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## Ethical Deception by Prosecutors

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# Ethical Deception by Prosecutors

## **Cover Page Footnote**

Rebecca B. Cross, J.D. candidate, Fordham University School of Law, 2004. I would like to thank Professor Bruce Green for his guidance throughout this process.

# ETHICAL DECEPTION BY PROSECUTORS

Rebecca B. Cross\*

## INTRODUCTION

Last Spring, the Colorado Supreme Court suspended Assistant District Attorney Mark Pautler for deceitful conduct in securing the surrender of an axe murderer on a killing spree.<sup>1</sup> Although many thought Pautler's conduct was morally acceptable, disciplinary authorities found that he violated ethical rules governing attorney conduct. All states have a rule of ethics that prohibits attorneys from engaging in "dishonesty, fraud, deceit, or misrepresentation." The interpretation of this rule, especially as applied to prosecutors, is unclear and controversial.

Using *People v. Pautler*<sup>2</sup> as a case study, this Comment sorts through relevant, current interpretations of the rule and proposes an approach for future analysis. Part I discusses the facts leading up to Pautler's disciplinary charges, the opinions of both the disciplinary panel that sanctioned Pautler and the Colorado Supreme Court, which affirmed the sanction, as well as the public response to Pautler's actions.<sup>3</sup> Part II examines how disciplinary authorities treat prosecutorial deception and the role imminent circumstances have in such discipline.<sup>4</sup> Finally, Part III concludes that when prosecutorial deceit does not involve the formal legal process, deceit may be justified if the moral costs are significantly exceeded by the moral benefits.<sup>5</sup>

## I. THE PAUTLER CASE

### A. Facts

Mark Pautler, a deputy district attorney in Jefferson County, Colorado,<sup>6</sup> was at home one Saturday when he was called to one of

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\* J.D. candidate, Fordham University School of Law, 2004. I would like to thank Professor Bruce Green for his guidance throughout this process.

1. *In re Pautler*, 47 P.3d 1175, 1184 (Colo. 2002).

2. *Id.*

3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part III.

6. Mark Pautler has been a prosecutor for over twenty years. Marlys Duran, *Attorney Pautler Appeals to State High Court: He Says He Was Right to Lie to Fugitive Killer*, ROCKY MTN. NEWS, Apr. 24, 2001, at 20A. He has been involved in a number of high-profile criminal investigations, including the 1999 shootings at Columbine

the most disturbing crime scenes of his career.<sup>7</sup> As he arrived and looked in the door to the townhouse, staring back at him were the eyes of a dead woman sitting duct-taped to a chair surrounded by a pool of blood; her skull was split, blood and pieces of her brain were splattered on the floor, walls, and even the ceiling.<sup>8</sup> Another body was discovered by the fireplace with a blood-filled plastic bag over its head, and a third body, wrapped in garbage bags, was found by the wall nearby.<sup>9</sup>

A few minutes later, a call came in from the Denver Police Department, informing Pautler that there were three kidnap victims; Pautler then left to interview them.<sup>10</sup> One of these hostages, J.D.Y., had witnessed a murder at the townhouse by a William Lee 'Cody' Neal.<sup>11</sup> Neal had brought J.D.Y., a girlfriend's roommate, to the townhouse saying he had a "surprise" for her.<sup>12</sup> Inside, two women, the owner of the townhouse with whom Neal had been living for two years, and a woman who was supposed to travel with Neal to Las Vegas that weekend, lay dead.<sup>13</sup> Neal tied J.D.Y.'s wrists and ankles spread-eagle to four eye-bolts installed in the floor just for that purpose, cut her clothes off with a knife, and terrorized her by placing a piece of an earlier victim's skull, with bloody hair still attached, on her stomach.<sup>14</sup> He then brought in a third victim, duct-taped her to a chair facing J.D.Y., welcomed her to his "mortuary," gave her a cigarette, fed his cat,<sup>15</sup> asked her "what kind of day she was having,"<sup>16</sup> and then killed her by striking her skull repeatedly with an axe as J.D.Y was forced to watch.<sup>17</sup>

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High School in Littleton. James J. Grogan, *31st Annual Institute on Employment Law: Ethics*, 691 P.L.I. 453, 482 (2002).

7. Steve Jackson, *Shades of Black; Defense Attorneys Fight To Save Their Clients By Comparing Them To Current Residents Of Death Row*, DENV. WESTWORD, June 21, 2001, available at <http://www.westword.com/issues/2001-06-21/feature2.html/1/index.html>.

8. *Id.*

9. *Id.*

10. *Id.* Investigators, who heard that the suspect had a handgun and shotgun, were concerned about the suspect returning to shoot the witnesses and so moved the interviews out of the apartment. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; see also *People v. Pautler*, 35 P.3d 571, 575-76 (Colo. 2001), *aff'd*, 47 P.3d 1175 (Colo. 2002).

15. Jackson, *supra* note 7.

16. Kevin Vaughan, *Grisly Tale of Murder; Wannabe Bounty Hunter, Witness Tell How He Killed 3 and Terrorized 3 Others; Then Gave Up*, ROCKY MTN. NEWS, July 10, 1998, at 5A.

