



FORDHAM UNIVERSITY  
THE SCHOOL OF LAW

## Lies, Damn Lies, and “Alternative Facts”

Thursday, November 16, 2017

6:30 – 7:30 p.m.

Fordham Law School, Bateman Room

150 West 62<sup>nd</sup> Street

New York, NY 10023

**Presented by:**

**Professor Bruce A. Green**, Louis Stein Chair of Law; Director, Stein Center

**Nicole I. Hyland '02**, Frankfurt Kurnit Klein & Selz

### CLE Materials

---

CLE Credit for the program has been approved in accordance with the requirements of the New York State CLE Board for 1 transitional and non-transitional credit in ethics.

CLE course materials for this program are available at [law.fordham.edu/clematerials](http://law.fordham.edu/clematerials).



Bruce A. Green is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law, and is involved in various bar association activities. Currently, Professor Green is a Council member and past chair of the ABA Criminal Justice Section, serves on the Multistate Professional Bar Examination drafting committee, and is a member and past chair of the NY State Bar Association's Committee on Professional Ethics. He previously served on the ABA Standing Committee on Ethics and Professional Responsibility, was the Reporter to both the ABA Task Force on Attorney-Client Privilege and the ABA Commission on Multijurisdictional Practice, and co-chaired the ethics committee of the ABA Litigation Section and Criminal Justice Section. Since joining the Fordham faculty in 1987, Professor Green has engaged in various part-time public service, including as a member of the NYC Conflicts of Interest Board, as a member of the attorney disciplinary committee in Manhattan, as Associate Counsel in the office of the Iran/Contra prosecutor, and as a consultant and special investigator for the NYS Commission on Government Integrity. Previously, Professor Green was a federal prosecutor in the Southern District of New York, where he served as Chief Appellate Attorney, and he was a judicial law clerk to Justice Thurgood Marshall and Circuit Judge James L. Oakes.

**Research and Teaching Areas**

Criminal Procedure; Legal Education; Public Defenders; Public Interest/Service; Legal Ethics and Professional Responsibility



**Partner**

**Practice Areas:**  
legal ethics and professional  
responsibility litigation

## Nicole Hyland

Nicole Hyland is a Partner at Frankfurt Kurnit Kurnit Klein & Selz. She counsels lawyers on ethics issues, such as advertising and social media use, conflicts of interest, legal fee disputes, escrow issues, multijurisdictional law practice, and more. She also represents lawyers in disciplinary proceedings, disqualification motions and malpractice cases.

Ms. Hyland serves on the New York State Bar Association's Committee on Standards for Attorney Conduct (COSAC), which is responsible for drafting and proposing amendments to the New York Rules of Professional Conduct. Since 2008, she has been a member of the Association of Professional Responsibility lawyers (APRL), a national organization of ethics and professional responsibility lawyers and she is co-chair of the Professional Ethics Committee of the New York Women's Bar Association. Ms. Hyland is the immediate past Chair of the Committee on Professional Ethics of the New York City Bar Association, which provides guidance to New York state lawyers on a wide range of ethical issues, issues formal and informal written opinions, and operates the Ethics Hotline, a free resource for all New York state attorneys.

Ms. Hyland frequently writes and lectures on legal ethics and professional responsibility issues. She is the co-author, along with Professor Roy Simon, of the 2015, 2016 and 2017 editions of *Simon's New York Rules of Professional Conduct Annotated*.

## INDEX

	<u>Page</u>
1. New York Rules of Professional Conduct – Part 1200	
Rule 1.1-1.5 .....	1
Rule 2.1-2.4 .....	4
Rule 3.1-3.3 .....	5
Rule 4.1-4.3 .....	7
Rule 7.1-7.2 .....	8
Rule 8.1-8.4 .....	13
2. <i>In re Dickey</i> , 396 S.C. 500 (2012) .....	15
3. <i>In re Hart</i> , 118 A.D.3d 13 (2014) .....	18
4. <i>In re Liotti</i> , 667 F.3d 419 (2011) .....	21
5. <i>In re Liotti</i> , 111 A.D.3d 98 (2013) .....	31
6. Ethics Opinion 323, <i>Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties</i> . (2004) .....	33
7. McCabe, Michael E., Jr. <i>Patent Attorney Who Lied to Client and Bar Counsel Receives Two-Month Suspension</i> . McCabe IP Ethics Law. (2014) .....	38
8. Smith, Abbe. Georgetown Law. <i>Conway Complaint</i> . Received by the Office of Disciplinary Counsel. (2017) .....	42
9. Ethics Opinion 2011-1, <i>Reconciling a Lawyer’s Competing Duties of Candor to the Court v. Duty of Confidentiality</i> . (2011) .....	47
10. <i>Apple Corps Limited v. International Collectors Society</i> , 15 F.Supp.2d 456 (D.N.J. 1998) ..	51
11. <i>Meyer v. Kalanick</i> , 2016 U.S. Dist. LEXIS 96583 (2016) .....	69
12. <i>People v. Jones</i> , 44 N.Y.2d 76 (1978) .....	78
13. <i>Cincinnati Bar Association v. Statzer</i> , 800 N.E.2d 1117 (Ohio 2003) .....	81

