal financial reporting requirements.[43] The Colorado Supreme Court, in upholding the disbarment, stated that:

> Attorneys must adhere to high moral and ethical standards. Truthfulness, honesty, and candor are core values of the legal profession. Lawyers serve our system of justice as officers of the court, and if lawyers are dishonest, then there is a perception that the system must also be dishonest. Attorney misconduct perpetuates the public's misperception of the legal profession and breaches the public and professional trust.[44]

II. A DURESS EXCEPTION TO RULE 8.4(C)

Although the Kutak Commission had recommended dropping Rule 8.4(c) because of its vagueness,[45] both the ABA and the State of Colorado decisively preserved Rule 8.4(c) and continue to maintain a strict prohibition against lying. It is con-

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poses of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion."

40. Jarvis & Tellam, *supra* note 29, at 668–675.

41. *See* COLO. RULES OF PROF'L CONDUCT R. 8.4 (1983). For purposes of argument, and considering that the Colorado Rule is identical to the Model Rule, this paper will simply refer to "Rule 8.4(c)" without delineating between the Model Rule and the Colorado Rule unless necessary.

42. *Id.*

43. 55 P.3d 126 (Colo. 2002).

44. *Id.* at 131 (internal citations omitted).

45. *See* Jarvis & Tellam, *supra* note 29, at 671.

ceivable that in choosing to preserve the Rule rather than delete it, the ABA wanted to retain the overall imperative nature of the Rule.[46] Such an umbrella proscription mandates that only certain scenarios can qualify as exceptions to the Rule. Had the ABA gone the other way and not preserved the Rule, every case would have required factual, case-by-case determinations that allow for no precedent or guidance to the practitioner.

Case law interpreting Rule 8.4(c) suggests that disciplinary bodies, to this point, have not been presented with a factual scenario compelling enough to formally create an exception to Rule 8.4(c).[47] Because of the expansiveness and universality of Rule 8.4(c), and its application to lawyers in both professional and non-professional contexts, disciplinary bodies seem to treat Rule 8.4(c) as a categorical imperative. Both the PDJ and the Supreme Court in *Pautler* unequivocally stated that "no exception to Rule 8.4 exists."[48]

Conceptually, two defenses exist which are relevant to this discussion on exceptions to Rule 8.4(c): duress and justification. Falling beneath the umbrella of "choice of evils," these two defenses allow an accused to admit to the conduct. However, these defenses permit the accused to then articulate some reason why the conduct is justified, or alternatively why the conduct nonetheless is not punishable (or even wrong at all). The fundamental difference between duress and justification is the element of compulsion. When duress is present, there is no independent act because the actor's conduct is forced rather than

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46. *Id.* Considering that the House of Delegates rejected the Kutak Commission's main argument for deletion (that the Rule was vague and overapplicable), this comment argues that this rejection constitutes the ABA's wish that the Rule remain overapplicable. The ABA probably preferred to have the more general rule that could be sorted out later, rather than try and craft a more tailored and specific new rule that could be circumvented and evaded more easily.

47. *See, e.g., Pautler I*, 35 P.3d at 578; *but see* Montag v. State Bar, 652 P.2d 1370 (Cal. 1982) (holding that an attorney's actions while under duress were not under the purview of the Rule, and the case only came to bar and sanction to discuss his actions once the duress had been removed). *Montag* might be an example of how most ethical review committees and systems have implicitly recognized a duress exception through their unwillingness to prosecute attorneys that would be protected in certain fact scenarios. Whether this is actually the case or is merely speculation, one cannot know; however, the distinction would be clearer upon the formal acceptance of the duress defense by a court, rather than the implicit acceptance by the prosecuting authority in not bringing a case to trial.

48. *Pautler I*, 35 P.3d at 578; *Pautler II*, 47 P.3d at 1180. This application in *Pautler* will be more fully discussed in Parts III & IV, *infra*.

voluntary. It follows that, if an act is forced, one cannot and should not be held accountable for it.[49] When asserting a justification defense, however, the actor knows that his act is wrong, and he has the *independence* to choose not to act—there is no threat or forcing of his hand.

Any exception to a Rule of Professional Conduct must clearly and unequivocally delineate the boundaries of when the exception does and does not apply. Such clarity helps guide fact-finders and disciplinary bodies, as well as lawyers, in determining what types of conduct are permissible and what actions are sanctionable. Also, this clarity keeps the exception from swallowing the rule, and guards against over-prosecution. While courts unanimously reject justification as a defense to Rule 8.4(c), they have not clearly addressed whether duress presents a valid exception to the mandate of Rule 8.4(c).[50]

Acts that are the product of a forced hand, *i.e.* acts taken under duress, should be exempted from the prescripts of Rule 8.4(c). Section A of this part addresses the categorical nature and moral imperativeness of Rule 8.4(c), and thus is not subject to many exceptions. Section B addresses how a duress defense, when properly applied and recognized, does not infringe on the moral categorical nature of the Rule, yet allows for a moral trap door for those distinct and unique situations where it may be perverse to strictly impose Rule 8.4(c).

A. The Categorical Imperative of Rule 8.4(c)

One of the loudest criticisms about lawyers in the contemporary world is that lawyers have no sense of morality.[51] As lawyers quickly point out, however, what is moral is not necessarily legal, and vice versa. Somewhere in the development of

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49. *See Montag*, 652 P.2d at 1371 (noting that lawyer's engaging in burglary and murder plot was not sanctionable because of duress element; only lying to grand jury after it was all over, and duress was absent, was sanctionable).

50. *See* discussion *supra* note 47 (quickly entertaining the possibility that a court has not formally addressed a true, bona fide duress case on point because such a case might never have been brought, and was instead "dismissed" at the discretionary prosecutor level).