17. Jackson, *supra* note 7.

Then, Neal picked the victim's cigarette up off the floor, smoked it, placed a gun to J.D.Y.'s head, and raped her.<sup>18</sup>

The next morning, Neal took J.D.Y. to her apartment and held her, her roommate, and a male friend hostage at gunpoint for thirty hours.<sup>19</sup> During this time he made J.D.Y. tell the others what she had seen at the townhouse,<sup>20</sup> and dictated the details of his crime spree into a tape-recorder.<sup>21</sup> He finally left the three hostages with instructions to contact law enforcement and gave them a pager number where he could be reached.<sup>22</sup>

In the early evening, detectives paged Neal from J.D.Y.'s apartment according to his instructions.<sup>23</sup> Neal returned the call on a cellular phone, from which his location could not be determined, and spoke with Deputy Sheriff Sheryl Zimmerman for over three and one-half hours.<sup>24</sup> Pautler and one other detective were in the apartment and observed the situation.<sup>25</sup> Pautler read notes Zimmerman passed to him, passed suggestions back to her, and kept the others informed of the events.<sup>26</sup> Neal confessed to the three homicides, describing them in detail.<sup>27</sup> Zimmerman developed a rapport with Neal, continuously encouraging him to surrender.<sup>28</sup> Neal's responses were erratic. Although one minute he would talk about turning himself in, the next he would claim that he had already murdered 500 people and would kill again if provoked.<sup>29</sup> At one point, he even indicated that he had seen the officers at the crime scene and could have harmed them if he had wanted to.<sup>30</sup>

Neal asked to speak to a specific lawyer, whom Pautler thought had left the practice of law but phoned anyway, only to find his number out of service.<sup>31</sup> Neal then asked to speak with a public defender; Zimmerman told him they were contacting one.<sup>32</sup> No

18. *Id.*

19. *Pautler*, 35 P.3d at 575.

20. Jackson, *supra* note 7.

21. *Pautler*, 35 P.3d at 575.

22. *Id.*

23. Vaughan, *supra* note 16, at 5A.

24. *Pautler*, 35 P.3d at 576.

25. *Id.*

26. *Id.* Zimmerman also held a handheld dictation unit to an extension phone and recorded the conversation. *Id.*

27. *Pautler*, 35 P.3d at 576.

28. *In re Pautler*, 47 P.3d 1175, 1177 (Colo. 2002).

29. Jackson, *supra* note 7.

30. Howard Pankratz, *Deception by Lawyers Ruled Out, Decision Stems From Attempt to Get Murder Suspect's Surrender*, DENV. POST, May 14, 2002, at B-01.

31. *Pautler*, 35 P.3d at 576.

32. *Id.*

one, however, made any attempt to do so.<sup>33</sup> Instead, Pautler discussed with the other law enforcement officers who should pose as public defender.<sup>34</sup> Zimmerman thought that Neal was bright and would be able to sniff out a cop posing as his attorney.<sup>35</sup> Pautler then called his superior, David Thomas, who agreed that extraordinary measures were necessary and decided to speak to Neal himself.<sup>36</sup>

After telling Neal that public defender "Mark Palmer" had arrived, Zimmerman handed the phone to Pautler.<sup>37</sup> Pautler spoke with Neal for less than seven and one-half minutes,<sup>38</sup> during which Neal, who referred to himself as "one of the most dangerous people you will ever have the chance to represent," called his situation "a friggin' nightmare."<sup>39</sup> He told Pautler he wanted three assurances from the sheriff's department before he would surrender,<sup>40</sup> explaining, "I want to make sure we don't have a three-ring circus. I want you here so you are on my side, on my track."<sup>41</sup> To this Pautler replied, "Right, I'll be present."<sup>42</sup> Pautler dodged Neal's question as to what his rights were, but told him that he believed the sheriff's department would honor his requests.<sup>43</sup>

A couple of hours later, Neal surrendered in a Target store parking lot and, when advised of his Miranda rights, did not ask to speak with an attorney.<sup>44</sup> He was put in a solitary cell and given the pack of cigarettes.<sup>45</sup> In the days following, when Neal was approached by the public defender's office, he maintained that he was already represented.<sup>46</sup> James Aber, head of the Jefferson County Public Defender's office, took on Neal's representation

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33. *In re Pautler*, 47 P.3d 1175, 1177 (Colo. 2002).

34. *Pautler*, 35 P.3d at 576.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at n.2.

39. Sarah Huntley, *Prosecutor Admits He Lied: Pautler Says He Posed As Defender To "Take A Killer Off The Streets,"* ROCKY MTN. NEWS, Mar. 8, 2001, at 4A [hereinafter Huntley, *Posed as Defender*].

40. *In re Pautler*, 47 P.3d 1175, 1177 (Colo. 2002). These three guarantees were that he would be confined separately from other inmates, that he could smoke cigarettes, and that "his lawyer" would be present. *Id.*

41. Huntley, *Posed as Defender*, *supra* note 39, at 4A.

42. *In re Pautler*, 47 P.3d at 1177.

43. *See id.*

44. Jackson, *supra* note 7.

45. *In re Pautler*, 47 P.3d at 1178.

46. *People v. Pautler*, 35 P.3d 571, 577 (Colo. 2001), *aff'd*, 47 P.3d 1175 (Colo. 2002).

and learned of the ruse weeks later when he recognized Pautler's voice on tapes of the phone conversation.<sup>47</sup> After several months, Neal dismissed his Public Defender and continued his case pro se, with court-appointed advisory counsel.<sup>48</sup> Neal pleaded guilty to his crimes and was sentenced to death.<sup>49</sup> He later hired Jeff Pagliuca to appeal the guilty plea and death sentence on various grounds, including Pautler's misconduct.<sup>50</sup> Neal is now said to be "sit[ting] in a cell watching TV, and reading about what is happening with Pautler and enjoying every minute of it."<sup>51</sup>

### B. Disciplinary Charges

In February 2000, Neal's attorney filed a complaint against Pautler with the Colorado Supreme Court's Attorney Regulation Committee, which found reasonable cause to proceed with a formal complaint.<sup>52</sup> Pautler was charged with violating rule 8.4(c) of the Colorado Rules of Professional Conduct, which provides: "It is professional misconduct for lawyers to. . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>53</sup>

In March 2001, there was a trial before a disciplinary panel, consisting of Presiding Disciplinary Judge Keithley and two Hearing Board members.<sup>54</sup> Pautler admitted that his conduct violated the plain wording of Colorado Rules of Professional Conduct Rule 8.4(c), but argued that circumstances, such as fear that Neal might harm others, Neal's unknown location, and the brutal nature of Neal's crimes, justified his actions.<sup>55</sup> If justification or "choice of evils" may be a defense to criminal conduct, Pautler argued that they should be a defense to professional misconduct charges.<sup>56</sup>

47. *In re Pautler*, 47 P.3d at 1178.