14. <i>Nebraska v. Addison</i> , 412 N.W.2d 855 (Neb. 1987) .....	86
15. <i>In re Holtzman</i> , 77 N.Y.2d 184 (1991) .....	88
16. <i>Randy Robison v. Orthotic &amp; Prosthetic Lab</i> , 27 N.E.3d 182 (Ill.App. 5 Dist. 2015) .....	91

## **RULE 1.1.**

### Competence

**(a)** A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**(b)** A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

**(c)** lawyer shall not intentionally:

- (1)* fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
- (2)* prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

## **RULE 1.2.**

### Scope of Representation and Allocation of Authority Between Client and Lawyer

**(a)** Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

**(b)** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

**(c)** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

- (ii) any information required by court rule or other law to be communicated to a client; and
  - (iii) material developments in the matter including settlement or plea offers.
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with a client's reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

**(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## **RULE 1.5.**

### *Fees and Division of Fees*

**(a)** A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

**(b)** A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

**(c)** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

**(d)** A lawyer shall not enter into an arrangement for, charge or collect:

- (1) a contingent fee for representing a defendant in a criminal matter;
- (2) a fee prohibited by law or rule of court;



## **RULE 2.1.**

### Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

## **RULE 2.2.**

*[Reserved]*

## **RULE 2.3.**

### Evaluation for Use by Third Persons

**(a)** A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

**(b)** When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

**(c)** Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

## **RULE 2.4.**

### Lawyer Serving as Third-Party Neutral

**(a)** A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

**(b)** A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or

### **RULE 3.1.**

#### *Non-Meritorious Claims and Contentions*

**(a)** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

**(b)** A lawyer's conduct is "frivolous" for purposes of this Rule if:

- (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
- (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
- (3) the lawyer knowingly asserts material factual statements that are false.

### **RULE 3.2.**

#### *Delay of Litigation*

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

### **RULE 3.3.**

#### *Conduct Before a Tribunal*

**(a)** A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

- (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer or use 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. 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.

**(b)** A lawyer who represents a client before a tribunal and who 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.

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

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

**(e)** In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

**(f)** In appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
- (2) engage in undignified or discourteous conduct;
- (3) intentionally or habitually violate any established rule of procedure or of evidence; or
- (4) engage in conduct intended to disrupt the tribunal.

## **RULE 4.1.**

### *Truthfulness In Statements To Others*

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

## **RULE 4.2.**

### *Communication With Person Represented By Counsel*

**(a)** In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

**(b)** Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

**(c)** A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

## **RULE 4.3.**

### *Communicating With Unrepresented Persons*

In communicating 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. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

## **RULE 7.1.**

### Advertising

**(a)** A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

- (1) contains statements or claims that are false, deceptive or misleading; or
- (2) violates a Rule.

**(b)** Subject to the provisions of paragraph (a), an advertisement may include information as to:

- (1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;
- (2) names of clients regularly represented, provided that the client has given prior written consent;
- (3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and
- (4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p);

range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

**(c)** An advertisement shall not:

- (1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
- (2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
- (3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or
- (4) be made to resemble legal documents.

**(d)** An advertisement that complies with subdivision (e) of this section may contain the following:

- (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;
- (2) statements that compare the lawyer's services with the services of other lawyers;
- (3) testimonials or endorsements of clients, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer's or law firm's services.

**(e)** It is permissible to provide the information set forth in subdivision(d) of this section provided:

- (1) its dissemination does not violate subdivision(a)of this section;
- (2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated;
- (3) it is accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome”; and
- (4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

**(f)** Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words “Attorney Advertising” shall appear therein. In the case of electronic mail, the subject line shall contain the notation “ATTORNEY ADVERTISING.”

**(g)** A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate these Rules.

**(h)** All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

**(i)** Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

**(j)** A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

**(k)** All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial

dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

**(l)** If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

**(m)** Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

**(n)** Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

**(o)** A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

**(p)** All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

**(q)** A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.



**(r)** Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

## **RULE 7.2.**

### *Payment for Referrals*

**(a)** A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

- (1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and
- (2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

**(b)** A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

- (1) a legal aid office or public defender office:
  - (i) operated or sponsored by a duly accredited law school;
  - (ii) operated or sponsored by a bona fide, non-profit community organization;

## **RULE 8.1.**

### *Candor in the Bar Admission Process*

**(a)** A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

- (1) has made or failed to correct a false statement of material fact; or
- (2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

## **RULE 8.2.**

### *Judicial Officers and Candidates*

**(a)** A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

**(b)** A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

## **RULE 8.3.**

### *Reporting Professional Misconduct*

**(a)** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

**(b)** A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

**(c)** This Rule does not require disclosure of:

- (1) information otherwise protected by Rule 1.6; or
- (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

#### **RULE 8.4.**

##### Misconduct

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 of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability:
  - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or
  - (2) to achieve results using means that violate these Rules or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified

396 S.C. 500  
Supreme Court of South Carolina.

In the Matter of **Dannitte** Mays **DICKEY**,  
Respondent.

No. 27090.  
|  
Submitted Dec. 30, 2011.  
|  
Decided Feb. 1, 2012.

profiles on online directories and marketing sites which contained material misrepresentations of fact, statements likely to create unjustified expectations about results attorney could achieve, statements comparing attorney's services with other attorneys' services in ways which could not be factually substantiated, and improperly referring to himself as a "specialist," warranted public reprimand. Appellate Court Rule 407, [Rules of Prof. Conduct, Rules 7.1\(a–c, f\), 7.4\(b\) 7.4\(b\)](#).