51. *See generally* Hodes, *supra* note 36. The perception of lawyers as zealous advocates all too often is depicted as lawyers selling themselves out for the highest dollar. Crude labels such as "ambulance chasers" and "devil's advocates" undeniably reinforce a public perception that lawyers, by and large, do not allow morals or morality to infiltrate legal thought.

the law, these two frameworks designed to govern human behavior were consciously separated. It is important to take note of the moral rationale regarding deceit, while recognizing the difference between these moral teachings and the legal necessities of Rule 8.4(c).

Philosophers have long argued over the morality of lying and deceit. In general, the strongest voices of morality have unequivocally frowned upon lying. Immanuel Kant, Saint Augustine, and Saint Thomas Aquinas all declared that lies and deceitfulness were wrong,[52] and that their consequences manifest themselves in the next life. St. Augustine, while declaring all lies as morally wrong, classified lies into eight categories.[53] One category specifically described the "type of lie which is harmful to no one and beneficial to the extent that it protects someone from physical defilement. . . ."[54] For St. Augustine, "the motive of the deception helped determine its gravity."[55] The gravity of the lie came to bear only when the soul ascended to judgment in heaven.

However, all of these moral teachings are based on the assumption that the lie is being told *voluntarily*. Their analyses do not directly consider whether the lie is being told under threat or compulsion of force—in declaring deceitfulness wrong, the teachings presume that the act is voluntary rather than involuntary. Should duress be an issue, moral standards might relieve the person telling the lie from moral responsibility for the lie:

> Since [moral] virtue is concerned with passions and actions . . . praise and blame are bestowed [on voluntary passions and actions, while] pardon, and sometimes also pity, [are bestowed on involuntary ones;] to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also

52. *See generally* Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722 (1989); Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937 (2002).

53. SAINT AUGUSTINE, TREATISE ON VARIOUS SUBJECTS 86–87 (Fathers of the Church 1952).

54. *Id.*

55. Shine, *supra* note 52, at 741.

> for legislators with a view to the assigning both of honours and of punishments.[56]

When examining whether Rule 8.4(c) is a categorical imperative, it is critical to determine its applicability in a given situation. Based on these philosophical underpinnings and as exemplified in case law, Rule 8.4(c) applies when a lawyer is lying voluntarily. However, involuntary action necessarily destroys the applicability of the Rule as a categorical imperative. Courts have not formally ruled on whether the Rule applies to involuntary conduct, and philosophers have not adequately addressed the moral interplay between duress and the Rule as a categorical imperative. Thus, without this definitive answer, applying Rule 8.4(c) as a categorical imperative even in duress situations is questionable legally, as well as philosophically.

B. Why a Duress Exception Would Be Proper for Rule 8.4(c)

A duress exception to Rule 8.4(c) does not infringe on the categorical nature of the Rule, because the duress element takes the lie out of the entire realm of voluntary acts; the absence of a voluntary act necessarily creates a natural exception to the applicability of the Rule. Because a situation involving duress is involuntary by definition, it seems that the Colorado Supreme Court, in the cryptic footnote six of *Pautler*, was alluding to a duress exception to Rule 8.4(c) when it stated that "under some unique circumstances, an 'imminent public harm' exception could apply to the Colorado Rules of Professional Conduct."[57] Because the definition of duress encompasses the idea behind imminent public harm (*i.e.*, the use or threatened use of force), it was a duress exception that the court had in mind. The court did not fully articulate the scope of that exception in the case, however, since the exception could not apply to the facts of *Pautler*.

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56. ARISTOTLE, THE NICOMACHEAN ETHICS 48 (Sir David Ross trans., J.L. Ackrill & J.O. Urmson rev. eds., Oxford Univ. Press 1980) (n.d.).

57. *Pautler II*, 47 P.3d at 1181 n.6. *See also supra* note 26, and discussion *infra* Part II.B.4.

1. Duress Defined

Presently, the law primarily articulates duress as a statutory defense[58] to criminal charges where a defendant "engaged in conduct 'at the direction of another person because of the use or threatened use of unlawful force upon him or upon another person' to such degree that a 'reasonable person . . . would have been unable to resist.'"[59] This standard has no element concerning the actor's knowledge of right or wrong. The single most important factor is whether the actor was compelled to act by threat of force or use of force. As stated by Professors Sanford H. Kadish and Stephen J. Schulhofer:

> The defendant is accorded a defense not because it was right to violate the law, but because the circumstances were so urgent and compelling that otherwise law-abiding people might well have done the same in the circumstances. This is the spirit behind the Model Penal Code formulation of the defense of duress.[60]

Disciplinary bodies have been inconsistent in considering elements of compulsion when judging the existence of a Rule 8.4(c) violation.[61] As a result, no across-the-board rule or set of guidelines presently exist to better guide sanction hearings.

2. What Would Be Necessary to Codify a Duress Exception to an Ethical Violation?

As noted by the Colorado Supreme Court's discussion in *Pautler*, there might be circumstances where duress could affect an ethical inquiry. Although duress is a creature of criminal law and a defense to criminal liability, it grows out of the

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58. *See* MODEL PENAL CODE §2.09 & cmts. (1962).

59. *Pautler II*, 47 P.3d at 1181 n.7 (quoting COLO. REV. STAT. §18-1-708 (2001)).

60. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 852 (7th ed. 2001).

61. *Compare Montag*, 652 P.2d at 1371, *with Pautler I*, 35 P.3d at 578. The *Montag* court recognized the possibility that an element of compulsion might exonerate a violation of Rule 8.4(c); in contrast, the Hearing Board in *Pautler* took a hard line stance and held that there was no exception to Rule 8.4(c). For the Board in *Pautler*, an element of compulsion influenced determination of sanction as a result of violation, not whether there was a violation per se. *Pautler I*, 35 P.3d at 578.

common law just as the ethical canons themselves do.[62] Considering their common ancestry, it is conceivable that the defense of duress could be applied in ethical inquiries. If a jurisdiction crafted a duress defense to an ethical violation, it should require three conditions to be met before the exception is applicable: immediate risk of death or serious injury, no peaceful alternative, and lying only to the extent necessary to dissipate the harm.