48. *Id.*

49. *Id.*

50. See Kieran Nicholson, *DA Posed as Defender in Arrest Judge to Weigh Deceit Complaint*, DENV. POST, Apr. 15, 2000, at B03 [hereinafter Nicholson, *Deceit Complaint*].

51. David C. Voshell, Editorial, "*Cody*" Neal Relishing Pautler's Predicament, ROCKY MTN. NEWS, Apr. 21, 2001, at 23A.

52. Nicholson, *Deceit Complaint*, *supra* note 50, at B03.

53. COLORADO RULES OF PROFESSIONAL CONDUCT R. 8.4(c)(1992). The sanction was stayed during twelve months of probation, and Pautler was to take ethics courses and retake the Multistate Professional Responsibility Examination. *People v. Pautler*, 35 P.3d 571, 589 (Colo. 2001), *aff'd* 47 P.3d 1175 (Colo. 2002).

54. *Pautler*, 35 P.3d at 574.

55. *Id.* at 578.

56. *Id.* at n.5.

Pautler also asserted that district attorneys are peace officers authorized to use deception.<sup>57</sup>

At trial, expert witnesses, including the Jefferson County District Attorney, the Denver District Attorney, and the former Jefferson County Sheriff, were to testify that Pautler's conduct was justified by circumstance.<sup>58</sup> The Denver District Attorney, Bill Ritter, testified that he shared Pautler's concern for public safety: "I'm suggesting that these are extraordinary circumstances when the prosecutor has no choice."<sup>59</sup> Ritter said that he once lied to a gunman who was holding a hostage by promising that he would not prosecute him, but when the gunman surrendered and released the hostage, Ritter still prosecuted.<sup>60</sup>

Nevertheless, the disciplinary panel rejected these arguments.<sup>61</sup> In the majority opinion, Presiding Judge Keithley, stated that there is no exception to the prohibition on deceit in the state rules of professional conduct, explanatory commentary to the rules, or case law.<sup>62</sup> Judge Keithley explained that "although there is a substantial body of law that allows law enforcement personnel to use artifice and deceit in the exercise of their professional duties," Pautler was not acting in his role as a peace officer, but rather as a lawyer.<sup>63</sup> Therefore, the court reasoned that his conduct should be tested against the rules of conduct applicable to lawyers.<sup>64</sup>

The defense of "justification" was also rejected as inapplicable to professional misconduct, but to the criminal law setting only.<sup>65</sup> The opinion relied mainly on *People v. Reichman*,<sup>66</sup> in which a District Attorney filed a fictitious criminal complaint against an undercover officer in order to maintain the officer's undercover status.<sup>67</sup> *Reichman* held that "surrounding circumstances . . . do not excuse the deception imposed on the court."<sup>68</sup> Although the disciplinary panel noted that the attorney in *Reichman*, unlike Pautler,

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57. *Id.* at 578.

58. Kieran Nicholson, *Jeffco Deputy DA Faces Hearing; Telephone Lie got Suspect to Surrender*, DENV. POST, Mar. 5, 2001, at B02 [hereinafter Nicholson, *Suspect to Surrender*].

59. Hector Gutierrez, *2 Prosecutors Say They Would Have Lied To Get Killer To Surrender*, ROCKY MTN. NEWS, Mar. 9, 2001, at 38A.

60. *Id.*

61. Pautler, 35 P.3d at 578-82.

62. *Id.* at 578.

63. *Id.*

64. *Id.*

65. *Id.*

66. 819 P.2d 1035, 1036 (Colo. 1991).

67. *Id.*

68. *Id.* at 1039.



deceived the court, it maintained that *Reichman's* holding is premised upon the deceit, not the party deceived.<sup>69</sup> The panel rejected the notion that the context of deception counts, explaining that “[i]t is the conduct of the lawyer which dictates whether there is a violation of The Rules of Professional Conduct, not the effect of that conduct or the person or entity to which the conduct is directed.”<sup>70</sup> This blanket prohibition on deception was based on a slippery-slope argument: “[o]nce the door of ‘justifiable deception’ is opened, it takes little imagination to speculate about conduct which could result.”<sup>71</sup>

In determining Pautler’s sanction, the panel found that although his primary motive was to secure Neal’s surrender, Pautler also had a secondary motive to keep Neal talking about his crimes without the benefit of legal representation.<sup>72</sup> Pautler was suspended for three months.<sup>73</sup> The dissenting opinion stated that the sanction was inappropriate because Pautler did not have a selfish motive, only “a legitimate desire to keep Neal in contact with the negotiators for the purpose of effectuating his surrender.”<sup>74</sup>

On appeal in the spring of 2002, this sanction was affirmed by the Colorado Supreme Court.<sup>75</sup> Justice Kourlis wrote the opinion, which began with a discussion of the need to remedy falling public confidence in the legal system, and explained that the profession was engaged in a nation-wide project to show the public that honesty is a core value.<sup>76</sup> The court also relied on *Reichman*<sup>77</sup> as well as on *In re Friedman*<sup>78</sup> and *In re Malone*<sup>79</sup> to reject any justification defense to a violation of Rule 8.4(c) of the Colorado Rules of Professional Conduct.<sup>80</sup> Judge Kourlis restated what the court ruled in *Reichman*: “even a noble motive does not warrant departure from the Rules of Professional Conduct.”<sup>81</sup>

69. *Pautler*, 35 P.3d at 579 n.7.

70. *Id.* at 579 (emphasis omitted).

71. *Id.* at 586.

72. *Id.* at 585-86.

73. *Id.* at 589.

74. *Id.* at 587.

75. *In re Pautler*, 47 P.3d 1175, 1184 (Colo. 2002).

76. *In re Pautler*, 47 P.3d at 1178-79.

77. 819 P.2d 1035, 1036 (Colo. 1991).