### Synopsis

**Background:** Office of Disciplinary Counsel (ODC) brought complaint in attorney discipline.

**[Holding:]** On agreement for discipline, the Supreme Court held that attorney's misuse of Internet marketing and advertising warranted public reprimand.

Public reprimand ordered.

West Headnotes (2)

- [1] **Attorney and Client**  
🔑 Grounds for Discipline

Attorney's creation of Web sites and internet profiles on online directories and marketing sites which contained material misrepresentations of fact, statements likely to create unjustified expectations about results attorney could achieve, statements comparing attorney's services with other attorneys' services in ways which could not be factually substantiated, and improperly referring to himself as a "specialist," violated rules of professional conduct governing lawyer advertising. Appellate Court Rule 407, [Rules of Prof. Conduct, Rules 7.1\(a–c, f\), 7.4\(b\)](#).

[Cases that cite this headnote](#)

- [2] **Attorney and Client**  
🔑 Public Reprimand; Public Censure; Public Admonition

Attorney's creation of Web sites and internet

[Cases that cite this headnote](#)

### Attorneys and Law Firms

**\*\*522** Lesley M. Coggiola, Disciplinary Counsel, and [Barbara M. Seymour](#), Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

[J. Steedley Bogan](#), of Bogan Law Firm, of Columbia, for respondent.

### Opinion

PER CURIAM.

**\*501** The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of a letter of caution, admonition, or public reprimand. In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School and Advertising School within six (6) months of the date of the order imposing discipline. We accept the agreement, issue a public reprimand, and order respondent to complete the Legal Ethics and Practice Program Ethics School and Advertising School within six (6) months of the date of this order. The facts, as set forth in the agreement, are as follows.

### FACTS

Respondent graduated from law school in 2008. He was admitted to the Bar in May 2010 and completed his mandatory trial experiences in July 2010.

Upon admission, respondent opened a solo practice,

handling primarily domestic and criminal matters. Between July 2010 and July 2011, respondent consulted with 93 potential clients. He opened 79 client files and resolved 25 cases by settlement, guilty plea, or completion of non-litigation legal work (i.e., drafting a deed). Representation of 15 of the opened files ended without resolution of the clients' legal **\*502** matters. As of July 2010, respondent had never handled any matter involving contested litigation to jury verdict.

In August 2010, respondent began using a law firm website at [www.divorcelawyer.columbia.com](http://www.divorcelawyer.columbia.com). In December 2010, respondent added a website at [www.dmd-law.net](http://www.dmd-law.net) to his law firm marketing. Respondent began using these websites without adequate review of the relevant provisions of the South Carolina Rules of Professional Conduct.

**\*\*523** The websites contained the following rule violations:

1. material misrepresentations of fact and omissions of facts necessary to make the statements considered as a whole not materially misleading by mischaracterizing respondent's legal skills and prior successes; falsely stating he handled matters in federal court; falsely stating he graduated from law school in 2005; and, listing approximately 50 practice areas in which he had little or no experience;
2. statements likely to create unjustified expectations about the results respondent could achieve;
- \*503** 3. statements comparing respondent's services with other lawyers' services in ways which could not be factually substantiated; and
4. descriptions and characterizations of the quality of respondent's services.

In addition, respondent set up internet profiles on various online directories and professional marketing sites, including [www.lawyers.com](http://www.lawyers.com), [www.lawguru.com](http://www.lawguru.com), and [www.linkedin.com](http://www.linkedin.com). Respondent relied on company representatives who were lawyers and non-attorney web designers who assured him that the advertisements would comply with respondent's ethical requirements. Respondent did not review the applicable provisions of the South Carolina Rules of Professional Conduct prior to posting the internet profiles. As a result, respondent's internet profiles contained the following:

1. material misrepresentations of fact by overstating and exaggerating respondent's reputation, skill, experience, and past results;

2. a form of the word "specialist" even though respondent is not certified by this Court as a specialist;
3. statements likely to create unjustified expectations about the results respondent could achieve; and
4. descriptions and characterizations of the quality of respondent's services.

## **LAW**

<sup>[1]</sup> Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, specifically, [Rule 7.1\(a\)](#) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading); [Rule 7.1\(b\)](#) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law); [Rule 7.1\(c\)](#) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated); [Rule 7.2\(f\)](#) (lawyer shall not make statements in advertisements or written communications which describe or characterize the quality of the lawyer's services);<sup>1</sup> and [Rule 7.4\(b\)](#) (lawyer who is not certified as a specialist shall not use any form of the word "specialist" in any advertisement or statement). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

## **CONCLUSION**

<sup>[2]</sup> We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for **\*504** Discipline by Consent and publicly reprimand respondent for his misconduct. Respondent shall complete the Legal Ethics and Practice Program **\*\*524** Ethics School and Advertising School within six (6) months of the date of this order.

PUBLIC REPRIMAND.

**All Citations**

396 S.C. 500, 722 S.E.2d 522

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and  
HEARN, JJ., concur.

**Footnotes**

- <sup>1</sup> By order dated August 22, 2011, the Court deleted the prohibition on describing or characterizing the quality of a lawyer's services from the Rules of Professional Conduct.

118 A.D.3d 13  
Supreme Court, Appellate Division, First  
Department, New York.

In the Matter of Norah HART, an attorney and  
counselor-at-law:  
Departmental Disciplinary Committee for the First  
Judicial Department, Petitioner,  
Norah Hart, Respondent.