First, the duress defense should apply only where there is immediate and imminent risk of death or serious injury. Where a person is clearly in imminent danger, a rule should not prohibit someone (even a lawyer) from lying to protect that person. Most judicial and statutory exceptions for duress, self-defense or defense of others require that the grave threat be immediate and imminent.[63] While interpretations differ regarding what constitutes immediacy, courts uniformly agree that a non-imminent danger does not and should not allow for drastic action (such as killing or lying to protect). This new exception, then, would not and should not apply in a case where a threat was not imminent, such as in *Pautler*.[64] Modern criminal law[65] and tort law[66] have created an exception for the ordinary citizen to protect an imminently endangered life. This allowance should be no different just because a protector holds a license to practice law.

As is the case with the attorney-client privilege, the criminal law self-defense exception, and the tort law self-defense exception,[67] a lawyer's recognition of imminent harm must be reasonable. To best limit the applicability of a duress defense, the exception should be directly keyed to the use of lethal force: if the lawyer could justifiably have used lethal force to defend

62. *See* State v. Toscano, 378 A.2d 755 (N.J. 1977) (common law traditionally allowed for the defense of duress; accordingly, NJ Supreme Court can recognize the defense in a criminal trial, and can also modify the common law defense when it creates the exception to provide direction to lower courts).

63. *Cf.* MODEL PENAL CODE § 3.05 (2001); RESTATEMENT (SECOND) OF TORTS §§ 65–66, 76 (1965). *See generally Duress or Coercion*, 22 C.J.S. *Criminal Law* § 52 (1989).

64. *Pautler II*, 47 P.3d at 1180.

65. MODEL PENAL CODE §3.05 (2001).

66. RESTATEMENT (SECOND) OF TORTS § 76 (1965).

67. As recognized in various Tort and Criminal Law contexts: *see* MODEL PENAL CODE § 3.05 (2001); RESTATEMENT (SECOND) OF TORTS §§ 65–66, 76 (1965).

the person, then the lawyer should similarly be able to lie in order to defuse the situation.

The trick would be recognizing that all lawyers—regardless of practice—have a certain amount of legal training that allows them to know what is reasonable action. Because of this knowledge, a jurisdiction might hold lawyers to a higher standard. For instance, a seasoned defense lawyer or prosecutor might have a much higher tolerance and skill level in talking down a killer than a transactional lawyer or ordinary person might have. This enhanced ability requires that an applicable standard of reasonable conduct be higher for a lawyer than it would be for a non-lawyer. However, this interpretation of what constitutes reasonable action cannot be so high-minded as to presume that lawyers are not human, and are not subject to human fears and emotions. The boundaries that gauge this exception should be not so much what a reasonable *person* would do in the situation, but what a reasonable *lawyer* would do.

Second, there should be no reasonable peaceful alternative available to the lawyer on the scene. Unlike the use of lethal force, which allows force even if other methods (such as retreat) might be available,[68] allowing a lawyer to lie strikes at the heart of the profession and is contrary to the oath of a lawyer. As such, it is proper that the *only* reasonable tools left in a lawyer's arsenal should be lying or lethal force. Clearly, if a lawyer can get out of the situation in a way that does not involve lying or killing (*e.g.*, the suspect has asked for $100 to release his hostage), the exception mandates that the lawyer attempt this reasonable alternative rather than resorting to deceit. A lawyer's word is his bond; any defense that allows him to break that bond should be nothing less than a last resort.

Third, the lawyer should only be allowed to lie to the extent necessary to dissipate the immediacy of the harm. In the criminal law realm, there is much debate about when the du-

68. *See, e.g.*, MODEL PENAL CODE § 3.05(2)(a) (2001) ("[the actor] is not obliged [to retreat] before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person"); RESTATEMENT (SECOND) OF TORTS § 65(2) (1965) ("The [ability to use lethal force] exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by . . . retreating . . . .").

ress defense detaches and culpability is imposed.[69] This element of a potential duress defense is much more stringent and limiting than the common law elements of duress, self-defense, or defense of others.[70] It is this stringency, however, which protects the ethical value and perception of the law and of lawyers. Because Rule 8.4(c) protects the integrity of lawyers by mandating honesty, any allowable exception to the Rule must be limited so as to mandate a lawyer's return to the truth at the earliest possible opportunity. The exception should allow the lawyer to lie only to the minimal extent possible in order to calm down a potential murderer or pacify a potentially explosive situation.

Because this duress exception should be applied as narrowly as possible, disciplinary bodies must determine that the lawyer's action was necessary in order to apply the exception. To allow these evaluators to simply determine that the lying was *not un*necessary (rather than that it *was necessary*) would allow for too much discretion in the lawyer's actions and expand a lawyer's use of lying to achieve certain ends. An overly expansive application of the exception would give a lawyer the discretion to lie whenever his lying was not absolutely prohibited, rather than restricting his discretion to only situations where lying was absolutely necessary. It is the slightest damage to the lawyer's reputation specifically, as well as the profession's reputation generally, that mandates lying be *only* a last resort.[71] Thus, lying must necessarily be the only alternative left besides use of lethal force and physical combat for the exception to apply.

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69. *See* KADISH & SCHULHOFER, *supra* note 60, at 849–58.

70. When an actor is allowed to use lethal force as well as some lesser amount of force in a given situation, the criminal law and tort law allowances do not limit the amount of force she may use. MODEL PENAL CODE § 3.04 (2001); RESTATEMENT (SECOND) OF TORTS § 65 (1965).