78. 392 N.E.2d 1333, 1334 (Ill. 1979) (prosecutor instructed police officers to testify falsely in order to collar attorneys who had been taking bribes).

79. 480 N.Y.S.2d 603, 604 (App. Div. 1984) (prosecutor instructed a corrections officer to testify falsely to protect himself from retribution by other officers).

80. *In re Pautler*, 47 P.3d at 1179-80.

81. *Id.* at 1180.

The court was uncertain whether deceit could ever be justified by an “imminent public harm” exception.<sup>82</sup> It discussed the trial testimony of the Denver District Attorney who lied to a kidnapper in order to secure the release of a hostage, and found that even if averting public harm would justify the Denver District Attorney’s lie, it would not justify Pautler’s lie because Pautler had feasible alternatives.<sup>83</sup>

Although it did not want to start “second guessing crime scene tactics” or “opine, in hindsight, as to which opinion was best,” the court explained that Pautler could have called a public defender to speak with Neal or told Neal that no attorney would be called until he surrendered.<sup>84</sup> As Judge Kourlis stated, “we are adamant that when presented with choices, at least one of which conforms to the Rules, an attorney must not select an option that involves deceit or misrepresentation.”<sup>85</sup> Furthermore, he explained, unlike the Denver District Attorney’s situation, Neal was not threatening any specific person.<sup>86</sup> The court reserved the right to apply this “imminent public harm” exception to “some unique circumstances,” but held that this is not such a case.<sup>87</sup>

Unlike the disciplinary panel opinion, which acknowledged the existence of a law enforcement exception to the ethical rules but finds that Pautler was not acting in his role as peace officer, this court rejected an exception for prosecutors, because attorneys do not “move in and out of ethical obligations according to their daily activities.”<sup>88</sup> The obligations that accompany a license to practice law trump all other duties, including apprehending criminals.<sup>89</sup>

The court also disagreed with the Hearing Board’s finding that Pautler had a secondary selfish motive and found instead that Pautler’s sole motive was to obtain Neal’s surrender.<sup>90</sup> The Court found no evidence that Pautler kept Neal on the phone to gain a tactical advantage in criminal proceedings. Pautler did not try to elicit incriminating statements from Neal and, because Neal had

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82. *Id.* at 1180-81 n.6.

83. *Id.* at 1180.

84. *Id.*

85. *Id.*

86. *Id.* According to a newspaper report, however, Pautler is quoted as saying that Neal did threaten to harm officers at the crime scene. Pankratz, *supra* note 30, at B-01.

87. *In re Pautler*, 47 P.3d at 1181 n.6.

88. *Id.* at 1182.

89. *Id.*

90. *Id.* at 1183.

already confessed to the crimes in detail, there was not even a need for additional evidence.<sup>91</sup>

Despite these somewhat different grounds, the court found the Board's decision reasonable and upheld its sanction stating, "[t]he fact that [Pautler] lied for what he thought was a good reason does not obscure the fact that he lied—in an important circumstance and about important facts."<sup>92</sup> Although the opinion began with an absolute prohibition on deceit,<sup>93</sup> towards the end of the opinion, it left open the possibility of an exception, holding that "[u]ntil a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so."<sup>94</sup>

### C. Public Reaction

Pautler's actions were the subject of many newspaper articles and editorials. Pautler's critics, many of whom were defense attorneys, were harsh. On a talk-radio show, one lawyer called Pautler's conduct "a capital offense" of the legal profession.<sup>95</sup> One defense attorney called it "mind numbing" and "unconscionable."<sup>96</sup> Neal's attorney, Pagliuca, called justifying Pautler's deceit "the epitome of arrogance," further stating that "[t]he notion that if the crime is bad enough, government lawyers are entitled to lie is a flawed one."<sup>97</sup>

Some critics felt that Pautler's actions trampled on Neal's Sixth Amendment rights.<sup>98</sup> As one defense attorney said, "it really doesn't matter how rancid the defendant is. He or she still has the right to a lawyer without having to run afoul of someone posing as

91. *Id.*

92. *Id.*

93. *Id.* at 1176 (stating that "purposeful deception by an attorney licensed in our state is intolerable").

94. *Id.* at 1182.

95. Chuck Green, *Lawyer Deserves Leniency*, DENV. POST, Mar. 12, 2001, at B01.

96. Karen Abbott & Sue Lindsay, *Prosecutor Accused in Impersonation, Deputy DA Pretended To Be Defense Attorney In Talk With Ax Murderer, Charges Say*, ROCKY MTN. NEWS, Apr. 14, 2000, at 5A.

97. Associated Press, *Prosecutor Posed As Defender To Capture Axe Murderer*, TELEGRAPH HERALD (Dubuque), Mar. 9, 2001, at B7.

98. Bill Briggs, *Truth Surrenders in Crisis, Lies Necessary at Times Cops Say*, DENV. POST, Apr. 4, 2001, at F01.

such.”<sup>99</sup> Critics also argued that Pautler’s deception violated trust, harming already tense relations between prosecutors and public defenders in Jefferson County and, more importantly, tainting Neal’s subsequent interactions with his real lawyer.<sup>100</sup> The President of the Colorado Criminal Defense Bar said:

It has to do with a need to trust the attorneys. The need to be able to put your life and your situation in their hands . . . . When law enforcement actually takes the steps of saying, ‘I am the defense attorney. I am a person you can confide in and rely on.’ If they are stepping into that special relationship, that violates all of those relationships and all of those trusts.<sup>101</sup>

Although Pautler had harsh critics, many applauded him. The Denver Post officially saluted his actions.<sup>102</sup> Pautler received numerous phone calls and letters of support from both attorneys and ordinary citizens.<sup>103</sup> Many referred to his deceit as only a “white lie.”<sup>104</sup> Letters to the editors of local newspapers called Pautler a hero.<sup>105</sup> In an article for the National Law Journal, Steven Lubet said, “[a]s a former criminal defense lawyer and a lifelong civil libertarian, I believe that Mark Pautler made the right choice. If he was wrong, he was wrong for a good reason. Let’s call it civil disobedience . . . .”<sup>106</sup>