April 24, 2014.

#### Synopsis

**Background:** Departmental Disciplinary Committee sought order confirming findings and fact and conclusions of law of Referee and Hearing Panel sustaining all disciplinary charges against attorney and adopting their recommendation of public censure.

**Holding:** The Supreme Court, Appellate Division, held that public censure was appropriate sanction.

Public censure warranted.

West Headnotes (1)

- [1] **Attorney and Client**  
🔑Public Reprimand; Public Censure; Public Admonition

Public censure was appropriate sanction to impose on attorney who engaged in unauthorized practice of law by representing plaintiffs in their actions against online dating service in jurisdictions in which she was not admitted pro hac vice, and in misrepresenting to agency employees that she was newspaper reporter, in light of attorney's prompt disclosure of her misrepresentations to agency's defense counsel, expression of remorse for her conduct, and cooperation with Disciplinary Committee's investigation. Rules of Prof.Conduct, **Rules 4.1**, 8.4.

[Cases that cite this headnote](#)

#### Attorneys and Law Firms

**\*\*354** Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York (Kathy Wu Parrino, of counsel), for petitioner.

Respondent pro se, no appearance.

ANGELA M. MAZZARELLI, Justice Presiding,  
ROLANDO T. ACOSTA, DAVID B. SAXE, KARLA  
MOSKOWITZ, JUDITH J. GISCHE, Justices.

#### Opinion

PER CURIAM.

**\*14** Respondent Norah Hart was admitted to the practice of law in the State of New York by the Second Judicial Department on April 19, 2006. At all times relevant to this proceeding, respondent has maintained an office for the practice of law within the First Judicial Department.

In January 2013, the Departmental Disciplinary Committee (the Committee) charged respondent with knowingly making a false statement of law or fact to a third person in violation of **rule 4.1** of the Rules of Professional Conduct (22 NYCRR 1200.0), engaging in conduct involving **dishonesty**, fraud, deceit or misrepresentation in violation of rule 8.4(c), engaging in the unauthorized practice of law in a jurisdiction in which she was not admitted to practice in violation of rule 5.5(a), engaging in conduct prejudicial to the administration of justice in violation of rule 8.4(d) and engaging in conduct adversely reflecting on her fitness as a **lawyer** in violation of rule 8.4(h). Respondent admitted the Committee's material allegations but denied the charges.

Shortly after her admission in 2006, respondent opened her own practice and also practiced as of counsel to a New York law firm. Respondent specializes in consumer fraud actions. In November 2010, respondent commenced a proposed class action in Texas on behalf of plaintiff Terry Smith against the online dating service Match.com. Respondent, who is not admitted to practice in Texas, associated herself with local counsel to enable her

participation in the action. Respondent did not personally draft the complaint but had input in its drafting. Except for one occasion, respondent did not appear in the Texas court; however, she did participate in discovery and communicated on several occasions with the Texas defense counsel.

On July 5, 2011, respondent placed a telephone call to Match.com's customer service department to obtain the name of a supervisor to depose. Respondent, using a false name, left a voice message and falsely identified herself as a journalist calling from a business journal for a story. A public relations coordinator returned the call later that day. When respondent answered, she used her real name, but when the coordinator stated she was returning a call from the business journal, respondent **\*\*355** again used the false name. Respondent was unable to obtain the name of a supervisor, **\*15** because she did not provide sufficient journalistic credentials in response to the coordinator's inquiries. Realizing she had acted improperly, respondent promptly disclosed her actions to defense counsel. In explaining her actions, respondent claimed that formal discovery would have been ineffective because defense counsel had submitted nonresponsive answers to her prior discovery requests.

On March 15, 2012, the Texas state court issued an order compelling plaintiff Terry Smith to produce certain discovery documents. When plaintiff did not produce the documents, defendant moved for fees and costs and to have plaintiff declared pro se, based on respondent's failure to be admitted pro hac vice. On April 23, 2012, the court held a hearing on the motion at which respondent appeared telephonically. A month before the hearing, plaintiff's local counsel withdrew from the action. Notwithstanding its withdrawal, the local counsel informed respondent that it would still sponsor her pro hac vice application. However, counsel withdrew that offer, just days before the hearing.

On April 25, 2012, the Texas court ruled that respondent had engaged in the unauthorized practice of law by participating in Smith's lawsuit without having satisfied Texas' rules for pro hac vice admission and directed, among other things, that respondent file a complete pro hac vice application, with proper support, on or before May 3, 2012 or the court would enjoin her from further participation in the action. The order also awarded Match.com \$10,000 in costs and fees, jointly and severally assessed against respondent, her New York firm and plaintiff, payable to defense counsel. On May 11, 2012, the court enjoined respondent from further participation because she failed to file a complete pro hac vice application.

Respondent, through local counsel, appealed the district court's order of April 25, 2012 to the Court of Appeals for the Fifth District of Texas. The court dismissed the appeal on the grounds that, under Texas law, it was not subject to appellate review. The appellate court also ordered respondent to pay Match.com's costs in defending the appeal as sanctions for filing a frivolous appeal. In October 2012, the court granted defendant Match.com's motion for summary judgment dismissing the action and did not rule on respondent's motion to reconsider the prior order.