71. The Colorado Supreme Court's concern with the damage to the profession's reputation generally is noteworthy: "[t]o the extent Pautler's misconduct perpetuates the public's misperception of our profession, he breached [the] public and professional trust." *Pautler II*, 47 P.3d at 1183.

3. Why a Duress Exception Would Not Cause the Disciplinary Body to Slide Down the Slippery Slope

A duress exception to Rule 8.4(c) is not likely to cause a disciplinary body to slide down a slippery slope because it is clear which lawyer acts are sanctionable and which are allowable behavior. First, any slippery slope criticism is initially inapplicable to a duress exception because a duress exception requires a clear and distinct finding that the act was not voluntary. If the act is deemed voluntary, Rule 8.4(c) governs; if the act is involuntary, the duress exception to 8.4(c) may apply if the act also meets the additional three criteria enumerated above.

Because the initial focus is not on the overall circumstances of the situation but only on whether the lawyer's action was voluntary, there can be no slippery slope evaluation of whether the lawyer's action was the best possible given the situation.[72] If a disciplinary body did not make an involuntariness finding, the proceedings would continue within the framework of the Rules. Such a clear-cut ability for a lawyer to distinguish between culpable and non-culpable acts would not initially cause a disciplinary body to slide down the slippery slope.

If the act were found to be under duress, then a disciplinary body must continue the analysis under the three additional criteria. Within these criteria, there might be some risk of a slippery slope,[73] but that risk is quite minimal. There is some hindsight involved when a disciplinary body could disagree about whether the lawyer reasonably lied given the

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72. From a conceptual standpoint, this section necessarily links a fact-specific inquiry system to a slippery slope, because a fact-based inquiry does not draw a distinct line between permissible and impermissible behavior except in that particular situation. Because a lawyer in a fact-specific evaluation scenario would only know what is bad after the fact, this section's analysis conceptualizes that dilemma as a slippery slope. Conversely, when an exception (such as this duress exception) is clearly delineated and ascertainable by the lawyer in the situation, the lawyer has less to wonder about regarding whether he has crossed the line.

73. The risk would arise because the analysis is thrust back into a fact-specific analysis, evaluating 1) whether there was a threat of imminent harm present in the situation, 2) whether the lie was the only alternative to dissipate the threat in that situation, and 3) whether the lawyer lied only to the extent necessary to dissipate the harm. *See generally* discussion *supra* Part II.B.3.

situation. Even so, both the lawyer and the disciplinary body are working from the same set of rules, and have the same basic understanding of the boundaries inherent in the exception. Thus, the slippery slope is still somewhat avoided, because the narrowness of the exception criteria allow little room for a lawyer to exercise much interpretive discretion. Given the nature of legal training and experience, these additional criteria do not unduly burden a lawyer or disciplinary body in accurately gauging the boundaries of these restrictions.

Further, even if a disciplinary body finds that his act does not meet all three additional criteria, a lawyer can still rest assured that the court recognizes the involuntariness of the situation, and will temper his sanction accordingly. For example, the relatively light punishment in *Pautler*[74] "suggests that the Colorado Supreme Court's strong pronouncement about the supremacy of the core values of honesty and truthfulness was tempered by its understanding that Pautler had been thrust into a highly charged situation not of his own making."[75]

4. Case Law Supporting the Concept of a Duress Exception to Rule 8.4(c)

Two cases, out of California and Alabama, most clearly note the possibility that a situation involving duress might create an exception to a Rule 8.4(c) violation.[76] In *Montag v. State Bar*,[77] the disciplinary board suspended a lawyer for six months after he lied to a grand jury about his complicity in a murder

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74. Pautler's license was suspended for three months, but this sanction was stayed pending completion of a one-year probation period; he also had to complete 20 hours of CLE training, and pass the Multistate Professional Responsibility Exam (MPRE). *Pautler I*, 35 P.3d at 589.

75. W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation"*, 44 S. TEX. L. REV. 53, 74 (2002). It should be noted that Mr. Hodes' statement is based on his analysis that Pautler's actions *were* under "extreme duress," *id.*, a conclusion with which this author does not agree. Nonetheless, this author does agree with Mr. Hodes' specific characterization, quoted here, that the sanction was considerably light given that the Court had just articulated Pautler's actions as a "serious breach of the public trust." *Id.* (paraphrasing *Pautler II*, 47 P.3d at 1183).

76. Although both cases seemed to infer that a duress exception could exist, neither actually recognized the existence of the exception; the facts of each case did not warrant the application of the exception, so the point was moot and only briefly discussed in dicta.

77. 652 P.2d 1370 (Cal. 1982).

and burglary plot.[78] The *Montag* hearing board found that, although the lawyer had been under duress when he made a deal to kill another person and to commit burglary, the duress ended when his accomplices were captured.[79] Thus, he could not claim the defense when he then lied about his involvement during his subsequent testimony before the grand jury.[80]

The *Montag* court held that the defense of duress applied to the time when the acts were committed, and thus the acts themselves did not constitute culpable conduct under the California Business and Professional Code.[81] However, because his accomplices were in jail and because he was no longer under duress when testifying before the grand jury, the lawyer had a duty both to disclose his complicity in the plot and to not falsely implicate his cohorts for extortion.[82] Specifically, the immediacy of the threat had subsided (and might have altogether disappeared, if his accomplices were indeed in prison). Thus, the lawyer's failure to testify to his complicity constituted an "act of moral turpitude and dishonesty," and warranted sanctions.[83]