Most of all, law enforcement officers rallied behind Pautler.<sup>107</sup> Detectives named him “one of the finest and fairest prosecutors we have ever worked with.”<sup>108</sup> At his trial, law enforcement officers, including the Jefferson County District Attorney and the Denver District Attorney, testified that they would have done the same thing in Pautler’s situation.<sup>109</sup> The Colorado District Attorney’s

99. Abbott & Lindsay, *supra* note 96, at 5A (quoting defense lawyer Scott Robinson).

100. Huntley, *Posed as Defender*, *supra* note 39, at 4A.

101. Nicholson, *Suspect to Surrender*, *supra* note 58, at B02.

102. Editorial, *Is Saving Lives Misconduct?*, DENV. POST, Mar. 10, 2001, at B-07.

103. Duran, *supra* note 6.

104. Editorial, *Don’t Save Any More Lives!*, DENV. POST, May 14, 2002, at B06.

105. Betty Von Tersch, Editorial, *Mother of Victim Says Pautler Should Be Praised, Not Prosecuted*, ROCKY MTN. NEWS, Mar. 4, 2001, at 7B.

106. Steven Lubet, *A Prosecutor’s Complex Dual Role*, NAT’L L. J., June 25, 2001, at A20.

107. Sarah Huntley, *Police Defend Prosecutor: His Posing As Public Defender To Nab Axe Murderer ‘Possibly Averted A Massive Manhunt,’* ROCKY MTN. NEWS, Mar. 2, 2001, at 4A [hereinafter Huntley, *Police Defend Prosecutor*].

108. Patrick Wilson, *Police Officers’ Local Expresses Support for Chief Deputy District Attorney*, ROCKY MTN. NEWS, Mar. 4, 2001, at 7B.

109. Gutierrez, *supra* note 59, at 38A.

Counsel even filed an amicus brief on his behalf.<sup>110</sup> Pautler did not regret his actions and stated afterwards: “I don’t think I did anything wrong”<sup>111</sup> and “I don’t think anyone should be sanctioned for doing what’s right in saving lives. I think it sends a bad message to lawyers, as a profession, that they should think more about saving their license than doing what’s right.”<sup>112</sup>

Some speculated as to what might have happened had Pautler not lied to Neal that night. The Golden County Police Chief said that Pautler “quite possibly averted a massive manhunt that may have driven Neal to flee, harm other victims or take hostages.”<sup>113</sup> As one editorial noted, officials in this county were still being blamed for not doing enough to prevent the Columbine disaster, and if Neal had not been apprehended, the public would crucify them again.<sup>114</sup>

Critics called the disciplinary authorities’ sanction of Pautler a “devotion to legalism”<sup>115</sup> with “flaws in reasoning.”<sup>116</sup> Additionally, they called for new disciplinary rules to leave more “wiggle room” for lawyers.<sup>117</sup> One such critic, a law professor at the University of Colorado at Boulder noted that many lawyers would feel uncomfortable adhering to the rules of ethics rules while in Pautler’s situation: “[w]hat seems morally right isn’t always what the ethical rules dictate.”<sup>118</sup>

William Tuthill, Pautler’s attorney and a Jefferson County District Attorney, proposed changing the state’s ethical rules to allow lawyers to lie “if they believe it’s reasonable in order to prevent the imminent risk of serious physical injury.”<sup>119</sup> Tuthill explained: “[w]e’re not advocating a system that allows lawyers to engage in deceit and misrepresentation. What we’re saying is, that there are

110. See *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002).

111. John Ingold, *Jeffco Deputy DA Censured, Pautler Not Sorry For Actions in Neal Case*, DENV. POST, Apr. 4, 2001, at B02.

112. Tillie Fong, *Deputy DA Gets Probation, Jeffco Official Who Posed as Defender May Appeal His Case to U.S. High Court*, ROCKY MTN. NEWS, Apr. 3, 2001, at 14A.

113. Huntley, *Police Defend Prosecutor*, *supra* note 107, at 4A.

114. Keith Sorci, Editorial, *Let the Trial Judge Rule*, ROCKY MTN. NEWS, Mar. 27, 2001, at 30A.

115. Editorial, *A Lawyer’s Lie: Catching Murderer Rightly Came First*, ROCKY MTN. NEWS, Apr. 8, 2001, at 3I.

116. Al Knight, *Pautler Ruling is Strained*, DENV. POST, May 15, 2002, at B07.

117. See Stephen Tarnoff, *Hard Line on a White Lie: Colorado Panel Disciplines Prosecutor Who Helped Coax Triple Murderer Into Surrendering*, 87 A.B.A. J. 32, 33-34 (2001).

118. *Id.*

119. Karen Abbott, *Attorneys Argue Over Ethics of Lying to Confessed Ax Killer*, ROCKY MTN. NEWS, Dec. 4, 2001, at 22A.

some times when engaging in deceit is justified when loss of life and limb are at stake."<sup>120</sup>

## II. ANALYSIS

### A. Prosecutorial Deceit

Prosecutors are treated distinctively under disciplinary rules, and are often held to higher ethical standards due to their unique role as justice-seekers.<sup>121</sup> As the Supreme Court elucidated in *Berger v. United States*:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.<sup>122</sup>

As such, prosecutors are given additional responsibilities under rules of professional conduct and have been held to a "special duty of integrity."<sup>123</sup> At the same time, however, prosecutors are "regulated less restrictively than other lawyers."<sup>124</sup> This divergent treatment is not seen in ethics rules, but rather in the absence of rules addressing much of prosecutors' conduct and in the absence of cases where disciplinary authorities have sanctioned prosecutors.<sup>125</sup>

The cases that do address prosecutorial deceit make it clear that, regardless of what the Colorado authorities may have said in *Pautler*, the context of the perpetrated deceit does count.<sup>126</sup> There are two main lines of case law dealing with prosecutorial deceit. The cases that find deceit impermissible are those in which prosecutors deceive the courts in some way, while the cases which find deceit permissible deal with prosecutors instructing law enforcement officers to use deceit during investigations.<sup>127</sup>

120. Ingold, *supra* note 111, at B02.

121. *Berger v. United States*, 295 U.S. 78, 88 (1935).