During these disciplinary proceedings, respondent acknowledged the Texas court's April 25, 2012 order but disputed that **\*16** she had engaged in the unauthorized practice of law. Respondent also acknowledged that she had not paid the \$10,000 and did not intend to do so because, in her view, she was not given a proper opportunity to appeal. These proceedings also brought to light two federal actions that respondent commenced against Match.com in Texas. Respondent was admitted pro hac vice in one of the actions but not the other. The Committee argued that respondent intended to mislead when she testified at her deposition that she had been admitted pro hac vice in both actions. Respondent testified that she was also involved as counsel in actions pending in Pennsylvania and Florida, but was not admitted to practice law in these jurisdictions.

On July 23, 2013, following a hearing, the Referee sustained all the charges and recommended a public censure. Shortly thereafter, the Hearing Panel, in an undated report, confirmed the Referee's liability findings and recommendation of public censure.

**\*\*356** The Committee seeks an order under the Rules of the Appellate Division, First Department (22 NYCRR) §§ 603.4(d) and 605.15(e)(2) confirming the findings of fact and conclusions of law of the Referee and Hearing Panel, sustaining all charges and adopting their recommendation of a public censure. Respondent was properly served with this motion but has not responded.

We confirm the findings of fact and conclusions of law sustaining all five charges and the recommended sanction of public censure. The Referee and Hearing Panel's liability findings have ample support in the record. Thus, the only issue before this Court is the appropriate sanction to impose.

Misconduct similar to that of respondent's has generally resulted in public censure, with suspension typically reserved for more egregious instances of misconduct (*see*



*Matter of Winiarksy*, 104 A.D.3d 1, 957 N.Y.S.2d 102 [1st Dept.2012][censure for, among other things, discovery related misconduct involving taking depositions of nonparty witnesses in violation of CPLR 408 and misleading opposing counsel]; *Matter of Musmanno*, 69 A.D.3d 54, 886 N.Y.S.2d 689 [1st Dept.2009][censure based on public censure in New Jersey for, among other things, falsely misrepresenting himself to a police officer that he was a prosecutor to avoid a traffic summons]; compare *Matter of Dear*, 91 A.D.3d 111, 934 N.Y.S.2d 141 [1st Dept.2011][six-month suspension for oral and written false accusations of ethnic bias against a state trooper in challenging a traffic summons]; *Matter of Brenner*, 44 A.D.3d 160, 840 N.Y.S.2d 349 [1st Dept.2007][six-month suspension for, among other things, making false statement \*17 as to having a prior disciplinary record in an affidavit submitted to federal court for permission to appear pro hac vice] ).

The sanction of public censure finds further support in the record in mitigation. Indeed, respondent promptly disclosed her misrepresentations to Match.com to defense counsel, expressed remorse for her conduct, cooperated with the Committee's investigation and has no prior disciplinary history. As to respondent's non-admitted status in the Texas federal court in connection with one of the other cases she commenced against Match.com, the Committee did *not* present any evidence that the federal court took any action similar to that of the Texas state

court. Moreover, the Committee did not bring charges related to this issue or the Pennsylvania and Florida matters. We find troubling respondent's attitude toward payment of the \$10,000 in sanctions. However, as the Hearing Panel noted, defense counsel has not sought enforcement; nor is there evidence that it has done so with the sanctions the Texas appellate court ordered. Further, respondent is *not* solely responsible for the sanctions, but is jointly and severally liable along with her firm and Smith (plaintiff). Thus, we find, on balance, the record in this matter favors public censure over suspension.

Accordingly, the Committee's petition is granted to the extent of confirming the Referee and Hearing Panel's findings of fact and conclusions of law, sustaining all charges and adopting the recommendation that respondent be publicly censured.

All concur.

#### All Citations

118 A.D.3d 13, 984 N.Y.S.2d 353, 2014 N.Y. Slip Op. 02864

667 F.3d 419  
United States Court of Appeals,  
Fourth Circuit.

In the Matter of Thomas F. LIOTTI, Esq.,  
Respondent.

No. 10-9504.  
|  
Argued: Oct. 27, 2011.  
|  
Decided: Dec. 2, 2011.

### Synopsis

**Background:** Disciplinary proceeding was commenced against a member of the New York bar and the bar of the United States Court of Appeals for the Fourth Circuit, arising from his conduct during the appeal of his client's criminal conviction.

**[Holding:]** The Court of Appeals, King, Circuit Judge, held that in light of mitigating factors that attorney's misconduct in the underlying appeal appeared as an isolated event, which was inconsistent with his otherwise fine career, and that there was no resulting prejudice to either party, attorney's misconduct in misrepresenting certain matters to the court, failing to correct a prior misrepresentation of material fact, and making of unsupported impugment of district judge's character warranted a public admonition.

Attorney publicly admonished.

West Headnotes (6)

[1] **Attorney and Client**  
🔑Weight and sufficiency

Proper standard of proof for an attorney's violations of the relevant rules of professional conduct is clear and convincing evidence.

1 Cases that cite this headnote

[2] **Attorney and Client**  
🔑Factors Considered

When attorney misconduct has been proven by clear and convincing evidence, court is obliged in formulating the appropriate discipline to consider both aggravating and mitigating factors, as well as the potential or actual injury resulting from the misconduct.

Cases that cite this headnote

[3] **Attorney and Client**  
🔑Deception of court or obstruction of administration of justice

Attorney's erroneous quoting of the trial transcript in the his reply brief, combining two separate parts of the trial transcript in reply brief, thereby creating the look of a fluid conversation, and patently incorrect statement in the appeal concerning the government's position on the potential duration of client's trial constituted misrepresentations to the court. N.Y.Rules of Prof.Conduct, Rule 8.4; U.S.Ct. of App. 4th Cir.Rule 46(g)(1)(c), 28 U.S.C.A.

Cases that cite this headnote

[4] **Attorney and Client**  
🔑Character and conduct  
**Attorney and Client**  
🔑Deception of court or obstruction of administration of justice

Attorney's declaration that it was his associate, not he, who witnessed the internet chat involving client and another person did not give rise to a violation of New York professional conduct rule prohibiting lawyer from acting as advocate before a tribunal in a matter in which the lawyer is likely to be a witness since evidence regarding the internet chat was otherwise available to the parties at trial, and the government never sought to call attorney as a witness or urge his disqualification as counsel; nevertheless, attorney's failure to reveal in his client's appeal that his client had already admitted to the government that the internet chat was a fake constituted a failure to correct a prior misrepresentation of material fact. N.Y.Rules of

Prof.Conduct, Rules 3.3(a)(1), 3.7.

Cases that cite this headnote

[5]

**Attorney and Client**

🔑 Deception of court or obstruction of administration of justice

Attorney's false accusation made during appeal of client's conviction, that the district judge suppressed informant's letter, constituted an unwarranted misrepresentation of the record and an unsupported impugment of the judge's character in contravention of applicable rules. N.Y.Rules of Prof.Conduct, Rule 8.4; U.S.Ct. of App. 4th Cir.Rule 46(g)(1)(c), 28 U.S.C.A.

Cases that cite this headnote

[6]

**Attorney and Client**

🔑 Factors in mitigation

**Attorney and Client**

🔑 Public Reprimand; Public Censure; Public Admonition

In light of mitigating factors that attorney's misconduct in the underlying appeal appeared as an isolated event, which was inconsistent with his otherwise fine career, and that there was no resulting prejudice to either party, attorney's misconduct in misrepresenting certain matters to the court, failing to correct a prior misrepresentation of material fact, and making of unsupported impugment of district judge's character warranted a public admonition. N.Y.Rules of Prof.Conduct, Rules 3.3(a)(1), 3.7, 8.4; U.S.Ct. of App. 4th Cir.Rule 46(g)(1)(c), 28 U.S.C.A.

Cases that cite this headnote

**Attorneys and Law Firms**

\*420 Thomas Edward Vanderbloemen, Gallivan, White & Boyd, P.A., Greenville, South Carolina, for Respondent. Michael L. Rigsby, Michael L. Rigsby, P.C., Richmond,

Virginia, as prosecuting counsel.

Before MOTZ, KING, and DUNCAN, Circuit Judges.

Public admonishment imposed by published opinion. Judge KING wrote the opinion, in which Judge MOTZ and Judge DUNCAN joined.

**OPINION**

KING, Circuit Judge:

By Notice to Show Cause issued on January 5, 2011 (the "Notice"), this Court's Standing Panel on Attorney Discipline initiated disciplinary proceedings against respondent \*421 Thomas Liotti, a member of the New York bar and the bar of this Court, arising from his conduct during the appeal in *United States v. Giannone*, No. 07-4844(L).<sup>1</sup> The Notice levied five separate charges against Liotti for violations of the applicable rules of professional conduct, primarily for factual misrepresentations. Liotti responded to the Notice, acknowledging various misrepresentations but maintaining that they were neither intentional nor worthy of disciplinary action. We disagree and conclude that Liotti's conduct did, in fact, contravene the applicable rules of professional conduct. As a result, as further explained below, we impose a public admonishment.<sup>2</sup>

I.

A.

The five charges contained in the Notice are summarized and explained as follows.

1.

According to the First Charge, Mr. Liotti improperly joined separate and unrelated quotations in the *Giannone* reply brief, causing them to appear as a single exchange on the same topic. By combining these separate passages—located two pages apart in the trial transcript—as a single series of questions and answers, Liotti created the erroneous impression that the passages

were actually sequential, rather than separate, the effect of which tended to support his contention that the government had failed to prove an offense.

2.

The Second Charge alleges that Mr. Liotti, in the *Giannone* opening brief, falsely accused the trial judge of suppressing evidence. Namely, Liotti asserted on appeal that the judge improperly withheld a letter written to her by an informant, revealing that the informant had used illegal drugs while working with government agents in Giannone's case. The informant's letter—dated March 1, 2007, four days prior to the March 5 commencement of Giannone's trial—was both postmarked and received by the district court after the trial concluded on March 8.<sup>3</sup> In denying Giannone's request for a new trial, the judge found that the court had received \*422 the letter on March 13, 2007. Also, according to the judge, the letter appeared to be postmarked March 12, 2007. The envelope containing the letter reflects that the U.S. Marshal x-rayed it on March 13, 2007. Notwithstanding the court's explicit finding to the contrary, Liotti asserted in the *Giannone* opening brief that the judge "received the letter on March 1, 2007," and the brief insisted that she "sat on this letter during the course of the trial." Br. of Appellant 80.

3.

The Third Charge alleges that, in the *Giannone* opening brief, Mr. Liotti misrepresented facts pertinent to an unsuccessful change of venue motion. In support of his appellate contention that venue should have been transferred to New York, Liotti accused the government of intentionally overestimating the expected length of Giannone's trial—i.e., that it would last approximately two weeks—and maintained that the government had padded its estimate in order to keep the case in South Carolina and defeat the venue motion. In reality, it was Liotti who estimated the trial would last two weeks; the government actually disagreed, surmising that the trial would last "3–4 days." See *United States v. Giannone*, No. 3:06-cr-01011 (D.S.C. Mar. 2, 2007). In its response brief, the government exposed Liotti's misstatement and Liotti replied in an inappropriately discourteous manner.

4.

As to the Fourth Charge, the Notice alleges that Mr. Liotti made misrepresentations in a sworn Declaration filed in

the district court and invoked on appeal. Liotti's Declaration asserted, inter alia, that Giannone had conducted an internet chat on a computer in Liotti's office prior to trial, and that the chat established Giannone's innocence. By filing the Declaration, Liotti could have become a witness in his client's case. On appeal, Liotti relied on the Declaration to argue his client's innocence, even though Giannone had made post-trial admissions to a government agent that he had faked the internet chat. Liotti did not, however, reveal his client's post-trial admissions to this Court.

5.

Finally, the Fifth Charge alleges that, in the *Giannone* reply brief, Mr. Liotti asserted without any record support that two of the Secret Service agents involved in Giannone's investigation had been fired for misconduct. At oral argument, Liotti sought to downplay the unsupported revelation, offhandedly maintaining that the government was in a better position to provide evidence concerning disciplinary actions against the officers.<sup>4</sup>

\*423 B.

The Notice directed Mr. Liotti to demonstrate why appropriate disciplinary measures, authorized by the Local Rules of Appellate Procedure of this Court (the "Local Rules"), should not be imposed. The Local Rules provide, in the pertinent part of Rule 46(g), that

(1) A member of the bar of this Court may be disciplined as a result of

...

(c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his ... principal office[.]

Local R.App. P. 46(g)(1)(c).

The Notice referenced relevant portions of the New York Rules of Professional Conduct (the "New York Rules"), which apply in these proceedings because Mr. Liotti's office is located in the State of New York. The New York Rules provide, inter alia, that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or *misrepresentation*[".]” N.Y. Rules Prof'l Conduct R. 8.4(c) (emphasis added). The New York Rules further specify

that a lawyer shall not knowingly “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” N.Y. Rules Prof’l Conduct R. 3.3(a)(1), 3.3(f)(2). These Rules also bar a lawyer from knowingly “offer[ing] or us[ing] evidence that the lawyer knows to be false” and “engag[ing] in undignified or discourteous conduct.” N.Y. Rules Prof’l Conduct R. 3.3(a)(3). A lawyer is precluded from acting as an advocate in a matter in which he is likely to be a witness, and he is barred from making false statements concerning the integrity of a judge. *See* N.Y. Rules Prof’l Conduct R. 3.7, 8.2(a).

## II.

### A.

In response to the Notice, Mr. Liotti filed his affidavit addressing the five charges (the “Affidavit”), as well as several supporting letters and a response brief.

#### 1.

As explained in more detail below, the admissions contained within Mr. Liotti’s Affidavit by themselves support the imposition of discipline. We thus set forth the Affidavit *in haec verba*:

THOMAS F. LIOTTI, ESQ., Respondent named above, hereby deposes and states the following to be true under the penalty of perjury:

1. I have been admitted to practice law in New York since 1977 and have never been disbarred or suspended from practice. My practice is based in Garden City, New York, and focuses in part on the defense of clients charged with criminal wrongdoing.

2. Jonathan Giannone’s family contacted me about representing him in the case underlying these proceedings. The Giannone family is from New York and has no ties to South Carolina, where that case was pending.

3. After his conviction in district court, Giannone asked me to continue representing him on appeal. Because Giannone did not have sufficient funds to pay me as a retained lawyer, I offered to see if the Fourth Circuit Court of Appeals would permit me to continue as

appointed counsel under the Criminal Justice Act (“CJA”). I have previously served as a CJA lawyer in the district courts for the Eastern District of New York and the Southern District of New York, as well as in the U.S. Court of Appeals for the Second Circuit.

\*424 4. I have reviewed the Notice to Show Cause. I understand the court’s concerns and wish to state that I had no intention of misleading the court, misstating the evidence, or otherwise violating the court’s rules or my obligations as a lawyer.

5. As to the first ground in the Notice, I understand how the two distinct excerpts on page 32 of my reply brief should not have been combined without a qualification or explanation. I am not sure how this oversight occurred, but I take responsibility for it and regret that it occurred.

6. As to the second ground in the Notice, I had no intention to impugn the district court or accuse the district judge of an impeachable offense. I recognize that my arguments on this point should have been handled differently so as to avoid the appearance that I was attacking the court’s credibility or integrity, which was never my intention.

7. As to the third ground in the Notice, I was mistaken about who made an estimate for a two-week trial. I believe that at some point, whether on or off the record, the government had made estimates consistent with a two-week trial, but I recognize that the record does not reflect this.

8. As to the fourth ground in the Notice, I was never aware that Giannone was manipulating the internet chat or misrepresenting what occurred. I am not knowledgeable in the way of computers and would not know whether the chat was being faked.