In *Trammell v. Disciplinary Board*,[84] a state official was implicated in a bribery scheme.[85] He argued that he was under duress when he lied to an undercover agent because the agent threatened him during a sting operation.[86] The *Trammell* court stated that the existence of duress was a factual question; since the fact-finding disciplinary board specifically found that no duress existed, the court did not need to decide whether duress could be a valid defense to the Rule 8.4(c) violation.[87] The board had found that the supposed statements of the undercover agent—*i.e.*, "I just hope you don't mess over me, cause I get awfully damn mad, and I will have to come looking for you"[88]—could not suffice as an immediate threat, especially when the state official subsequently gave the agent his card

78. 652 P.2d at 1371–72.
79. *Id.*
80. *Id.* at 1371.
81. *Id.*
82. *Id.*
83. *Id.*
84. 431 So. 2d 1168 (Ala. 1983).
85. *Id.* at 1170–71.
86. *Id.*
87. *Id.* at 1171.
88. *Id.*

and said he was "easy to find."[89] Because the defense of a duress exception was wholly inapplicable, the *Trammell* opinion did not distinguish between duress as a criminal defense and as a defense in an ethical inquiry.

Both *Montag* and *Trammell* imply that, given the right set of circumstances,[90] a lawyer might successfully defend himself against a violation of Rule 8.4(c) for lying. Although neither respondent succeeded in their duress defenses, the courts' decisions implicitly recognize the utility of a duress defense. It was only a factual deficiency in the case that caused the respective courts to deny the appeals, without rejecting the defense itself.

C. *Why Pautler Could Not Successfully Establish a Duress Exception*

As the *Pautler* Hearing Board noted in footnote ten of its decision, Pautler's "ability to accurately evaluate the circumstances or apply informed reason [was not] affected by [the events of Neal's on-going negotiation]."[91] The Colorado Supreme Court further clarified that "Pautler was not acting at the direction of another person who threatened harm."[92] Although Pautler cited *Montag* and *Trammell* when he argued that the duress defense might apply, the court did not have to reach the question of whether the duress defense applied, or even existed. The Hearing Board found Pautler was not under any duress, just as the respondents in *Montag* and *Trammell* were not.[93]

Although Neal allegedly made statements that Pautler could have construed as threats, Neal was also in negotiations to surrender and had made statements of his desire to end the situation without harming anyone else.[94] Further, during the entire course of these negotiations, it was clear that Neal was

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89. *Id.*

90. Namely, the existence of compulsion or force, and immediate threat to life or limb.

91. *Pautler I*, 35 P.3d at 581 n.10.

92. *Pautler II*, 47 P.3d at 1181.

93. *Trammell*, 431 So. 2d at 1171 (finding "no compelling reason to reverse . . . and to recognize duress as an excuse, for [respondent]'s acts" which were not under duress); *Montag*, 652 P.2d at 1372 (holding that, according to the record, respondent lied to the grand jury in order to conceal his own criminal participation and not because he remained under any threat or intimidation).

94. *Pautler I*, 35 P.3d at 576.

not putting anyone's life in immediate danger because the police knew he did not have any hostages. Thus, the situation in *Pautler* did not contain an element of duress because there was no identifiable threat strong enough that it would have altered a reasonable person's actions.[95] While many lawyers post-*Pautler* have pointed to footnote six[96] and speculated about its scope, this comment hopefully clarifies that the scope is already defined: had Neal still held someone hostage and had he been threatening that hostage's life, Pautler might have lied under duress and thus been exempted from the mandate of Rule 8.4(c).[97]

III. WHY A MORE AMORPHOUS JUSTIFICATION EXCEPTION WOULD DESTROY RULE 8.4(C)

Building on the dichotomy between voluntary and involuntary acts, both moral and legal arguments are clear regarding why a lawyer should never have the opportunity to voluntarily lie. The most salient reason not to allow lawyers to lie voluntarily centers on public perception of the legal profession, and the greater need to reform the image of lawyers.[98] It is ironic that the same cynical public who generally decries lawyers voiced its belief that Pautler should be spared after hearing the particular facts of the case.[99] The editors of the Denver Post

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95. This argument puts aside the fact that a duress defense is a statutory defense. While technically there is no explicit code or provision in the ethical rules that outlines the duress defense and thus it is not codified in the "statutes" of the Colorado Rules of Professional Conduct, the Colorado Supreme Court would be free to recognize the duress defense for ethical violations, nevertheless, because it is the body that determines what the Rules of Professional Conduct are for Colorado. Had the Colorado Supreme Court recognized Pautler's duress defense, it statutorily might have been construed as an amendment to the Colorado Rules of Professional Conduct in addition to its value as case law precedent.

96. *Pautler II*, 47 P.3d at 1181 n.6, stating that "an imminent public harm exception" could possibly exist, under "some unique circumstances." It is important to note that this footnote did not officially recognize a duress defense to Rule 8.4(c). It might just have been the court hinting that it might recognize duress as an exception, given the opportunity.

97. *Id.* This scenario is presumed to be exactly what the Colorado Supreme Court had in mind when it said that a "situation might exist" where Rule 8.4 did not apply; the differentiation between duress and justification had not been fully made in the footnote, but is clearer upon further analysis contained within this writing.

98. *See, e.g.*, Hodes, *supra* note 36.

99. *Don't Save Any More Lives!*, DENVER POST, May 14, 2002, at B-06.

said that it was "obtuse" to sanction Pautler for a "white lie that helped bring a triple ax murderer into police custody before he could kill again."[100]

In that sense, the Denver Post editors and the public generally do not agree with the *Pautler* decision and criticized it as promulgation from the proverbial ivory tower. However, as noted above,[101] the *Pautler* decision is in fact grounded in the same moral bedrock within which the public strives to maintain its roots. Although public opinion might have supported a different conclusion based on *Pautler*'s particular facts, moral and philosophical arguments worked in tandem to produce a more correct result.