122. *Id.*

123. *See id.*; *In re Chancey*, No. 3122262, 1994 WL 929289, at\*5 (Ill. Atty. Reg. Disp. Com. Apr. 21, 1994).

124. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 228 (2000).

125. *See id.* at 228-29; *see also* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. REV. 721, 744-55 (2001).

126. *See infra* notes 128-37 and accompanying text.

127. *Id.*

Both *Pautler* opinions rely mainly on three cases, *Friedman*,<sup>128</sup> *Malone*,<sup>129</sup> and *Reichman*,<sup>130</sup> in which laudable motive is found not to excuse deceit. All of these cases, however, have to do with deceit perpetrated on a court. *Friedman* involved a prosecutor who directed police officers to accept bribes and lie under oath in order to develop evidence against the bribe-takers in subsequent prosecutions.<sup>131</sup> The opinion sanctioning *Friedman* noted that “[t]he integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored.”<sup>132</sup> One justice noted, “I abhor the thought of intentionally deceiving a judge.”<sup>133</sup>

The prosecutor in *Malone* was sanctioned for instructing a corrections officer who was testifying about the beating of inmates to lie under oath to preserve his identity and protect him from retaliation by the other officers.<sup>134</sup> In *Reichman*, a prosecutor filed fictitious criminal charges with the court to help an undercover officer maintain his covert status.<sup>135</sup> The officer then appeared in court and made false statements to the judge who was unaware of the deception.<sup>136</sup> The reviewing court sanctioned *Reichman*; in the opinion it discussed the need to maintain the integrity of the judicial process and stated specifically that it would not “excuse the deception imposed on the court.”<sup>137</sup>

Authorities, however, have not tended to question prosecutors’ use of out-of-court misrepresentations during investigations.<sup>138</sup> Disciplinary authorities have allowed prosecutors to supervise and direct investigations involving deceit.<sup>139</sup> Law enforcement officers regularly deceive suspects; it is considered an accepted investigative technique.<sup>140</sup> Disciplining an attorney for supervising these investigatory practices would encumber meaningful investigations, so

128. See *In re Friedman*, 392 N.E.2d 1333, 1334-35 (Ill. 1979).

129. *In re Malone*, 480 N.Y.S.2d 603, 607-08 (App. Div. 1984).

130. See *People v. Reichman*, 819 P.2d 1035, 1039 (Colo. 1991).

131. *In re Friedman*, 392 N.E.2d at 1334.

132. *Id.* at 1335.

133. *Id.* at 1339 (Underwood, J., concurring).

134. *In re Malone*, 480 N.Y.S.2d at 604-05.

135. 819 P.2d at 1035-36.

136. *Id.* at 1036.

137. *Id.* at 1039.

138. See *Zacharias & Green*, *supra* note 124, at 230.

139. *Sorrels v. United States*, 287 U.S. 435, 441 (1932); *Apple Corps v. Int’l Collectors Soc’y*, 15 F. Supp. 2d 456, 474-75 (D.N.J. 1998); see *United States v. Parker*, 165 F. Supp. 2d 431, 476-78 (W.D.N.Y. 2001); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999).

140. *Gidatex*, 82 F. Supp. 2d at 122.

courts have determined that public policy favors deception over unchecked lawlessness and have given prosecutors discretion in directing investigations.<sup>141</sup>

When prosecutors are directly involved in investigations, the ethical standards that apply are not so clear. Up until 2001, few ethics opinions or rules had ever directly addressed this question.<sup>142</sup> The two states that recently took on this issue have decided that prosecutors may use deceit during the investigatory stages of a case. In 2001, Oregon amended its disciplinary rules to allow criminal attorneys to misrepresent their identity or purpose in investigating believed unlawful activity.<sup>143</sup> In 2002, a Utah ethics opinion stated that "as long as a prosecutor's . . . conduct employing dishonesty, fraud, deceit or misrepresentation is part of an otherwise lawful government operation, the prosecutor . . . does not violate [the ethics] Rule[s]."<sup>144</sup> The Committee further stated that there should be no distinction between supervising an activity and directly taking part in it.<sup>145</sup>

Were Pautler's activities investigative? While speaking with Neal, the police were not conducting an undercover operation but were investigating unlawful behavior.<sup>146</sup> *Higgs v. County of Douglas* set forth a test to determine whether a prosecutor's activities are investigative or advocatory, which looks at whether the challenged conduct occurs prior to the filing of criminal charges and whether it more closely resembles traditional police conduct or prosecutorial conduct.<sup>147</sup> The conversation with Neal was prior to

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141. See *United States v. Russell*, 411 U.S. 423, 432 (1973); *Hoffa v. United States*, 385 U.S. 293, 315 (1966); *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988); *In re Gatti*, 8 P.3d 966, 975-76 (Or. 2000); Christopher J. Shine, *Deception and Lawyers: Away From A Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 747-48 (1989).

142. Utah Ethics Advisory Op. 02-05, 2002 WL 459018 (Utah St. Bar). Prosecutors have increasingly become involved in investigative roles. See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 732-36 (1999). The ethics rules have not acknowledged the role of the investigating prosecutor because it was not a role envisioned by the American Bar Association (ABA) when it promulgated the rules. *Id.* at 739-43. A more likely explanation is that it has been accepted that the ethics rule prohibiting deceit do not apply to prosecutors. Prosecutorial discretion has traditionally been considered beyond judicial review. *Id.* at 746-47.

143. OREGON RULES OF PROF'L RESPONSIBILITY DR 1-102(D) (2001). This was adopted to limit the Oregon Supreme Court's earlier opinion in *In re Gatti*. *Id.*

144. See Utah Ethics Advisory Op. 02-05, 2002 WL 459018.

145. *Id.*

146. *People v. Pautler*, 35 P.3d 571, 576 (Colo. 2001), *aff'd*, 47 P.3d 1175 (Colo. 2002).

