

**STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2011**

**Order Promulgating Amendment to the Vermont Rules
of Professional Conduct**

Pursuant to Chapter II, Section 37, of the Vermont Constitution, it is hereby ordered:

1. That Comment 3 to Rule 4.1 of the Vermont Rules of Professional Conduct be added to read as follows:

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

* * * * *

Government Lawyers

[3] Rule 4.1 does not prohibit a lawyer from advising or supervising lawful activity that is part of a government investigation into violations of law. In engaging in such practices, a government lawyer remains subject to Rule 8.4(c).

Reporter's Notes—2011 Amendment

Comment [3] is added to Rule 4.1 to address concerns expressed by government lawyers that the Supreme Court's decision in *In re PRB Docket No. 2007-046*, 2009 VT 115, 187 Vt. 35, 989 A.2d 523, might be understood as affecting the traditional use of deception as an investigative mechanism in the enforcement of the criminal or other law. While Rule 4.1 prohibits a government lawyer from directly making a false statement to another in the course of an investigation, the Comment recognizes that law enforcement officers and other nonlawyer investigators may engage in deception when investigating unlawful activity. The supervising lawyer must have the ability to advise and supervise in such investigations to prevent investigators from violating constitutional or other legal rights of any person.

Rule 4.1 also does not prohibit a government official who is a lawyer from engaging in deception in activity that does not involve client representation—e.g., a law enforcement officer who is a lawyer but is acting as an investigator. As Comment [1] suggested, however, all

government lawyers remain subject to the prohibition of Rule 8.4(c) against engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation,” which the Court in *In re PRB, 2009 VT 115*, ¶ 12, held applies only “to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.”

Other jurisdictions have recognized that investigative supervision by prosecutors and other government lawyers is not misconduct. See *United States v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (explaining that it is not unethical for prosecuting attorneys to supervise or advise undercover investigations); Utah State Bar Ethics Advisory Opinion, Opinion No. 02-05 (March 18, 2002) (concluding that it is not misconduct for a government lawyer to supervise or participate in a lawful covert government operation that employs dishonesty, fraud or misrepresentation for the purpose of gathering relevant information); Arizona Ethics Opinion 99-11 (not professional misconduct for attorneys to supervise testers who make misrepresentations regarding identity or purpose to gather facts regarding an ongoing violation of law). See also DC Bar Ethics Opinion 323 (March 29, 2004) (related to lawyers involved in intelligence gathering, such as FBI); Florida Rule 8.4(c) (“it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule”).

2. That this Comment as added is prescribed and promulgated to become effective on _____, 2011. The Reporter’s Notes are advisory.

Dated in Chambers at Montpelier, Vermont, this ___ day of ___, 2011.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice