BIG E …. little e: ETHICS AND THE TRIAL LAWYER

IADC TRIAL ACADEMY

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INTRODUCTION

From time to time in our daily practices, there are occasions when our own individual moral values and ethical constructs ("BIG E") are juxtaposed against our profession's "ethical" rules or Codes of Professional Responsibility ("little e"). Our program is designed to examine a number of these situations in an effort to develop a critical manner of thinking about and analyzing what a lawyer "ought" to do in the face of a conflict between our individual ethical values and the norms imposed upon us by the applicable codes of conduct. Each of the scenarios/fact problems presented here today are based on "real" situations encountered by "real" lawyers and are not the project of the over-imaginative mind of a law professor. These materials are designed to provide a framework for looking at the various provisions of "little e" – the Model Rules of Professional Conduct in a much broader setting.

I. A VISIT TO THE HORSE SHED

Preparing witnesses for testimony at deposition or trial may place attorneys in potentially awkward situations. We listen to the witnesses' story and help "frame" it in the context of the lawsuit and our themes/defenses. We have to examine whether we are "coach[ing] into a phony story" or "guid[ing] him a little…show[ing] him the light," a dilemma faced by the attorneys in "Anatomy of a Murder". We will also look at a witness preparation session from the "The Verdict." Some of the following rules may apply.

A. Rule 3.3(a)(3)

> A lawyer shall not knowingly: . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

B. Rule 3.4(b)

A lawyer shall not: . . .

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; . . . .

C. D.C. Bar Opinion No. 79 (December 18, 1979)

A lawyer may not prepare, or assist in preparing, testimony he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may – indeed, should – do whatever is feasible to prepare his or her witness for examination.

D. See, Altman, "Witness Preparation Conflicts," 22 Litigation No. 3, 38 Fall 1995

E. Compare Freedman, "Counseling the Client: Refreshing Recollection or Prompting Perjury?" 2 Litigation No. 3, Spring 1976 at 35 (explaining the requirements of the law or a client's theory of the case before hearing the witness's initial recollection may constitute unethical suggestion) with *In re Petroleum Products Antitrust Litigation*, 502 F. Supp. 1092 (C.D. Cal. 1980) and *State of North Carolina v. McCormick*, 298 N.C. 788, 259 8E 2d 880 (1979) (cases suggest that there is nothing wrong *per se* with orienting the witness before tapping their memory).

F. Nassau Bar Ethics Opinion No. 94-6 (permissible and ethical to advise a client of the applicable law before hearing the client's version of the facts as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence.)

G. ABA Formal Opinion 87-353 (April 20, 1987) Lawyer's Responsibility with Relation to Client Perjury (Tab A)

H. ABA Formal Opinion 93-376 (August 6, 1993) The Lawyer's Obligation Where a Client Lies In Response To Discovery Requests (Tab B)

I. Consider Marvin Frankel's critical comments on the American practice of witness preparation in his book, Partisan Justice, (1980) at pages 15-16:

[E]very lawyer knows that the "preparing" of witnesses may embrace a multitude of . . . measures [other than the ordering and refreshing of recollection], including some ethical lapses believed to be more common than we would wish. The process is labeled archly in lawyer's slang as "horseshedding" the witness, a term that may be traced to utterly respectable origins in circuit-riding and otherwise horsy days but still rings a bit knowingly it today's ear. Whatever word is used to describe it, the process often extends beyond helping organize what the witness knows, and moves in the direction of helping the witness to know new things. At

its starkest, the effort is called subornation of perjury, which is a crime, and which we are permitted to hope is rare. Somewhat less stark, short of criminality but still to be condemned, is the device of telling the client "the law" before eliciting the facts—i.e., telling the client what facts would constitute a successful claim or defense, and only then asking the client what the facts happen perchance to be. The most famous recent instance is fictional but apt: "Anatomy of a Murder," a 1958 novel by Robert Traver. . . . It is not unduly cynical to suspect that this, if not in such egregious forms, happens with some frequency.

Moving away from palpably unsavory manifestations, we all know that the preparation of our witnesses is calculated, one way and another, to mock the solemn promise of the whole truth and nothing but. To be sure, reputable lawyers admonish their clients and witnesses to be truthful. At the same time, they often take infinite pains to prepare questions designed to make certain that the controlled flow of truth does not swell to an embarrassing flood. "Don't volunteer anything," the witnesses are cautioned. The concern is not that the volunteered contribution may be false. The concern is to avoid an excess of truth, where one spillover may prove hurtful to the case. . . .

J. See also, Salmi, "Don't Walk The Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial," 18 Rev. Litig. 135 (Winter 1999); Piorkowski, "Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limits of 'Coaching'," 1 Geo. J. Legal Ethics 389 (1987); Hodes, "The Professional Duty To Horseshed Witnesses – Zealously, Within the Bounds of the Law," 30 Tex. Tech. L. Rev. 1343 (1999); Wydick, "The Ethics of Witness Coaching," 17 Cardozo L. Rev. 1 (1995); LeGrande and Mierau, "Witness Preparation and the Trial Consulting Industry," 17 Geo. J. Legal Ethics 947 (2004); Allen, "Emerging from the Horse Shed and Still Passing the Smell Test – Ethics of Witness Preparation and Testimony," The Brief 56 (Summer 2003).

K. NYCLA Prof. Ethics Comm. Formal Opinion 741 (March 1, 2010) (A lawyer is "required to remedy the false testimony". Remedies include reasoning with the client to himself correct the false statement, but if all else fails, the remedy is to disclose the false testimony. Withdrawal is not an option.) (Tab C)

L. New York State Bar Committee on Professional Ethics, Opinion 837 (March 16, 2010) (Upon learning that a client has lied to a tribunal, an attorney may not simply withdraw but instead must take action necessary to remedy the false evidence, and this remedial obligation trumps the duty of confidentiality.) (Tab D)

M. *Handi & Ibrahim Mango Co. v. Fire Assoc. of Phila., 20 FRD 181, 182-83 (S.D.N.Y. 1957)* ("It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial …. This sort of preparation is essential to the proper presentation of a case and to avoid surprise …. There is no doubt that these practices are often abused … the line

must depend in large measure, as do so many other matters of practice, on the ethics of counsel.")

N. *In Re: Eldridge, 82 N.Y. 161, 171 (1880)* ("His duty is to extract facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.")

O. *State v. McCormick, 298 N.C. 788, 791-92 (1979)* ("It is not improper for an attorney to prepare his witness for trial, to explain the applicable law" in any given situation and to go over before trial the attorney's questions and the witness's answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer …. Even though a witness has been prepared in this manner, his testimony at trial is still his voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness's testimony at trial and not the testimony that the attorney has placed in the witness's mouth and not false or perjured testimony.")

P. §116 Restatement (3rd) Law Governing Lawyering ("§116. Interviewing and Preparing a Prospective Witness (1) A lawyer may interview a witness for the purpose of preparing a witness to testify.")

Q. Comment to §116 (In preparing a witness to testify, a lawyer may: (1) Invite the witness to provide truthful testimony favorable to the lawyer's client; (2) Discuss the role of the witness and effective courtroom demeanor; (3) Discuss the witness's recollection and probable testimony; (4) Reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider the witness's recollection or recounting of events in that light; (5) Discuss the applicability of law to the events at issue; (6) Review the factual context into which the witness's observations or opinions will fit; (7) Review documents or other physical evidence that will be introduced; (8) Discuss probable lines of hostile cross-examination that the witness should be prepared to meet; (9) Rehearse the witness's testimony; (10) Suggest choice of words that might be employed to make the witness's meaning clear; (11) BUT THE LAWYER MAY NOT ASSIST THE WITNESS TO TESTIFY FALSELY AS TO A MATERIAL FACT.)

R. *RTC v. Bright, 6 F3d 336 (5th Cir. 1993)* ("Were [the witness] giving testimony at a deposition or trial the attorney for either side would not be required to accept her initial testimony at face value but would be able to confront her with other information or attempt to persuade her to change it …. In an arms-length interview with a witness, [it is proper] for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate [assuming a good faith basis for believing so.]

S. Rule 1.03 (b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions….")

T. *Hayworth v. State, 840 P.2d 912* ("As long as the context of a witness's testimony is not ethically objectionable, advising the witness about the credible way to present that content – and rehearsing that content --- and rehearsing that presentation --- have been held not to raise any ethical problems.")

II. WHO IS MY CLIENT?

When representing a corporation, lawyers frequently come into contact with many employees who have knowledge of the fact and circumstances of the lawsuit. When meeting with these people, we are often asked "Whose lawyer are you?" Do we represent the employee? If so, can she expect to have a privileged and confidential conversation with us? Or will we share what we learn with others in the company? We will use the rules, comments, and case law below as we discuss.

A. Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

B. Comments (1) and (2) to Rule 1.13

(1) An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

(2) When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the

organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

C. ABA Formal Opinion 08-450 (April 9, 2008) Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters

D. *Perez v. Kirk & Carrigan*, 822 SW2d 261 (1991)

E. See also, Fox "Your Client's Employee is Being Deposed: Are You Ethically Prepared?," 29 Litigation 17 (Summer 2003); Simon, "Whom (or What) Does the Organization's Lawyer Represent?," 91 California Law Review 57 (2003).

III. CROSS-EXAMINATION OF THE TRUTHFUL WITNESS

How far can an attorney go, in the "zealous" representation of a client, when questioning an attorney who she knows to be telling the truth? Can we "eliminate him as an effective witness" with cross examination to make him seem less sympathetic as Maggie is told to do in "A Class Action"? Is it Ethical (BIG E) to do so? We will examine the situation and, perhaps, use some of the following to do so.

A. Comment to Rule 1.3

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause of endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

B. Rule 4.4(a) Respect for the Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person. . . .

C. Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of the truth." 5 J. Wigmore, Evidence §1367 (Chadbourn rev. 1974).

D. The purpose of cross-examination is to expose falsehood and catch the truth. Emory Buckner, quoted in Francis Wellman's "The Art of Cross-Examination" (4th ed. 1936).

E. Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination. American Bar Ass'n., Standards for Criminal Justice Standard 4-7.6(b) (3d ed.1991)

IV. THE IME

During an Independent Medical Examination of the Plaintiff, the doctor determines that the Plaintiff's injuries are not as she has suggested in the lawsuit. However, the physical examination done by the doctor reveals a life-threatening condition that will be fatal in a short period of time. Neither the patient nor her doctors currently know of the condition. Upon telling the client of the condition, the attorney is told to not reveal the situation to opposing counsel. Can he do so? Is it BIG E ethical to do?

A. Assume that at the time of this fact pattern that the applicable Professional Responsibility Code provided in Rule 1.6(b),

A lawyer may reveal:

(1) . . . .

(2) . . . .

(3) The intention of a client to commit a crime and the information necessary to prevent a crime;

(4) Confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

B. Rule 1.6:

. . . a lawyer shall not knowingly: (1) reveal a confidence or secret of a client.

C. Model Rule 1.6(b)

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm; . . . .

D. See, *Spaulding v. Zimmerman*, 116 NW2d 704 (Minn. 1962); See also, Cramton and Knowles, "Professional Secrecy and Its Exceptions: *Spaulding v.*

Zimmerman Revisited," 83 Minn. L. Rev. 63 (1998); Cramton, "Lawyer Disclosure to Prevent Death or Bodily Injury: A New Look at *Spaulding v. Zimmerman*," 2 J. Inst. for Study Legal Ethics 163 (1999); and Langford, "Reflections on Confidentiality – A Practitioner's Response to *Spaulding v. Zimmerman*," 2 J. Inst. for Study Legal Ethics 183 (1999)

V. TRUTH TELLING IN SETTLEMENT NEGOTIATIONS/MEDIATIONS/ COURT-ORDERED ADR

Court ordered settlement conferences are becoming the norm in current day litigation. Judges are often the mediator. When asked for your client's top dollar, are you required to tell him the truth? What does the judge expect and what does your client expect? We will examine the perhaps opposing views using these materials.

A. Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

B. Comment to Rule 4.1

Statements of Fact

(2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

C. Rule 8.4 Misconduct

It is professional misconduct for a lawyer to: . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . . .

D. ABA Formal Opinion 93-370 (February 5, 1993) Judicial Participation in Pretrial Settlement Negotiations (Tab E)

E. ABA Formal Opinion 06-439 (April 12, 2006) Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to a Caucused Mediation (Tab F)

F. ABA Formal Opinion 94-387-(1994)

> As a general matter, the Model Rules of Professional Conduct . . . do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to represent her client diligently, and possibly her obligation to keep client confidences.

G. See also ABA Formal Opinion 95-397 (1995) (Outright misrepresentations of material facts, either through knowing misstatement or nondisclosure are prohibited)

H. See also, D. Peters, "When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal," 2007 J. Disp. Resol. 119 (2007); Richmond, "Lawyers' Professional Responsibilities and Liabilities in Negotiations," 22 Geo. J. Legal Ethics 249 (2009); G. Peters, "The Use of Lies in Negotiation," 48 Ohio St. L.J. 1 (1987); Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 N. Ill. U.L. Rev. 255 (1999); Krivis, "The Truth about Deception in Mediation," For The Defense, July 2002, 47; Downey, "The Ethics of Bluffing," For The Defense, June 2005, 54;

VI. USING SOCIAL MEDIA TO INVESTIGATE ADVERSE PARTIES/THIRD PARTIES/PROSPECTIVE OR ACTUAL JURORS

In the modern era, lawyers have so much information potentially available to them on the Internet. Can you get on Facebook to look at Plaintiff's status ("Loving life and feeling great") and use it to defend against her claims of pain and suffering? If you cannot do so, can your legal assistant? Can you use Twitter or other sites to investigate potential members of the jury panel or those actually sworn in as jurors in your case?

A. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

> With respect to a nonlawyer employed or retained by or associated with a lawyer:

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; . . . .

B. Rule 8.4 Misconduct

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 or another; . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; . . .

C. Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; . . .

D. Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

E. The Philadelphia Bar Association Professional Guidance Committee – Opinion 2009-02 (March 2009). (Tab G)

F. New York City Bar Formal Opinion 2010-2 (September 2010) (Tab H) (A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.)

G. New York State Bar Association Opinion 843 (September 10, 2010) (Tab I) (A lawyer representing a client may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in litigation.)

H. SDCBA Legal Ethics Opinion 2011-12 (Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011) (An attorney may not make an ex parte "friend" request of a represented party. An attorney's duty not to deceive

prohibits him from making a friend request even of unrepresented parties without disclosing the purpose of the request.) (Tab J)

I. New York Bar Association Formal Opinion 2012-02 (June 2012) (Tab K) (Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the results of the research are that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct can run afoul of the Rules of Professional conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.)

J. In *Carino v. Muenzen*, 2010 WL 3448071 (N.J.Super.A.D. Aug. 30, 2010) the court addressed the issue of whether attorneys may access the Internet during jury selection to obtain information about jurors on the panel. The court held that accessing the Internet during jury selection was permissible: "We … conclude that the Judge acted unreasonably in preventing use of the internet…. There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining a 'level paying field.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel, even if only one of them chose to utilize it."

K. In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct, 34 Hofstra L. Rev.771 (2006)

L. In Re Gotti, 8 P3d 966 (Ore 2000) (no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigators); See also: Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis, 32 Seattle Univ. L. Rev. 123 (2008) and Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis if the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995)

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 87-353
April 20, 1987
LAWYER'S RESPONSIBILITY WITH RELATION TO CLIENT PERJURY

If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation.

If the lawyer learns that the client intends to testify falsely before a tribunal, the lawyer must advise the client against such course of action, informing the client of the consequences of giving false testimony, including the lawyer's duty of disclosure to the tribunal. Ordinarily, the lawyer can reasonably believe that such advice will dissuade the client from giving false testimony and, therefore, may examine the client in the normal manner. However, if the lawyer knows, from the client's clearly stated intention, that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client's intention to testify falsely to the tribunal.

The professional obligations of a lawyer relating to client perjury as now defined by the Model Rules of Professional Conduct (1983), particularly in Model Rule 3.3(a) and (b), require a reconsideration of Formal Opinion 287 (1953), which was based upon an interpretation of the earlier Canons of Professional Ethics (1908), and Informal Opinion 1314 (1975), which interpreted the predecessor Model Code of Professional Responsibility (1969, revised 1980). [FN1] Formal Opinion 287 discussed in part the lawyer's responsibility with regard to false statements the lawyer knows that the client has made to the tribunal. Informal Opinion 1314 dealt with the lawyer's duty when the lawyer knows of the client's intention to commit perjury.

Formal Opinion 287

Formal Opinion 287 addressed two situations: one, a civil divorce case; the other, the sentencing procedure in a criminal case. In the civil matter, the client informs his lawyer three months after the court has entered a decree for divorce in his favor that he had testified falsely about the date of his wife's desertion. A truthful statement of the date would not have established under local law any ground for divorce and would have resulted in the dismissal of the action as prematurely brought. Formal Opinion 287 states that under these circumstances, the lawyer must advise the client to inform the court of his false testimony, and that if the client refuses to do so, the lawyer must cease representing the client. [FN2] However, Formal Opinion 287 concluded that Canon 37 of the Canons of Professional Ethics (dealing with the lawyer's duty to not reveal the client's confidences) prohibits the lawyer from disclosing the client's perjury to the court.

In this factual situation, Model Rule 3.3 also does not permit the lawyer to disclose the client's perjury to the court, but for a significantly different reason. Contrary to Formal Opinion 287, Rules 3.3(a) and (b) require a lawyer to disclose the client's perjury to the court if other remedial measures are ineffective, even if the information is otherwise protected under Rule 1.6, which prohibits a lawyer from revealing information relating to representation of a client. However, under Rule 3.3(b), the duty to disclose continues only 'to the conclusion of the proceeding . . .' From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct. [FN3] Therefore, on the facts considered by Formal Opinion 287, where the lawyer learns of the perjury after the

Tab A

conclusion of the proceedings--three months after the entry of the divorce decree [FN4]--the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

In the criminal fact setting, Formal Opinion 287 is directly contrary to the Model Rules with regard to one part of its guidance to lawyers. Briefly, the criminal defense lawyer is presented with the following three situations prior to the sentencing of the lawyer's client: (1) the judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him; (2) the judge asks the defendant whether he has a criminal record and he falsely answers that he has none; (3) the judge asks the defendant's lawyer whether his client has a criminal record.

Formal Opinion 287 concluded that in none of the above situations is the lawyer permitted to disclose to the court the information he has concerning the client's actual criminal record. The opinion stated that such a disclosure would be prohibited by Canon 37, which imposed a paramount duty on the lawyer to preserve the client's confidences. In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited, under Rule 1.6, from disclosing information relating to the representation. [FN5] However, in situation (2), where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 that the lawyer is prohibited from disclosing the client's false statement to the court is contrary trary to the requirement of Model Rule 3.3. [FN6] This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal for the reasons stated in the discussion of Rule 3.3 below. [FN7]

Change in Policy in Model Rule 3.3

Model Rule 3.3(a) and (b) represent a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.

The relevant provisions of Rule 3.3(a) are:

> (a) A lawyer shall not knowingly:
>
> . . .
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Rule 3.3(a)(2) and (4) complement each other. While (a)(4), itself, does not expressly require disclosure by the lawyer to the tribunal of the client's false testimony after the lawyer has offered it and learns of its falsity, such disclosure will be the only 'reasonable remedial [measure]' the lawyer will be able to take if the client is unwilling to rectify the perjury. The Comment to Rule 3.3 states that disclosure of the client's perjury to the tribunal would be required of the lawyer by (a)(4) in this situation.

Although Rule 3.3(a)(2), unlike 3.3(a)(4), does not specifically refer to perjury or false evidence, it would require an irrational reading of the language: 'a criminal or fraudulent act by the client,' to exclude false testimony by the client. While broadly written to cover all crimes or frauds a client may commit during the course of the proceeding, Rule 3.3(a)(2), in the context of the whole of Rule 3.3, certainly includes perjury.

Since 3.3(a)(2) requires disclosure to the tribunal only when it is necessary to 'avoid assisting' client perjury, the important question is what conduct of the lawyer would constitute such assistance. Certainly, the conduct proscribed in Rule 3.3(a)(4)--offering evidence the lawyer knows to be false-- is included. Also, a lawyer's failure to take remedial measures, including disclosure to the court, when the lawyer knows the client has given false testimony, is included. It is apparent to the Committee that as used in Rule 3.3(a)(2), the language 'assisting a criminal or fraudulent act by the client' is not limited to the criminal law concepts of aiding and abetting or subornation. Rather,

it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.

Furthermore, as previously indicated, contrary to Formal Opinions 287 and 341 and the exception provided in DR 7-102(B)(1) of the Model Code, the disclosure requirement of Model Rule 3.3(a)(2) and (4) is not excused because of client confidences. Rule 3.3(b) provides in pertinent part: 'The duties stated in paragraph (a) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.' Thus, the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3(a)(2) and (4) supersedes the lawyer's responsibility to the client under Rule 1.6.

Application To Criminal Cases--Effect of *Nix v. Whiteside*

The Comment to Rule 3.3 makes it clear that this disclosure requirement applies in both civil and criminal cases. However, the Comment states that if such disclosure by a lawyer would constitute a violation of a criminal defendant's constitutional rights to due process and effective assistance of counsel, '[t]he obligation of the advocate under these Rules is subordinate to such a constitutional requirement.' Subsequent to the publishing of this Comment, however, the Supreme Court of the United States held in *Nix v. Whiteside*, ---- U.S. ----, 106 S. Ct. 988, 994-97, 89 L.Ed.2d 123, 134-37 (1986) that a criminal defendant is not entitled to the assistance of counsel in giving false testimony and that a lawyer who refuses such assistance, and who even threatens the client with disclosure of the perjury to the court if the client does testify falsely, has not deprived the client of effective assistance of counsel. Some states, nevertheless, may rely on their own applicable constitutional provisions and may interpret them to prohibit such a disclosure to the tribunal by defense counsel. In a jurisdiction where this kind of ruling is made, the lawyer is obligated, of course, to comply with the constitutional requirement rather than the ethical one.

As stated earlier, the obligation of a lawyer to disclose to the tribunal client perjury committed during the proceeding, which the lawyer learns about prior to the conclusion of the proceeding, represents a reversal of prior opinions of this Committee given under earlier rules of professional conduct. However, the Committee has done nothing more in this opinion than apply the ethical rule approved by the American Bar Association when it adopted Rule 3.3(a) and (b) of the Model Rules of Professional Conduct. Even so, a question may be raised whether this application is incompatible with the adversary system and the development of effective attorney-client relationships. [FN8]

The Committee believes it is not. Without doubt, the vitality of the adversary system, certainly in criminal cases, depends upon the ability of the lawyer to give loyal and zealous service to the client. And this, in turn, requires that the lawyer have the complete confidence of the client and be able to assure the client that the confidence will be protected and honored. However, the ethical rules of the bar which have supported these basic requirements of the adversary system have emphasized from the time they were first reduced to written form that the lawyer's duties to the client in this regard must be performed within the bounds of law.

For example, these ethical rules clearly recognize that a lawyer representing a client who admits guilt in fact, but wants to plead not guilty and put the state to its proof, may assist the client in entering such a plea and vigorously challenge the state's case at trial through cross-examination, legal motions and argument to the jury. However, neither the adversary system nor the ethical rules permit the lawyer to participate in the corruption of the judicial process by assisting the client in the introduction of evidence the lawyer knows is false. A defendant does not have the right, as part of the right to a fair trial and zealous representation by counsel, to commit perjury. And the lawyer owes no duty to the client, in providing the representation to which the client is entitled, to assist the client's perjury.

On the contrary, the lawyer, as an officer of the court, has a duty to prevent the perjury, and if the perjury has already been committed, to prevent its playing any part in the judgment of the court. This duty the lawyer owes the court is not inconsistent with any duty owed to the client. More particularly, it is not inconsistent with the lawyer's duty to preserve the client's confidences. For that duty is based on the lawyer's need for information from the client to obtain for the client all that the law and lawful process provide. Implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.

It must be emphasized that this opinion does not change the professional relationship the lawyer has with the client and require the lawyer now to judge, rather than represent, the client. The lawyer's obligation to disclose client perjury to the tribunal, discussed in this opinion, is strictly limited by Rule 3.3 to the situation where the lawyer *knows* that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. [FN9] The lawyer's suspicions are not enough. *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

Informal Opinion 1314

So far, this opinion has discussed the duty of the lawyer when the lawyer learns that the client has committed perjury. The lawyer is presented with a different dilemma when, prior to trial, the client states an intention to commit perjury at trial. This was the situation addressed in Informal Opinion 1314 (1975). The Committee, in that opinion, stated that the lawyer in that situation must advise the client that the lawyer must take one of two courses of action: withdraw prior to the submission of the false testimony, or, if the client insists on testifying falsely, report to the tribunal the falsity of the testimony.

The Committee distinguished, in Informal Opinion 1314, the situation where the lawyer does not know in advance that the client intends to commit perjury. In that case, the Committee stated that when the client does commit perjury, and the lawyer later learns of it, the lawyer may not disclose the perjury to the tribunal because of the lawyer's primary duty to protect the client's confidential communications. As stated earlier in this opinion, the Committee believes that Model Rule 3.3 calls for a different course of action by the lawyer.

The duty imposed on the lawyer by Informal Opinion 1314--when the lawyer knows in advance that the client intends to commit perjury, to advise the client that if the client insists on testifying falsely, the lawyer must disclose the client's intended perjury to the tribunal--was based on the Committee's reading of DR 7-102(A)(4), (6) and (7). These provisions prohibit a lawyer from: (1) knowingly using perjured testimony or false evidence; (2) participating in the creation or preservation of evidence the lawyer knows to be false; and (3) counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent. However, none of these prohibitions *requires* disclosure to the tribunal of any information otherwise protected by DR 4-101. Although DR 4-101(C)(3) permits a lawyer to reveal a client's stated intention to commit perjury, this exception to the lawyer's duty to preserve the client's confidences and secrets is only discretionary on the part of the lawyer.

Informal Opinion 1314 in this regard is more consistent with Model Rule 3.3(a)(2) than with any provision of the Model Code, upon which the opinion was based. However, the Committee does not believe that the mandatory disclosure requirement of this Model Rule provision is necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in *Nix v. Whiteside*. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).

In the unusual case where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial, and the lawyer is unable to effectively withdraw from the representation, the lawyer cannot examine the client in the usual manner. Under these circumstances, when the client has not yet committed perjury, the Committee believes that the lawyer's conduct should be guided in a way that is consistent, as much as possible, with the confidentiality protections provided in Rule 1.6, and yet not violative of Rule 3.3. This may be accomplished by the lawyer's refraining from calling the client as a witness when the lawyer knows that the only testimony the client would offer is false; or, where there is some testimony, other than the false testimony, the client can offer in the client's defense, by the lawyer's examining the client on only those matters and not on the subject matter which would produce the false testimony. Such conduct on the part of the lawyer would serve as a way for the lawyer to avoid assisting the fraudulent or criminal act of the client without having to disclose the client's confidences to the court. However, if the lawyer does not offer the client's testimony, and, on inquiry by the court into whether the client has been fully advised as to the client's right to testify, the client states a desire to testify, but

is being prevented by the lawyer from testifying, the lawyer may have no other choice than to disclose to the court the client's intention to testify falsely.

This approach must be distinguished from the solution offered in the initially ABA-approved Defense Function Standard 7.7 (1971). This proposal, no longer applicable, [FN10] permitted a lawyer, who could not dissuade the client from committing perjury and who could not withdraw, to call the client solely to give the client's own statement, without being questioned by the lawyer and without the lawyer's arguing to the jury and false testimony presented by the client. This 'narrative' solution was offered as a model by the ABA and supported by a number of courts [FN11] on the assumption that a defense lawyer constitutionally could not prevent the client from testifying falsely on the client's own behalf and, therefore, would not be assisting the perjury if the lawyer did not directly elicit the false testimony and did not use it in argument to the jury.

The Committee believes that under Model Rule 3.3(a)(2) and the recent Supreme Court decision of *Nix v. Whiteside*, ---- U.S. ----, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986), the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury. Despite differences on other issues in *Nix v. Whiteside*, the Justices were unanimous in concluding that a criminal defendant does not have the constitutional right to testify falsely. More recently, this ruling was made the basis of the holding by the Seventh Circuit in *United States v. Henkel*, 799 F.2d 369 (7th Cir. 1986) that the defendant 'had no right to lie' and, therefore, was not deprived of the right to counsel when the defense lawyer refused to present the defendant's testimony which he knew was false.

FN1. The Committee notes that other prior opinions of this Committee relating to client perjury are not consistent with Model Rule 3.3. These include Formal Opinions 341 (1975) and 216 (1941) and Informal Opinions 1318 (1975) and 869 (1965). Lawyers are cautioned to investigate the applicable local ethical rules and opinions governing a lawyer's responsibility with relation to client perjury, since local standards may differ from Rule 3.3 as adopted by the ABA House of Delegates in August, 1983.

FN2. This requirement of withdrawal from the representation stated in Formal Opinion 287 is inconsistent with Model Rule 1.16, which, under the facts posited in the Opinion, provides only for discretionary withdrawal.

FN3. This explanation, at least, is consistent with the distinction between information relating to continuing crime, which is not protected by the attorney-client privilege, and information relating to past crime, which is protected. *See, e.g., In re* Grand Jury Proceedings, 680 F.2d 1026 (5th Cir. 1982) (discussing crime/fraud exception to attorney-client privilege).

FN4. The Committee assumes that there were no further proceedings and that this was a final decree. This is not to say, however, that the judgment could not be set aside by the court if the court subsequently learns of the fraudulent representations of the client.

FN5. Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

FN6. The validity of Formal Opinion 287 in this regard was initially put in question in 1969 when the ABA adopted DR 7-102(B)(1). This provision required a lawyer to reveal to an affected person or tribunal any fraud perpetrated by the client in the course of the representation discovered by the lawyer. Because of its apparent inconsistency with DR 4-101, prohibiting a lawyer from revealing a confidence or secret of the client, DR 7-102(B)(1) was amended in 1974 to provide an exception to the duty to reveal the client's fraud when the information is protected as a privileged communication. Formal Opinion 341 (1975) interpreted the words 'privileged communication' to encompass confidences and secrets under DR 4-101, thereby making the amendment consistent with Formal Opinion 287.

FN7. The Comment to Rule 3.3 suggests that the lawyer may be able to avoid disclosure to the court if the lawyer can effectively withdraw. But the Committee concludes that withdrawal can rarely serve as a remedy for the client's perjury.

FN8. *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

FN9. The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never 'know' that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4- 3.2(a) and (b) (1979) are also applicable.

FN10. This particular Standard was not approved by the ABA House of Delegates during the February, 1979 meeting when the Standards were reconsidered and otherwise approved.

FN11. *See, e.g.*, United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980); State v. Lowery, 111 Ariz. 26, 28-29, 523 P.2d 54, 56-57 (1974).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-376 **August 6, 1993**
The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests

A lawyer in a civil case who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court. In this context, the normal duty of confidentiality in Rule 1.6 is explicitly superseded by the obligation of candor toward the tribunal in Rule 3.3. The lawyer must first attempt to persuade the client to rectify the situation or, if that proves impossible, must herself take whatever steps are necessary to ensure that a fraud is not perpetrated on the tribunal. In some cases this may be accomplished by a withdrawal from the representation; in others it may be enough to disaffirm the work product; still others may require disclosure to opposing counsel; finally, if all else fails, direct disclosure to the court may prove to be the only effective remedial measure for client fraud most likely to be encountered in pretrial proceedings.

The Committee has been asked to address the ethical obligations of a lawyer in a civil case who is informed by her client after the fact that the client lied in responding to interrogatories and deposition questions, and supplied a falsified document in response to a request for production of documents.

The Committee most recently reviewed the professional obligations of a lawyer with regard to client fraud in the context of an adjudicative proceeding in ABA Formal Opinion No. 87-353 (1987). In that opinion, dealing with client perjury, the Committee reconsidered several earlier opinions in light of the Model Rules of Professional Conduct (1983, amended 1993), particularly Rule 3.3 ("Candor Toward the Tribunal").[1] The Committee adopted a comple-

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1. Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered

Tab B

mentary interpretation of Rules 3.3(a)(2) and (4) and concluded that the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3 superseded the lawyer's responsibility to keep client confidences under Rule 1.6.[2] "It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury." The opinion goes on to state that

It is apparent to the Committee that, as used in Rule 3.3(a)(2), the language "assisting a criminal or fraudulent act by the client" is not limited to the criminal law concepts of aiding and abetting or subornation. Rather, it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process.

It is with this overall purpose in mind that the Committee now addresses the application of the Model Rules in the pretrial situation presented by the current inquiry.

A lawyer represents the agent for an insurance company in a contract action filed by an insured against both the company and the agent. The lawsuit was filed on a policy requiring proof of claim within 60 days of loss. The insured alleged that he had put such proof in the regular mail addressed to the agent on the 59th day, thereby providing timely notice under law and complying with the terms of the policy. Unfortunately, the insured did not obtain a

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material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b)The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c)A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

2. Rule 1.6 Confidentiality of Information

(a)A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b)A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer to allegations in any proceeding concerning the lawyer's representation of the client.

mailing receipt or other evidence of posting. Subsequently, the insurance company refused to pay the claim on the ground that the required notice was never received.

Because the defendant agent would not be amenable to a trial subpoena, he was one of the first to be deposed after suit was filed. At the deposition, the plaintiff/insured hoped to prove timely mailing and receipt by the agent, while the defendants hoped to establish a basis for summary judgment in view of the lack of such timely mailing or receipt, as indicated by evidence offered by the agent in pretrial discovery. When asked at the deposition if he had received proof of claim by the 60th day, the agent replied that he had not, and produced a copy of his office mail log confirming this, which was marked as an exhibit in the deposition.

The deposition was transcribed according to local custom and the agent later stopped by the lawyer's office to review and sign it. The next day the lawyer sent a letter to plaintiff's counsel, pointing out plaintiff's serious problem of lack of proof of compliance with the policy requirement of timely notice, and enclosing a draft copy of a motion for summary judgment. She intended to file the motion as soon as she received notice from the court reporter that the deposition had been duly signed, sealed and filed with the court. Failing a favorable ruling on said motion (or reasonable settlement proposal by plaintiff), the lawyer planned to use the deposition at trial pursuant to Federal Rule of Evidence 804(b)(1).

Several days later, on a business trip, the lawyer ran into her client the agent, at the airport. In the course of discussing the status of the case and the upcoming trial, the agent advised the lawyer that he had lied about not receiving insured's notice. In fact, it had arrived in his office on the 60th day and his secretary had entered its receipt in the office mail log with other incoming correspondence before placing the mail on his desk. The agent, however, had shredded the letter and altered the mail log to conceal the fact of receipt.

In circumstances where a lawyer has offered perjured testimony or falsified evidence in an adjudicative proceeding, the Model Rules, like the predecessor Model Code of Professional Responsibility (1969, amended 1980), adopt the view that remedial measures must be taken. See Rule 3.3, Comment. Although Rule 1.6 generally affords protection to client confidences, its confidentiality requirement is qualified by its own provisions, and by the effect of other Rules. Most notably in this context, the duty of confidentiality mandated by Rule 1.6 is explicitly superseded by the duty of disclosure in Rule 3.3. See Rule 3.3(b).[3] Thus, as was made clear in Formal Opinion No. 87-353, disclosure of a client's perjury is required by Rule 3.3 where a lawyer has offered material evidence to a tribunal and comes to know of its falsity, or when disclosure of a material fact is necessary to avoid assisting a criminal or

3. See Note 1 supra.

fraudulent act by the client.

In the case at hand, there is no issue as to knowledge on the lawyer's part of the client's fraud; the client has made a direct admission to the lawyer after the fact. Similarly, there is no doubt that the perjury and other fraudulent acts of the client relate to a material fact, in that a necessary element of plaintiff's case is at issue. However, because the client's misrepresentations took place during pretrial discovery and none occurred in open court, the question arises whether the applicable rule of conduct is Rule 3.3 or Rule 4.1 ("Truthfulness in Statement to Others"). [FN4] The issue is whether perjury or fraud in pretrial discovery should be regarded as a lack of candor toward the tribunal, governed by Rule 3.3, or untruthfulness toward the opposing party and counsel, as to which Rule 4.1 is the applicable provision. Unlike the duty of candor toward a "tribunal" in Rule 3.3, the duty of truthfulness toward "others" in Rule 4.1 does not expressly trump the duty to keep client confidences in Rule 1.6. If it is Rule 4.1 rather than Rule 3.3(a) that applies in this context, the prohibition on disclosure of client confidences in Rule 1.6 must be given full effect.

It is clear that once the deposition is signed and filed and the motion for summary judgment submitted to the court, a fraud has been committed upon the tribunal which would trigger application of Rule 3.3(a). Indeed, we think that even before these documents are filed there is potential ongoing reliance upon their content which would be outcome-determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement. Support for this view is found in case law holding that the duty of a lawyer under Rule 3.3(a)(2) to disclose material facts to the tribunal implies a duty to make such disclosure to opposing counsel in pretrial settlement negotiations. See, e.g., Kath v. Western Media, Inc., 684 P.2d 98, 101 (Wyo.1984) (letter contradicting testimony of a key witness should have been disclosed to opposing counsel in connection with settlement negotiations, under Rule 3.3 and DR 7-102(A)); Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507, 509 (1983) (fact that client had died should have been disclosed to opposing counsel in pretrial settlement negotiations.)

Further supporting the applicability of Rules 3.3(a)(2) and (4) to pretrial discovery situations is the fact that while paragraphs (a)(1) and (3) presuppose false or incomplete statements made to the tribunal, neither paragraph (a)(2) nor (a)(4) expresses any such condition precedent that the tribunal must have been aware of the crime, fraud, or false evidence.

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4. Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Committee is therefore of the view that, in the pretrial situation described above, the lawyer's duty of candor toward the tribunal under Rule 3.3 qualifies her duty to keep client confidences under Rule 1.6. Continued participation by the lawyer in the matter without rectification or disclosure would assist the client in committing a crime or fraud in violation of Rule 3.3(a)(2).[5] Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer's duty to take reasonable remedial measures under Rule 3.3(a)(4), including disclosure if necessary, according to the complementary interpretation of paragraphs (a)(2) and (a)(4) in ABA Formal Opinion No. 87-353.

It is important to note, however, that the Committee does not assert, nor should it be inferred from its analysis of Rule 3.3(a) in Opinion No. 87-353, that disclosure to the tribunal is the first and only appropriate remedial measure to be taken in situations arising under Rule 3.3(a)(4). As the Comment to Rule 3.3 makes clear, the duties of loyalty and confidentiality owed to her client require a lawyer to explore options short of outright disclosure in order to rectify the situation. Thus, the lawyer's first step should be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client's wrongdoing or breaching the client's confidences, depending upon the rules of the jurisdiction and the nature of the false evidence. For example, incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal. Although this approach would not appear to be feasible in the case at hand, it is nevertheless the type of reasonable remedial measure that should be explored initially by a lawyer when confronted by a situation in which she realizes that evidence she has offered or elicited in good faith is false.

In this case, if efforts to persuade the client to rectify fail, the lawyer must herself act to see that a fraud is not perpetrated on the tribunal. At a minimum she must withdraw from the representation, so as to avoid assisting the client's fraud in violation of Rules 3.3 and 1.2(d). See Rule 1.16(a)(1) (withdrawal mandatory where continued representation would result in a violation of rules of professional conduct). However, the Committee observed in Opinion No. 87-353, "withdrawal can rarely serve as a remedy for the client's

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5. The more general prohibition against assisting client fraud contained in Rule 1.2(d) would also be violated were the lawyer to continue to represent the client in the matter without taking steps to rectify the fraud, up to and including giving notice of withdrawal and disaffirmance of her work product. See ABA Formal Opinion No. 92-366 (August 8, 1992).

perjury." While withdrawal may enable the lawyer to avoid knowing participation in the commission of perjury, Rule 3.3(a)(4) specifically requires the lawyer to do more than simply distance herself from the client's fraud when she has offered evidence that she learns was false; she must take "reasonable remedial measures" to alert the court to it. Moreover, under paragraph (b) of Rule 3.3, the lawyer's duties in this regard "continue to the conclusion of the proceeding," presumably even if the lawyer has withdrawn from the representation before this time.

It is possible that so-called "noisy withdrawal" procedures could be effective in the instant case, albeit in a way that is tantamount to disclosure. See ABA Formal Opinion No. 92-366 (August 8, 1992). Utilization of the withdrawal/disaffirmance approach suggested by Opinion No. 92-366 is appealing as a remedial measure because it is less intrusive on the confidential relationship between lawyer and client than outright disclosure to the tribunal under Rule 3.3(a). It may also have the advantage of directly and expeditiously rectifying the fraud in a way that does not compromise the tribunal and prevent the case from proceeding. On the other hand, "noisy withdrawal" may not be an entirely effective means of dealing with the type of client fraud likely to occur in the pretrial stages of a case. For instance, withdrawal would not be sufficient to correct the fraud's impact on the case if the plaintiff decided to drop his or her lawsuit because of a perceived lack of proof prior to or notwithstanding the "noisy withdrawal." Also, a "noisy withdrawal" does not necessarily put either successor counsel or the opposing party on notice as to why the documents are being disaffirmed. Thus, notwithstanding withdrawal and disaffirmance, the fraud could continue to adversely affect the proceedings and ultimate disposition of the case. Direct disclosure under Rule 3.3, to the opposing party or if need be to the court, may prove to be the only reasonable remedial measure in the client fraud situations most likely to be encountered in pretrial proceedings.

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 741
Date Issued: March 1, 2010

TOPIC: Lawyer learns after the fact that a client has lied about a material issue in a civil deposition.

DIGEST:

A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics Opinion 712.

RULES:

RPC 3.3, 1.6

QUESTION:

What are a lawyer's duties and obligations when the lawyer learns after the fact that the client has lied about a material issue in a civil deposition?

OPINION:

This opinion provides guidance under the newly promulgated New York Rules of Professional Conduct, 22 NYCRR 1200 et seq. (April 1, 2009) (RPC), for a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case. As explained in detail below, this opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially.

Lawyers are ethically obliged to represent their clients competently and diligently and to preserve their confidential information. At the same time, lawyers, as officers of the court, are ethically and professionally obliged not to assist their clients in perpetrating frauds on tribunals or testifying falsely. Balancing the duties of competent representation, client confidentiality and candor to the tribunal requires careful and thoughtful analysis.

Tab C

Rules of Professional Conduct

Effective April 1, 2009, the New York Rules of Professional Conduct, in RPC 3.3 (a)(3), forbid a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client false testimony:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Two other provisions of RPC 3.3 are also relevant here. RPC 3.3 (b) provides that a lawyer who "represents a client before a tribunal and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In addition, a lawyer is duty bound to "correct a false statement of material fact previously made to the tribunal by the lawyer." RPC 3.3 (a) (1).

RPC 3.3 (c) requires a lawyer to remedy client false testimony "even if compliance requires disclosure of information otherwise protected by Rule. 1.6." The lawyer's duty of confidentiality is contained in RPC 1.6, which states that a lawyer shall not knowingly reveal confidential information, including information protected by the attorney-client privilege, except in six enumerated circumstances. One of those circumstances is "when permitted or required under these Rules or to comply with other law or court order." (RPC 1.6(b)(6).) Under the explicit language of RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court or known client false testimony or to correct prior false statements offered by the lawyer supersedes the lawyer's duty to maintain a client's confidential information under RPC 1.6.[1]

NYCLA Ethics Opinion 712 Is Superseded Because It Was Based upon the Old Code

The lawyer's duty to remedy false statements by disclosure of confidential information if necessary represents a change in the ethics rules, and requires us to revisit and withdraw our prior opinion on client false testimony in depositions.

In a prior opinion on this issue, we stated that a lawyer who learns of a client's past false testimony at a deposition must maintain the confidentiality of that information but cannot use it in settlement or trial of the case. The former Code's protection of client confidences formed the basis for NYCLA Ethics Opinion 712, www.NYCLA.org, 1996 WL 592653 (1996), which addressed the issue of admitted past client false testimony in a civil deposition. That opinion

[1] The Committee notes that Section 4503 of the New York Civil Practice Law and Rules ("C.P.L.R.") provides that unless the client waives the privilege, an attorney...shall not disclose or be allowed to disclose such communication. RPC 3.3 thus seemingly contradicts the C.P.L.R. The apparent contradiction between Section 4503 of the C.P.L.R. and the RPC 3.3 has not been addressed by any court thus far. Resolution of the contradiction is a matter of law, and Committee opinions do not address matters of law.

analyzed the conflict between the lawyer's duty to preserve client confidences under former DR 4-101, and the lawyer's competing duty to avoid using perjured testimony or false evidence under former DR 7-102. We concluded, in Ethics Opinion 712, that the lawyer may not use the admitted false testimony, but also may not reveal it: "The information that the testimony was false may not be disclosed by the lawyer." The lawyer could ethically argue or settle the case, provided that the lawyer refrained from using the false testimony.

NYCLA Ethics Opinion 712 was based upon the prior Code of Professional Responsibility, which was superseded by the Rules of Professional Conduct on April 1, 2009. In light of the adoption of RPC 3.3 on April 1, 2009, N.Y. County 712 is no longer valid, and accordingly does not provide guidance for conduct occurring after April 2009.[2]

Is a Deposition Tantamount to Testimony before a Tribunal?

An important question under the new rules is whether deposition testimony is considered to be different from trial testimony.

The text of the rules does not explicitly refer to depositions and other pretrial proceedings in civil cases. RPC 3.3 (a) (3) applies when a witness, the client or the lawyer "has offered material evidence" that the lawyer learns to be false, and RPC 3.3 (b) applies to "criminal or fraudulent conduct related to the proceeding." RPC 1.0 (w) defines "Tribunal" as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." RPC 1.0 (w).

The literal language of the RPC 3.3 (a) (3) applies when a lawyer "has offered material evidence," which the lawyer later comes to learn was false. While the phrase is not defined in the rules, the taking of a deposition is no different from calling a witness at a trial. Under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial.

While not formally adopted as part of the Rules, the comments to the New York Rules of Professional Conduct explicitly contemplate the applicability of Rule 3.3 to depositions:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. ... It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

Rules of Professional Conduct 3.3 comment [1].

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[2] The New York State Bar Association has opined (Opinion 831) that if client fraud occurred before the effective date of the New York Rules of Professional Conduct, April 1, 2009, and the fraud is protected as a client confidence or secret (DR 4-101(A)), then an attorney may not reveal the fraud.

We conclude that testimony at a deposition is governed by RPC 3.3, and is subject to the disclosure provisions of RPC 3.3 (c). False testimony at a deposition may be perjury, punishable as a crime. The victim of the perjury is the adversary party, which may rely on the false testimony, and the justice system as a whole even if the deposition is not submitted to a court, or not submitted to the court for months or even years after the testimony is reduced to transcript form.

Remediation of False Testimony at a Deposition

A lawyer's duty under RPC 3.3 comes into effect immediately upon learning of the prior testimony's falsity, and requires a lawyer to remedy the false testimony. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony.

Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the court.

Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See RPC 1.13 (organization as client).

Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

When faced with the necessity to remedy false deposition testimony, a lawyer no longer has the option to simply withdraw from representation while maintaining the client confidential information.[3] Prior to the adoption of the New York Rules of Professional conduct in April 2009, when remonstration failed, the attorney was presented with a dilemma. The attorney could not reveal a client confidence, and yet could not stand by and allow false testimony to be relied on by others. Withdrawal was the only option. The Committee now concludes that withdrawal from representation is not a sufficient method of handling false testimony by a client where prior remonstration has failed to correct the false deposition testimony. Withdrawal, without more, does not correct the false statement, and indeed increases the likelihood that the false statement, if unknown by a substituting attorney, will be presented to a tribunal or relied upon by the adverse party. Unless in withdrawing, the lawyer also communicates the problem sufficiently to enable the false testimony to be corrected, withdrawal from representation is no remedy.

Accordingly, a lawyer is required to remedy the false testimony. Depending on the circumstances a lawyer may be able to correct the false testimony or withdraw the false statement. RPC 3.4 directs a lawyer to abstain from preserving known false testimony. A lawyer may not "participate in the creation or preservation of evidence when the lawyer knows

[3] Pursuant to RPC 1.6, confidential information includes the definition of confidences and secrets contained in former DR 4-101(A).

or it is obvious that the evidence is false." RPC 3.4 (a) (5). Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement.

Ultimately the false testimony cannot be perpetuated. If remonstration is not effective, the attorney must disclose the false testimony. However, disclosure of client confidential information should be limited to the extent necessary to correct the false testimony.

Knowledge of Falsity under RPC 3.3 and 1.0

New York lawyers should note that the duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer "comes to know of its falsity. . .." RPC 3.3 (a) (3). The lawyer may refuse to introduce, in a civil case, evidence "that the lawyer reasonably believes is false." RPC 3.3 (a) (3), (emphasis added). Thus, it is only when the lawyer knows that the prior testimony is false that the rules trigger a duty to take corrective action.

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) defines knowledge as "actual knowledge of the fact in question," which "may be inferred from circumstances."

While there is no known precedent under the 2009 Rules, some guidance is provided by authorities decided under the prior rules. In *In re Doe*, the Second Circuit Court of Appeals articulated the standard of knowledge required to trigger reporting to the tribunal under former DR 7-102:

> [T]he drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.
>
> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

In re Doe, 847 F.2d 57, 63 (2d Cir. 1988). While the Court's discussion of a lawyer's duty to report a fraud on the tribunal dealt with a non-client's fraud, the Court's cogent analysis of the "knowledge" standard also applies to a lawyer's duty with respect to a client's fraud on a tribunal. It is clear that only actual knowledge triggers the duty to report the fraud on the tribunal. In *In re Doe*, the Court held that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report.

While the following case does not directly address the ethics rules, it may, nevertheless, provide further guidance by way of analogy, and illustrates the notion that actual knowledge may be gleaned from the circumstances. In *Patsy's Brand Inc. v. I.O.B. Realty et al.*,2002 U.S. Dist. LEXIS 491, (vacated by *In re Pennie & Edmonds LLP*, 2003 U.S. app LEXIS 4529 (2d Cir. 2003)) the United States District Court for the Southern District of New York sanctioned defense counsel for F. R.Civ. P. Rule 11 violations. There, a law firm having substituted as counsel for defendant offered an affidavit that prior counsel had disavowed in withdrawing. The Court stated that "rather than risk offending and possibly losing a client, counsel simply closed their eyes to the overwhelming evidence that statements in the client's affidavit were not true." The Court found that by the time the law firm substituted as counsel, the affidavit had been conclusively proven to be false in very material respects. Counsel was aware that their client had made prior false statements under oath. Although the law firm discussed the false statements and the affidavit with their client, and relied on the client's explanation, the Court determined that all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on (their client's) statements.[4]

While *Patsy's Brands* was decided under Rule 11, a lawyer confronting the question of what may constitute actual knowledge may find some guidance in that opinion and in *Doe*, above.

Conclusion

A lawyer who comes to know that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer does disclose the client's false statement to the tribunal, the lawyer must minimize the disclosure of client confidential information.

[4] The finding was reversed on appeal because the law firm had not been given an opportunity to withdraw the false affidavit before sanctions were levied.

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 837 (3/16/10)

Topic:	Confronting false evidence and false testimony
Digest:	Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidence or secret" no longer exists.
Rules and Code:	Rule 1.0(k); Rule 1.6; Rule 1.16; Rule 3.3; DR 4-101; DR 7-102
Comments:	Comment 3 to Rule 1.6, Comments 7, 8, 10 & 11 to Rule 3.3

QUESTION

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document and some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

(1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

(2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

Tab D

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information is protected as a confidence or secret.*

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

> If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

> A lawyer who represents a client before a tribunal and who knows that a person . . . is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

> The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7-102(B) (1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" -- which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1) . . . .

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known,"

[1] Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).

"know," or "knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[2]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

> The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C.

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[2] To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require re-analysis in light of the existing Rules.

Sisk, *Rule 1.6: Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics § 5:6(d)(4)(E) (2009 ed.).

13. As elaborated by Professor Sisk, *Rule 3.3: Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3) (2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. *See* Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in

[3] The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied in situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g., United States v. Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y. 2009) (quoting *U.S. v. Richard Roe, Inc.* for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in future court decisions and ethics opinions.

criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See, e.g., People v. Andrades*, 4 N.Y.3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) – (8)); *People v. DePallo*, 96 N.Y.2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding ... ." The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n.4 (2009).

Application to the facts on this inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.*, N.Y. County 732 (2004) at p.5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, e.g.*, N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding -- he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation .... not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunalas is reasonably necessary to remedy the situation ....

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR § 4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5.

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b) (1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

(41-09, 46-09)

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-370 **Februrary 5, 1993**
Judicial Participatatin in
Pretrial Settlement Negotiations

A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. A judge participating in pretrial settlement discussions may inquire as to a lawyer's settlement authority or advice to the client concerning settlement terms, but should not require a lawyer to make such disclosures where the information is subject to Rule 1.6 and the lawyer does not have authority to disclose them.

With the increasing and salutary initiatives in the areas of alternative dispute resolution and pretrial settlement, a process sponsored and supported by the courts and the Bar, certain issues concerning the responsibilities of both attorneys and those conducting such proceedings have become apparent and should be addressed.

In this instance the Committee has been asked whether the Model Rules of Professional Conduct (1983, amended 1993), prohibit a lawyer from disclosing to a judge conducting pretrial settlement discussions the limits of settlement authority given by the client. Further, the Committee is asked whether a lawyer may properly be required to disclose to a judge in a settlement conference the lawyer's advice to the client regarding settlement.

The specific facts presented to the Committee are as follows: During pretrial settlement negotiations the judge meets separately with each counsel in chambers, all counsel having notice of the meeting. The judge, without prior notice, asks the lawyer to reveal the limits of settlement authority conferred on the lawyer by the client.[1] The judge also asks the lawyer to disclose the settlement terms the lawyer will recommend to the client.

As a preliminary matter, we note that in many states, and in the federal system, a judge has the discretion to mandate participation of counsel in a pretrial settlement conference. In addition, Model Rule 3.2 imposes on a lawyer the duty to seek expeditious resolution of a matter consistent with the interests of the client. Reasonable settlement is often better for the client than the fortuities of a trial. A lawyer should therefore cooperate to the fullest extent

1. The phrase "limits of settlement authority" is understood to mean the minimum amount the plaintiff will accept or the maximum amount the defendant will offer.

Tab E

possible in a pretrial settlement conference.

A Lawyer's Authority and Advice Regarding Settlement are Confidential Matters

Protected by Model Rule 1.6

Model Rule 1.6.[2] prohibits the disclosure of information relating to the representation without the client's informed consent. Both the limits of settlement authority and the lawyer's advice to the client regarding settlement are clearly "information relating to the representation" within the meaning of Rule 1.6. Therefore, disclosure of this confidential information is prohibited in the absence of consent by the client after consultation,[3] unless the disclosure (1) falls within one of the exceptions specified by Rule 1.6(b), or (2) is "impliedly authorized to carry out the representation."

Neither of the Rule 1.6(b) exceptions applies to the information sought by the judge in the instances here under consideration. The requested disclosures also cannot ordinarily be considered as "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 discusses the nature of the "impliedly authorized" exception, defining it as a "disclosure that facilitates a satisfactory conclusion."[4] The ethical propriety of the requested disclosures turns on whether these disclosures would facilitate a conclusion satisfactory to the client.

While a lawyer normally has implied authority to enter into routine stip-

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2. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1)to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2)to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The meaning of "consultation" is given in the Terminology Section of the Model Rules:

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

4. The Comment to Rule 1.6 states in relevant part:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

ulations and to admit matters not in dispute, the settlement parameters sought by the judge are neither routine nor uncontested. The potential for adversely affecting the client's position, or leading to a disposition of the case that is not satisfactory to the client, will ordinarily be significantly increased by disclosure of the client's ultimate settlement position. Such information is confidential and its disclosure cannot be said to be impliedly authorized simply by reason of the lawyer's representation of the client. Although there will be occasions when a lawyer's authority to reveal a client's settlement position may be implied from the circumstances, no such implication arises simply because the inquiry is made by a judge. Such information should not be disclosed even to a judicial mediator without informed client consent. [5]

While a Judge, During Settlement Discussions, May Inquire as to a Lawyer's Settlement Authority or Advice to the Client Concerning Settlement Terms, a Judge Should Not Require a Lawyer to Make Such Disclosures Where the Information is Subject to Rule 1.6 and the Lawyer Does Not Have Authority to Disclose Them

We turn to the question of whether a judge is precluded from asking such questions of counsel, or from requiring counsel to answer them, by the Model Code of Judicial Conduct (1990) ("MCJC") or the predecessor Code of Judicial Conduct (1972) ("CJC"). While MCJC Canon 3B(7)(d) permits judges to participate in settlement conferences, [FN6] it does not override, nor permit an exception, either explicit or implicit, to the obligation of confidentiality imposed on a lawyer by Rule 1.6.

The predecessor Code of Judicial Conduct (1972) did not contain a counterpart to MCJC 3B(7)(d). Neither did it contain an express prohibition against a judge's participation in voluntary pretrial settlement conferences with the parties and their counsel. If, however, the judge participated in settlement discussions to such an extent that the judge became a witness to crucial fact issues, disqualification would be enforced under Canon 3C(1)(a). See, e.g., Collins v. Dixie Transportation, Inc., 543 So.2d 160 (Miss.1989).

In the pretrial settlement process, the judge's role is to "encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." MCJC, from the Commentary to Canon 3B(8). It is not appropriate for the judge to compel

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5. The disclosure of settlement limits or recommendations by an attorney where settlement authority is contractually retained by an insurance carrier or other third party is not addressed in this opinion.

6. "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." MCJC Canon 3B(7)(d).

lawyers to make confidential admissions which may be against their clients' interests.[7]

In Kothe v. Smith, 771 F.2d 667 (2d Cir.1985), the court criticized a judge's "excessive zeal" in imposing sanctions on a party who did not settle a case prior to trial within the range recommended by the court, stating "Offers to settle a claim are not made in a vacuum.... [T]he process of settlement is a two-way street, and a defendant should not be expected to bid against himself." Kothe, at 669-670; see also Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937) ("The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged.").

Thus we conclude a judge may not require a lawyer to disclose settlement limits authorized by the lawyer's client, nor the lawyer's advice to the client regarding settlement terms. This is not to suggest, however, that a judge may not, in seeking to facilitate a settlement, and in an appropriate manner, make inquiry of a lawyer as to those matters. For example, while attempting to settle a case a judge may well feel it appropriate and helpful to inquire of counsel the limits of his settlement authority or whether counsel will recommend to the client the terms of settlement the judge recommends. Such an inquiry, if exercised within limits, is proper. Those limitations are formed by the ethical constraints imposed upon lawyers by Rule 1.6 not to disclose information relating to the representation without prior client consent or other expressly-permitted excuse.

The judge should be sensitive to these ethical constraints on counsel and sensitive as well to the superior position of authority the judge enjoys with respect to the lawyer and the effect an inquiry from one in the judge's position may have upon lawyers who must appear before him, particularly those who appear before the judge frequently. Accordingly, a judge making such an inquiry should acknowledge the lawyer's ethical duties and assure the lawyer that the inquiry is not intended to pressure the lawyer to violate them. Properly phrased and sincerely expressed, such prefatory remarks will help strike the balance between the perceived need of the judge to inquire and the ethical duty of the lawyer to comply with relevant confidentiality rules.

If the lawyer, in response to the inquiry, expresses a reticence to disclose

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7. The Advisory Committee's Notes to the 1983 amendment to Fed.R.Civ.P. 16(c) state in relevant part:

> The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rules be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

such information on ethical grounds, the judge should not pursue the inquiry further.

The question may also arise whether a lawyer is justified in lying or misrepresenting in response to questions about the limits of settlement authority on the basis that the judge is behaving improperly and has no right to the information or a truthful answer. Model Rule 4.1 states: "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." The Comment to Rule 4.1 states in relevant part:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category....

While as explained in the Comment, supra, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Conclusion

Despite the benefits of pretrial settlement of litigated matters, the Committee is of the opinion that, absent informed client consent, a lawyer should not reveal to a judge, and a judge conducting pretrial settlement discussions should not require a lawyer to disclose, the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439 **April 12, 2006**

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules[1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

Tab F

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).[2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

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2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client . . . ." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.[3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.[4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.[5] Still others have suggested that lawyers should strive to balance the

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HODES, THE LAW OF LAWYERING § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.[7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370[8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,[9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

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6. *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,[10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397[11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.[12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.[13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

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10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.[14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,[15] and the setting aside of settlement agreements,[16] as well as civil lawsuits against the lawyers themselves.[17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.[18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.[19]

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14. In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004)

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.[21]

(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are "the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential informa-

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

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tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-02
(March 2009)

The inquirer deposed an 18 year old woman (the "witness"). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer's client.

During the course of the deposition, the witness revealed that she has "Facebook" and "Myspace" accounts. Having such accounts permits a user like the witness to create personal "pages" on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user's permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness's testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness's permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to "friend" her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

Tab G

The inquirer asks the Committee's view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the "Rules") are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally "ordering" the conduct that would be done by the third person. That might depend on whether the inquirer's relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer's firm, then that lawyer's conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party's conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

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; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; ...

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a. [1]

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

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[1] The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person,** which provides in part that

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . .
>
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

"Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until 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. " The opinion can be found at http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2

The Oregon Supreme Court in *In Re Gatti*, 8 P3d 966 (Ore 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

"The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania's Rule 8.4], and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree." The opinion can be found at http://www.publications.ojd.state.or.us/S45801.htm

Following the *Gatti* ruling, Oregon's Rule 8.4 was changed. It now provides:

"(a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See *Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis*, 32 Seattle Univ. L. Rev.123 (2008), and *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

NEW YORK CITY BAR

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential

[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[4] While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies,

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[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . 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." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in

most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

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[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 843 (9/10/10)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York

Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's

[1] One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* – and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"[1] request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

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[1] Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

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Similarly, ABA Model Rule 4.2 says: **"**In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.

In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory status and the power to enforce corporate policy are not enough. (*Id*. at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id*. at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, my send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party

to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id*. at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id*. at *6.) "Rather, the facts show and the court finds that he was *attempting to obtain information for use in the litigation* that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid*., emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . .

the very policy purpose for the no contact rule." (*Ibid*.) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id*. at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.

The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

a) Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.[2]

[2] *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid*.) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id*. at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by

[Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id*. at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b) Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference .[3]

[3] The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

c) Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the

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with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id*. at pp. 453-454.)

[4] There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. "[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

d) Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id*. at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary,

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(Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.

suggest support for our conclusion that there was no ethical violation to begin with." (*Id.* at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports, supra*.))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports*, *supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports*, *supra*, 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id*., at 698-699.)[5]

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

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[5] The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id*. at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id*. at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id*. at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id*. at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were $100,000 when he knew they were $300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id*. at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid*., citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id*. at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id*., emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id*.)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

> omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id*. at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York

Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

Formal Opinion 2012-2: JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (*see* American Bar Association Formal Opinion 319 ("ABA 319")), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (*see WSJ Law Blog* (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual

assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (*Juror's Tweets Upend Trials,* Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See* New York Pattern Jury Instructions, Section III, *infra*.)However, 79% of judges who responded to a Federal Judicial Center survey admitted that "they had no way of knowing whether jurors had violated a social-media ban." (*Juror's Tweets, supra*.) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal "communication." Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the "Rules"), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.[1]

The Committee believes that the principal interpretive issue is what constitutes a "communication" under Rule 3.5. We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror's social media activities, the lawyer must promptly reveal the improper conduct to the court.

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney's Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for *not* conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff's counsel investigated the juror's civil litigation history using Missouri's automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.[2] Although the court upheld plaintiff's request for a new trial based on juror nondisclosure, the court noted that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that "litigants should endeavor to prevent retrials by completing an early investigation." *Id.*at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff's counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court's ruling was not prejudicial, the Superior Court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel." *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).[3]

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a "friend request" to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to "friend" a party, even if the "friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication" and is therefore *prohibited* by the rule against *ex parte* communications with represented parties.[4] In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party's social networking personal webpage, which is accessible to all website users, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly *permitted*." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers' Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not 'friend' the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." *Id.* NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and

general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.[5]

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a "Communication"?

Any research conducted by an attorney into a juror or member of the venire's background or behavior is governed in part by Rule 3.5(a)(4), which states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order." The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney's purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for

the very purpose of communication, and automatic features or user settings may cause a "communication" to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror's social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of "communicate" and "communication," which are not defined either in the Rule or the American Bar Association Model Rules.[6]

Black's Law Dictionary (9th Ed.) defines "communication" as: "1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The information so expressed or exchanged." The Oxford English Dictionary defines "communicate" as: "To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across." Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines "communication" (for the purposes of discovery requests) as: "the transmittal of information (in the form of facts, ideas, inquiries or otherwise)."

Under the above definitions, whether the communicator intends to "impart" a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the "transmission of," "exchange of" or "process of bringing" information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her

profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably "communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), *infra.*

Although the text of Rule 3.5(a)(4) would appear to make any "communication"—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee's current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney's research or actions. However, other services may be more difficult to navigate depending on their functionality and each user's particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites' social functionality. An attorney may not, for example, send a chat, message or "friend request" to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a "communication" would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her

knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation.[7] In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney's associations or membership in a network or group in order to access a juror's information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating *any* Rule "through the acts of another." Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney's benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 ("PBA 2009-02") concluded that if an attorney uses a third party to "friend" a witness in order to access information, she is guilty of deception because "[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit." (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to "friend" an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys *may not* shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no "communication" occurs, the Committee notes the potential

impact of jury research on potential jurors' perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee's view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, *infra*, great benefit that can be derived from detecting instances when jurors are not following a court's instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge." Although the Committee concludes that an attorney may conduct jury research on social media websites as long as "communication" is avoided, if an attorney learns of juror misconduct through such research,

she *must* promptly[8] notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney.[9]

On this issue, the Committee notes that New York Pattern Jury Instructions ("PJI") now include suggested jury charges that expressly prohibit *juror* use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: "please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom." Moreover, PJI 1:10 states, in part, "in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . ." New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney's 2002).

The law requires jurors to comply with the judge's charge[10] and courts are increasingly called upon to determine whether jurors' social media postings require a new trial. *See, e.g., Smead v. CL Financial Corp.,* No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror's conduct is *mis*conduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a "conversation," it may not always be obvious whether a particular post is "connected with" the trial. Moreover, a juror may be permitted to post a comment "about the fact [of] service on jury duty."[11]

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that "lawyers may communicate with jurors concerning the verdict and case." (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via

social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that "it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror" to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. "Communication," in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another's perception*—including the fact that they have been researched.In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

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1. Rule 3.5(a)(4) states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order."

2. Missouri Rule of Professional Conduct 3.5 states: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order."

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that "if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court's supervisory control over the jury selection process would, as a practical matter, be obliterated." (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court's ruling from the public file.

4. California Rule of Profession Conduct 2-100 states, in part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 ("NYCBA 2010-2") and SDCBA 2011-2 (both addressing social media "communication" in the context of the "No Contact" rule) were helpful precedent for the Committee's analysis, the Committee is unaware of any opinion setting forth a definition of "communicate" as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," and also states "a lawyer or law firm shall not: (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 or another." (Rule 8.4(c),(a).)

8. New York City Bar Association Formal Opinion 2012-1 defined "promptly" to mean "as soon as reasonably possible."

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee's purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. *People v. Clarke*, 168 A.D.2d 686 (2d Dep't 1990) (holding that jurors must comply with the jury charge).

11. *US v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) *aff'd*, 655 F.3d 288 (3d Cir. 2011) ("[The juror's] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing

more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.") (internal citations omitted).