The Rules strive to prevent ethical dilemmas from sliding into fact-by-fact, case-by-case analyses.[102] The Rules are meant to provide concise, bright-line mandates to those who practice law, as well as to those affected by the practice of law, regarding acceptable and unacceptable legal conduct. Rule 8.4(c) states that a lawyer may not lie.[103] The *Pautler* court, following prior established case law, reiterated that justification could not be an exception to Rule 8.4(c). Since the Rule is meant to proscribe a lawyer from voluntarily lying, it would immediately nullify the Rule to then say circumstances exist where a lawyer could voluntarily lie. Due to the voluntary nature of the underlying conduct, courts have not and should not recognize a justification defense, because doing so would swallow the Rule entirely. Section A of this part looks at the statutory definition of justification. Section B then examines how courts have uniformly rejected a justification exception to Rule 8.4(c), largely based on the overriding need for a bright-line rule. Section C discusses how the creation of a justification exception would nullify any clear, bright-line guidance and cause the profession

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100. *Id.*

101. *See* discussion *supra* Part II.A, discussing the philosophical underpinnings of the categorical imperative not to lie.

102. MODEL RULES, ABA Chairperson's Introduction (1983) ("[T]he Commission [on Evaluation of Professional Standards] was charged with evaluating whether existing standards of professional conduct provided *comprehensive and consistent* guidance for resolving the increasingly complex ethical problems in the practice of law.") (emphasis added).

103. MODEL RULES R. 8.4(c) (1983); *cf.* discussion *supra*, Part II, regarding the inherent interpretation that a lawyer should not be allowed to *voluntarily* lie; if the lie is involuntary, as this comment argues, then Rule 8.4(c) should not apply.

to slide down into obtuse, fact-specific determinations. Section D spotlights these competing arguments for and against a justification exception in the context of the *Pautler* decision.

A. Justification, or "Choice of Evils," Defined

The actual legal defense of "justification," commonly referred to as the "choice of evils" defense,[104] inherently contains a balance element where one action prohibited by law is judged against another course of action. In the criminal context, the Model Penal Code defines justification as:

> Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another . . . provided that:
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law . . . and
> (b) [no law preventing the contemplated action] provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[105]

Like duress, justification is codified within modern criminal statutes. Pautler argued that justification has common law roots as well, just like duress, and that these roots allowed an extra-statutory application of the justification doctrine. The court chose to ignore these common law arguments, partly because of the superceding statutory enunciation and partly because of the moral dilemma that would surround a defense that allows a lawyer to voluntarily lie.[106]

B. Precedent Denying a Justification Exception to Rule 8.4(c) Violations

Prior to *Pautler*, Colorado followed solid precedent from other jurisdictions and specifically denied a justification defense to Rule 8.4(c) violations in *People v. Reichman*.[107] In *Reichman*, a district attorney faked an undercover agent's ar-

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104. *Compare* MODEL PENAL CODE §3.02(1) (1962) *with* COLO. REV. STAT. §18-1-702 (1971) (calling the justification defense a "choice of evils" defense).

105. MODEL PENAL CODE §3.02(1) (1962).

106. *See* discussion *infra* Part III.D.

107. 819 P.2d 1035 (Colo. 1991).

rest and filed false charges against him in order to bolster the agent's credibility in a drug sting operation.[108] The DA did not disclose to the court the falsity of the charges and arrest warrant.[109] In sanctioning the DA for his participation, the *Reichman* court recognized that police officers might have the right to falsely arrest one of their own and otherwise fictitiously investigate him to protect a sting; however, a lawyer does not have the same right.[110] The *Reichman* court concluded that "[t]he [DA's] responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility."[111]

Reichman followed the precedent of two similar cases from other jurisdictions, *In re Malone*[112] and *In re Friedman*.[113] In *Friedman*, an Illinois disciplinary board found that a state prosecutor violated the Model Code for instructing police officers to lie in court without notifying the court of the sting operation.[114] The purpose of the sting was to trap the attorneys for the defense, who had offered a bribe to those same officers if they perjured themselves.[115] The *Friedman* court concluded that the prosecutor violated DR 1-102(A)(4), but the court declined to impose a sanction because of a lack of "guidance of precedent or settled opinion" on the issue.[116]

In *Malone*,[117] the court sanctioned a New York prosecutor with public censure for violating DR 1-102(A)(4).[118] A prosecutor had instructed a prison guard to testify falsely in order to protect the guard from retaliation in a prison corruption case.[119] The *Malone* court, directly citing *Friedman*, rejected the "end[s] justify the means" argument that the instruction to

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108. *Id.* at 1036.
109. *Id.* at 1036–37.
110. *Id.* at 1038–39.
111. *Id.* at 1039. Note that *Reichman* was decided before the promulgation and adoption of the Rules of Professional Conduct; however, provision DR-1-102(A)(4) of the Code, under which Reichman was sanctioned, is identical to the current Rule 8.4(c).
112. 480 N.Y.S.2d 603 (N.Y. App. Div. 1984).
113. 392 N.E.2d 1333 (Ill. 1979).
114. *Id.* at 1334.
115. *Id.*
116. *Id.* at 1336.
117. 480 N.Y.S.2d 603 (N.Y. App. Div. 1984).
118. *Id.* at 608.
119. *Id.* at 604.

lie was necessary to protect the witness, and thus should be excused on justification grounds.[120]

C. Preventing the Slippery Slope

Unlike the bright-line delineation of a duress exception, a justification exception to Rule 8.4(c) would render the boundaries of the Rule murky at best and indistinguishable at worst.