147. 713 P.2d 840, 853 (Colo. 1985).



formal charges but does not clearly resemble either traditional police conduct or traditional prosecutorial conduct, as it was an unusual situation.<sup>148</sup> The Colorado disciplinary panel found that Pautler was not acting in his role as a law enforcement officer because he was not acting as a member of the “investigative team exercising police authority” but rather as an attorney, “giving legal advice and acting as a consultant.”<sup>149</sup>

Instead of drawing the line of permissible deceit at whether an activity is investigative, defense attorney Steven Lubet draws the line at which part of the legal process the conduct involves.<sup>150</sup> Case law also seems to draw this distinction. The cases that sanction deceit for a creditable purpose (*Freidman*, *Reichman* and *Malone*, the main cases on which the *Pautler* courts rely), involve misrepresentations that are aimed, at least in part, at securing convictions.<sup>151</sup> In these cases, attempting to justify deceit was seen as an argument that the ends justify the means. In *Olmstead v. United States*, Justice Brandeis chastised the breaking of rules in order to secure a conviction.<sup>152</sup> He called such rationale a “pernicious doctrine,” unacceptable in the administration of criminal law.<sup>153</sup>

Pautler’s conduct, on the other hand, was not aimed at obtaining a conviction or gaining any sort of tactical advantage. The Colorado Supreme Court plainly acknowledged this.<sup>154</sup> Pautler did not try to elicit any incriminating statements from Neal.<sup>155</sup> There was not even a need for any additional evidence, as Neal had twice confessed to his crimes in detail.<sup>156</sup> Rather, Pautler’s sole motivation was to secure Neal’s surrender.<sup>157</sup>

## B. The Role of Imminent Circumstance

Whether or not Pautler was acting within an investigative role, his lie would not have been tolerable in ordinary circumstances. If Neal had been with police officers at the time, it would clearly not

148. See *Pautler*, 35 P.3d at 576.

149. *Id.* at 578. Pautler was carrying a gun at the time of his conversation with Neal. *In re Pautler*, 47 P.3d 1175, 1178 (Colo. 2002).

150. Lubet, *supra* note 106, at A20. He explains, “[l]ying to obtain a conviction must be absolutely prohibited. Lying to obtain an arrest—well, that has to be judged case by case.” *Id.*

151. See *supra* notes 127-37 and accompanying text.

152. See 277 U.S. 438, 485 (1928).

153. *Id.*

154. *In re Pautler*, 47 P.3d at 1183.

155. *Id.*

156. *Id.*

157. *Id.*

have been acceptable for Pautler to walk in and impersonate Neal's attorney. The reason may be the content of the misrepresentation.

The Utah Ethics Advisory Committee, which held prosecutors may use deceit in undercover operations, also said that conduct that infringes on the constitutional rights of suspects will violate Rule 8.4(c).<sup>158</sup> Although, critics of Pautler have said that his actions tread on Neal's Sixth Amendment right to counsel and his right to due process,<sup>159</sup> this is false. Neal's constitutional rights did not actually come into play until he was in custody.

Pautler's lie did, however, step on attorney-client relations. One of the purposes of the rule against deceit is to facilitate open communication and trust between a client and his attorney.<sup>160</sup> Many of those who condemned Pautler's actions felt that they contributed to Neal's lack of trust of public defenders and the eventual dismissal of his attorney.

Therefore, in determining whether this lie, or any lie, is allowable it is necessary to consider the context of the circumstances in which the lie was told:

### 1. *Should Urgency Ever Justify Deception?*

Philosophical approaches to when deceit may be justified vary. A categorical approach, advocated by such philosophers as Kant, Augustine, and Aquinas, asserts that a lie may never be justified by circumstance.<sup>161</sup> Critics call this approach untenable, often citing a common hypothetical to illustrate the absurdity of this stance.<sup>162</sup> In the hypothetical, there is an innocent person being pursued by killers hiding in someone's house.<sup>163</sup> The killers, often described as Nazi's looking for Jews, come to the door and ask if the innocent person is there.<sup>164</sup> Kant would direct the Nazis to the Jews, reason-

158. Utah Ethics Advisory Op. 02-05, 2002 WL 459018 (Utah St. Bar).

159. Briggs, *supra* note 98, at F01.

160. See Richard K. Burke, "Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law, 38 ARK. L. REV. 1, 7-9 (1984).

161. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 47-48; Shine, *supra* note 141, at 740-44; William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 435 (1999).

162. See Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 949-50 (2002); Shine, *supra* note 141, at 724; Simon, *supra* note 161; Transcript from Professionalism Conference, 52 S.C. L. REV. 481, 536-38 (2001).

163. Transcript, *supra* note 162, at 536.

164. *Id.*

ing that one is not responsible for actions stemming from the truth, only those stemming from deception.<sup>165</sup>

Some modern scholars feel that, although this approach may not be generally acceptable, lawyers should be held to elevated standards. At a professionalism conference, one law professor said:

I think lawyers have a unique obligation towards honesty, one that is far more demanding than the honesty of ordinary morality. . . . if . . . Nazis were at the door of a lawyer and the conversations with them were part of the legal conversation, then Kant got the answer right. The reasons for this, however, are not Kant's reasons. 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.<sup>166</sup>

The Chief Justice of the Arizona Supreme Court agreed: “[l]awyers are and should be different! . . . as long as we . . . try to justify [lies] in a situational way—‘a lawyer should not lie, except. . .,’ I think we are doomed.”<sup>167</sup> Some ethics authorities, such as in *Pautler*, follow this approach and treat the ethics rules word for word. Such a literal, or as some critics call it, “superficial” interpretation absolutely prohibits deceit and finds circumstance irrelevant.<sup>168</sup>

A contextual approach, advocated by Utilitarians such as Bentham<sup>169</sup> recognizes that there are moral costs to lying and holds that someone should lie only when costs are exceeded by the morally relevant benefits.<sup>170</sup> Sissela Bok advocates a quasi-categorical approach under which a lie may only be morally justified in crucial circumstances.<sup>171</sup> She argues that lying is a slippery-slope, that the disposition to lie intensifies with the practice of lying.<sup>172</sup> This concern is the reason many feel lying by attorneys should be absolutely prohibited. As Justice Zlaket said, “[lying] corrodes the individual lawyer, and it corrodes the profession. The lawyer who lies every day pretty soon does not know if he or she is lying to a spouse, to a

165. See Shine, *supra* note 141, at 742.

166. Transcript, *supra* note 162, at 538.

167. *Id.* at 535-36.