> Such an interpretation reduces the Rules of Professional Conduct to meaningless expressions of aspirational goals forever subject to the situational whims of lawyers seeking to do the right thing as they then see it. Once the door of 'justifiable deception' is opened, it takes little imagination to speculate about conduct which could result: by other prosecutors in the pursuit of justice, defense counsel in the zealous advocacy of their client's cause, domestic relations counsel in the protection of their client's abused children, and even commercial counsel in the protection of assets of their corporate client.[121]

Lawyers and the public alike view Rule 8.4(c) as a mandate that lawyers be held to their word.[122] A justification exception, however, would destroy both that mandate as well as the resulting perception, because it would allow a single lawyer to make his or her own subjective interpretation about the overall severity and circumstances of a situation. It would thus constitute nothing more than a gut check of the overall, on-balance nastiness of a situation. Unlike a duress exception, there would be no bright line to tell a lawyer when he had crossed over that threshold.

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120. *Id.* at 606.

121. *Pautler I*, 35 P.3d at 586.

122. Hodes, *supra* note 36, at 545 n.64 (quoting Symposium, *Improving the Professionalism of Lawyers: Can Commissions, Committees, and Centers Make a Difference?*, 52 S.C. L. REV. 481, 538) (comments by Jack Lee Sammons, Professor of Law, Mercer Univ. Law School):

> The primary reason is that dishonesty is more destructive of the quality of the legal conversation than anything else, and the quality of that conversation is the primary good carried by our practice. In other words, honesty is a constitutive rule of our practice; we do not have a practice without it. When we are dishonest, we foul our own nest.

D. Why Pautler's Proposal for a Justification Exception Failed

Pautler clearly violated the plain language of Rule 8.4(c),[123] and no established exception existed in statute or case law to a Rule 8.4(c) violation.[124] The result of Pautler's case depended on whether the Hearing Board would adopt his justification exception as adequate to avoid a violation.

Unfortunately for Pautler, a justification exception had already been explicitly denied as a defense to Rule 8.4(c) violations in Colorado. Both the Hearing Board and the Colorado Supreme Court began their discussion of Pautler's justification argument by citing *Reichman*.[125] The Colorado Supreme Court quickly dismissed Pautler's argument, stating that "in *Reichman*, we rejected the same defense [justification] to Rule 8.4(c) that Pautler asserts here. We ruled that even a noble motive does not warrant departure from the Rules of Professional Conduct."[126] The *Pautler* decision rightly noted the factual similarities to the decisions in *Friedman*, *Malone* and *Reichman*.[127] Just like in these predecessor cases, there was no immediate or identifiable threat in *Pautler*, but merely the apprehension of possible future harm. Also, it was specifically a prosecutor who had undertaken the questionable actions, a fact that troubled the courts in all the cases. Noting this concern, the *Pautler* Hearing Board stated that:

> [Prosecutors] must be forever vigilant that their conduct as attorneys not only meets the minimum standards of conduct set forth in The Rules of Professional Conduct but they must strive to exceed those requirements. They must also carefully carry out their duty to protect the public in the exercise of their prosecutorial responsibilities while maintaining the duties and responsibilities of professional conduct imposed upon them by The Rules of Professional Conduct. They may not choose to satisfy the former at the expense of the latter.[128]

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123. *Pautler I*, 35 P.3d at 578.
124. *Id.* at 578–79.
125. 819 P.2d 1035 (Colo. 1991); *see* discussion *supra* Part III.B.
126. *Pautler II*, 47 P.3d at 1180.
127. *Id.* at 1179–80.
128. *Pautler I*, 35 P.3d at 579.

While a court might consider circumstances of possible future harm to be mitigating factors in determining the appropriate sanction,[129] they do not bear on whether Rule 8.4(c) was violated.

Friedman, *Malone*, *Reichman*, and *Pautler* also stand for the proposition that the drafters of the Rules explicitly rejected the doctrine of justification as an exception to Rule 8.4(c). In Colorado, it is the Supreme Court that adopts and promulgates the Rules of Professional Conduct.[130] In that sense, the court serves as the deliberative body that decides what the Rules are, in addition to its duty of interpreting and enforcing the provisions themselves. In reviewing its adoption of the Rule, the *Reichman* court gave constructive legislative notice that it would not entertain any justification exception to Rule 8.4(c). In reviewing that adoption and description in *Reichman*, the *Pautler* court again declined to insert any after-added exceptions into the language of Rule 8.4(c), noting that no justification exception was warranted under the Rule's plain language.[131]

As a prosecutor in Colorado, Pautler should have been aware of the rejection of a justification exception espoused in *Reichman*:

> Since 1991, when the decision in *Reichman* was issued, prosecutors have known that deception is not justified by motive, no matter how lofty. The law had been unmistakable for nearly seven years at the time of Pautler's misconduct that deception by a prosecutor is not acceptable and will not be tolerated in Colorado.[132]

As an assistant DA, Pautler was exactly the audience to whom *Reichman* was directed and thus, Pautler "knew or should have known" that justification was not a valid exception to scrutiny for lying to suspects.

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129. In all three cases, the courts looked at the facts of the case as mitigating factors in imposing a sanction.

130. In some states, it is actually the elected legislative branch which dictates the rules of conduct for lawyers and other professionals; other states, such as Colorado, leave it to the Supreme Court. For the purposes of this section, the term "legislature" refers to the body in charge of promulgating and adopting the rules of conduct.

131. *Pautler I*, 35 P.3d at 578–79 (no explicit exception is written into the language of the Rule).

132. *Id.* at 586.