168. David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception of Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 811 (1995).

169. Bok, *supra* note 161, at 47-48.

170. Simon, *supra* note 161, at 436.

171. Bok, *supra* note 161, at 31.

172. *Id.*

friend, or to everybody else. In the process, this profession goes down and down.”<sup>173</sup> The disciplinary panel in *Pautler* also expressed such a concern, “once the door of ‘justifiable deception’ is opened, it takes little imagination to speculate about conduct which could result.”<sup>174</sup>

Bok explains that concerns such as averting harm to innocent persons can outweigh the need for truth.<sup>175</sup> She believes that lying to protect innocent lives, such as to divert the Nazis in the above hypothetical, is not only morally justified, but also does not invoke the same caustic concerns.<sup>176</sup> The lies are “neither [ ] likely to encourage others to lie nor make it much more likely that the person who lied to save a life might come to lie more easily or more often.”<sup>177</sup>

Under a broader categorical approach, not only is lying to protect people’s lives ethical, but lying about your identification to investigate housing discrimination<sup>178</sup> or to get a welfare officer to take your phone call so that your hungry client may get food stamps<sup>179</sup> may also be considered ethical.

## 2. *Did Urgency Justify Pautler’s Conduct?*

The Colorado Supreme Court argued that even if averting public harm would justify some lies, it would not justify Pautler’s; it reserves the right to apply an “imminent public harm” exception to “some unique circumstance” but finds that this is not such a case.<sup>180</sup> The Court reasoned that Pautler had feasible alternatives.<sup>181</sup> The alternatives, however, that the Court presented, such as calling a public defender to speak with Neal or telling Neal that no attorney would be called until he surrendered, do not seem practicable. Pautler and his colleagues worried that exercising either of these options could have prevented Neal’s surrender, and lead to more killings.<sup>182</sup> The Court also stated that Neal was not threatening any

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173. Transcript, *supra* note 162, at 535.

174. *People v. Pautler*, 35 P.3d 571, 586 (Colo. 2001), *aff’d*, 47 P.3d 1175 (Colo. 2002).

175. Bok, *supra* note 161, at 108.

176. *Id.* at 40, 108-10.

177. *Id.* at 109.

178. Transcript, *supra* note 162, at 537.

179. Simon, *supra* note 161, at 434-35.

180. *In re Pautler*, 47 P.3d 1175, 1180 n.6 (Colo. 2002).

181. *Id.* at 1180.

182. Kieran Nicholson, *DAs Support Prosecutor’s Deception, Standoff With Killer Left No Choice, They Say*, DENV. POST, Mar. 9, 2001, at B02.

specific person.<sup>183</sup> Pautler is quoted, however, as saying, “[Neal] even indicated he had gone over to the crime scene and seen the officers there and could have done them harm.”<sup>184</sup>

The Colorado disciplinary authorities cite two supposed costs of Pautler’s deceit: the specific cost to Neal and the general cost of public perception. The costs to Neal appear extremely minimal. Pautler and Neal only had a seven and one-half minute conversation.<sup>185</sup> Neal gave Pautler no confidential information. The claim that Neal may have developed mistrust for attorneys that affected his future relations with his actual attorney, even if with merit, is inconsequential. The evidence against Neal was insurmountable and a trustful attorney-client situation would not have affected the outcome of his case.

Citing public perception as a reason to strictly adhere to disciplinary rules is paradoxical. While lawyers may view ethics as observance of these rules, the public views ethical conduct in much broader terms.<sup>186</sup> As much of the public praised Pautler’s conduct, this strict devotion to rules may have just reinforced the perception that lawyers are governed by self-important rules that smother good judgment.<sup>187</sup> A recent ABA survey showed that sixty-four percent of people complain that today’s attorney is no longer a seeker of justice.<sup>188</sup> Allowing Pautler’s deception in order to promote justice could even help refurbish public image of lawyers.<sup>189</sup>

### III. CONCLUSION

One of the reasons that prosecutors are treated distinctively under disciplinary rules is their unique role of being more than an advocate. They may sometimes find themselves in situations that do not involve the formal legal process. In these situations, the harms that are normally sought to be prevented by rules of professional conduct may not apply. Therefore, prosecutors should be permitted to use deceit when the benefits will significantly outweigh any costs involved.

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183. *In re Pautler*, 47 P.3d at 1180.

184. Pankratz, *supra* note 30, at B-01.

185. *People v. Pautler*, 35 P.3d 571, 576 n.2 (Colo. 2001), *aff’d*, 47 P.3d 1175 (Colo. 2002).

186. Gary A. Hengstler, *Vox Populi*, 79 A.B.A. J. 60, 62 (1993).

187. Philip Cherner, *A Tale of Two Duties*, ROCKY MTN. NEWS, May 18, 2002, at 4B.

188. Hengstler, *supra* note 186, at 62.

189. Resnicoff, *supra* note 162, at 949.

Pautler's deceit facilitated the surrender of a man who had brutally killed three women and who was threatening to kill again. He lied, not to gain any sort of advocatorial advantage over Neal, but to protect members of the public. The morally relevant costs of his misrepresentation, if any, are significantly outweighed by its benefit. Pautler's sanction was thus unwarranted.