The Hearing Board decision noted that, although Pautler's justification arguments had no bearing on whether he violated Rule 8.4(c), they had weight when determining the sanction for that violation.[133] In deciding the applicable sanction, the Hearing Board was split regarding what constituted an appropriate sanction, given the circumstances of the case.[134] The majority opinion took note of Pautler's acknowledgement that he knew what he was doing was wrong, as well as his statements that he would "make the same decisions and engage in the same deceitful misconduct . . . given the same or similar circumstances again."[135] To the majority, these statements evidenced a self-serving motive behind the deceit, warranting more than mere censure. Attributing less weight to Pautler's statements, the dissenting member would have only publicly censured Pautler for his actions.[136]

IV. WHAT PAUTLER SHOULD HAVE DONE

Although both the Hearing Board and the Colorado Supreme Court rightly found that Pautler violated Rule 8.4(c), a change to only a handful of facts in the case might have supported the opposite outcome. One of the key facts in *Pautler* was the lack of an imminent threat of harm to anyone. Although Pautler perceived a great risk of future harm if Neal were to get away, there was no imminent harm at the moment Pautler chose to lie to Neal. Had this threat existed, it is questionable whether the Attorney Regulation Counsel would have even prosecuted the case.

Since there was no coercion, Pautler should have entertained alternatives to achieve his desired goal of Neal's surrender. As noted above, any of the police officers also on-scene were authorized to lie to Neal.[137] Although there might have

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133. *Id.* at 579 n.9.

134. *Id.* at 586–589. Two of the three Hearing Board members, the PDJ and Edwin S. Kahn, voted for the sanction imposed. Hearing Board member Linda Kato, however, felt that the facts of the case warranted a less severe sanction, since there had been no concrete finding that Pautler lied out of a "selfish or dishonest motive." *Id.* at 588.

135. *Id.* at 586.

136. *Id.* at 589.

137. *See Pautler I*, 35 P.3d at 578 n.6 and accompanying text. Since 1973, police have had the authority to use deceit and trickery as a law enforcement technique. United States v. Russell, 411 U.S. 423, 436 (1973). Modern applica-

been an increased risk of detection (at least more than if an actual lawyer spoke with Neal), Pautler would have remained well within his duties and ethical boundaries had he let the officers lie, rather than doing it himself. Second, Pautler could have made more of an effort to locate Daniel Plattner, the lawyer whom Neal had originally requested. Simply making one phone call and finding the number disconnected is but a first step in effectively locating someone.

Although his chief reason for impersonating a PD was that he did not trust lawyers from that office, a third option for Pautler was to call the PD's office. Pautler believed that his fear a PD would advise Neal to stop talking justified his ruse because it allowed him to keep the lines of communications open.[138] And yet, any PD would likely have helped resolve the standoff peacefully by counseling Neal to surrender even while recommending that he cease speaking directly to the police.[139] While it is beyond the scope of this paper to go into the specific intricacies of a PD's responsibilities in such a situation,[140] one can generally note that *any* lawyer—prosecutor, PD, probate, transactional or otherwise—would be under a certain moral as well as ethical responsibility to encourage Neal's surrender.

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tions of this authority include operations like undercover stings. The ability of a peace officer to lie was specifically addressed in the Hearing Board's note six. *Pautler I*, 35 P.3d at 578 n.6. The opinion was careful to distinguish lawyers who lie (yet happen to also be designated peace officers, such as DA's like Pautler) from peace officers who lie (and also happen to hold a law license but are not acting as lawyers when they lie, such as FBI Agents). *Id.*

138. *Cf. Pautler II*, 47 P.3d at 1183 ("[Since] Neal had already confessed to the crimes . . . both over the phone and in the taped confession . . . we conclude that Pautler's only motive was Neal's surrender to law enforcement.").

139. It is common practice, when a criminal suspect is negotiating surrender and is represented by an attorney, for the defense attorney to negotiate with authorities regarding time, place and manner of surrender. A PD in the situation might have indeed told Neal to stop talking; however, Pautler's inferential leap that only *his* talking could bring about a surrender, and thus he was justified in lying to keep Neal talking, is erroneous. A PD would recommend that Pautler stop talking to police (for evidentiary reasons), but would most likely also then begin his own negotiation and shuttling between authorities and Neal to nonetheless bring about a peaceful surrender. This reasoning seems implicitly recognized by the Colorado Supreme Court in its decision. *See supra* note 138.

140. With the exception of noting that the PD has a concomitant duty not to lie by virtue of being a lawyer.

CONCLUSION

Pautler followed a strong body of case law when it confirmed that there is no justification exception to Rule 8.4(c) of the Rules of Professional Conduct. As such, the voluntary lying by Pautler was a violation of the Rules of Professional Conduct, and Pautler was sanctioned accordingly. His arguments for a justification exception could not stand, because such an exception would have swallowed the entire Rule itself.

Reiterating the absence of a justification exception, however, the Colorado Supreme Court hinted that it might recognize a different exception to Rule 8.4(c) given the proper situation. The decision's moral underpinnings seem to indicate that a proper situation would necessarily require involuntary conduct before the Rule could excuse a lawyer's lie. There might be additional necessary criteria, such as the need for actual danger, proportionality of the lie to the situation, and the absence of alternative actions. Looking at case law both in Colorado and other jurisdictions that interpret and apply Rule 8.4(c), the Colorado Supreme Court's cryptic footnote six[141] was likely aimed at recognizing a duress exception to Rule 8.4(c).

Such a duress exception to Rule 8.4(c) would serve the best interests of both the profession and the public. The very rare and narrow circumstances where the defense would apply are circumstances where the public has demonstrated its willingness to condone otherwise morally-culpable behavior.[142] For the practitioner, it would be important to know that the single most important element is the presence of coercion. If a lawyer's actions might be considered voluntary, she is better off choosing another option that does not involve lying or deceit. But if there is an element of coercion, a lawyer should not be scrutinized for being forced to lie in order to protect a life in imminent danger.

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141. *Pautler II*, 47 P.3d at 1181 n.6.

142. *See, e.g.*, *Don't Save Any More Lives!*, DENVER POST, May 14, 2002, at B-06.