9. As to the fifth ground in the Notice, I concede that there was not direct evidence establishing that the Secret Service agents were fired as a result of their conduct in the investigation. However, while there may ultimately be some validity to Giannone’s claims on this point, I should have couched my argument more in terms of what the evidence in the record established.

10. I wish to reiterate that I have not knowingly intended to violate my obligations as an attorney and do not believe that I have knowingly submitted false evidence or argument, misrepresented the record, or made false accusations warranting discipline.

FURTHER AFFIANT SAYETH NAUGHT.

J.A. 269–71.<sup>5</sup>

2.

In further response to the Notice, Mr. Liotti submitted several supporting letters from his bar colleagues attesting to his good character. The authors of these letters vouch for Liotti’s legal ability and professional competence, but, for the most part, do not discuss the details of these disciplinary proceedings.<sup>6</sup> The letters from Liotti’s colleagues also describe him as a passionate and zealous advocate for his clients. Included are letters from two district judges who declined to provide character evidence in the absence of a subpoena or court order. A third district judge advised that Liotti had appeared before him in a number of matters and had always conducted himself appropriately and professionally.

\*425 3.

In Mr. Liotti’s response brief in this proceeding, he emphasizes that he is an experienced and respected member of the New York bar, having practiced law for more than thirty-three years and attaining an “AV rating” (the “highest possible rating”) from *Martindale–Hubbell*. Br. of Resp’t 47. His brief, like his Affidavit, addresses each of the charges, essentially admitting their substance, primarily attributing his actions to mistakes and poor judgment, and denying any intentional misconduct. Liotti expresses regret for his actions and contends that the charges, considered either separately or collectively, fail to justify any disciplinary measures.

As to the First Charge, the response brief explains that, in combining two portions of the trial transcript in the *Giannone* reply brief, Mr. Liotti was actually seeking to make two distinct arguments, but now recognizes that he should not have combined the excerpts without proper qualification or explanation. With respect to the Second Charge, Liotti’s response brief maintains that he was reasonably permitted to call into question the district judge’s finding that the informant’s letter was not received until after *Giannone*’s trial. Concerning the Third Charge, the brief urges that Liotti was under the incorrect impression that it was the prosecutor, rather than he, who estimated the trial would last two weeks.

Addressing the Fourth Charge, the response brief asserts that Mr. Liotti’s Declaration was merely a proffer of what the evidence would show, and that the Declaration was implicitly (i.e., without objection from the government or

the district court) sanctioned by the court. Regarding his failure to correct the inaccuracies of the Declaration, Liotti suggests that *Giannone*’s post-trial admissions were unclear and later recanted, and that such corrections would have been immaterial in any event. With respect to the Fifth Charge, the response brief argues that Liotti believed that the government agents had been fired for misconduct. This contention was apparently based on *Giannone*’s and an informant’s allegations, coupled with evidence that the agents were no longer employed with the Secret Service. Liotti admits that the *Giannone* record does not confirm his personal belief, but contends that there is no direct evidence that he was wrong.

B.

On October 27, 2011, Mr. Liotti, his lawyer, and the prosecuting counsel appeared in this Court for hearing and argument.<sup>7</sup> Liotti’s lawyer attributed each charge to mistake, poor judgment, or Liotti getting “carried away” in his arguments, steadfastly maintaining that none of the charges warrants formal discipline. His lawyer proposed that the informal discipline that Liotti has already endured—for example, responding to the Notice and making pleas to colleagues and judges for supporting letters—constitutes sufficient punishment for any perceived transgressions. Emphasizing that Liotti’s misconduct falls short of justifying discipline, counsel entreated us to either dismiss the proceedings or impose a private discipline.

Mr. Liotti’s lawyer argued that attorneys frequently make mistakes or misrepresentations during the appellate process, for which they are rarely required to answer. For that reason, counsel suggested, Liotti may have lacked proper notice that \*426 his conduct could lead to disciplinary proceedings. Finally, counsel proposed that we consider issuing Liotti a “caution letter,” a confidential type of discipline used in New York when a lawyer’s behavior warrants comment by a court but does not rise to the level of publicly sanctionable misconduct.<sup>8</sup>

The prosecuting counsel responded that the cumulative effect of the five charges against Mr. Liotti brings this case well within the disciplinary compass. Refuting Liotti’s assertion that his experience and competence make him less culpable, the prosecuting counsel maintained that those factors render his misconduct less forgivable. According to the prosecuting counsel, experienced attorneys have a greater obligation than their younger and greener colleagues to know and adhere to the rules of professional conduct. Although counsel acknowledged the presence of mitigating factors that we

must assess, he asserted that the admissions made in Liotti's Affidavit are alone sufficient to justify the imposition of discipline. And, counsel argued, because an important purpose of attorney discipline is the deterrence of other members of the bar from engaging in similar conduct, any such discipline should be publicly disclosed.

### III.

[1] [2] We agree with the American Bar Association Standards for Imposing Lawyer Sanctions (the "ABA Standards") that the proper standard of proof for violations of the relevant rules of professional conduct is "clear and convincing evidence." See ABA Standards § 1.3. The panoply of available sanctions for attorney misconduct includes disbarment, suspension, fine, public reprimand, and private reprimand. *Id.* §§ 2.2–2.10. When such misconduct has been proven by clear and convincing evidence, we are obliged in formulating the appropriate discipline to consider both aggravating and mitigating factors, as well as the "potential or actual injury" resulting from the misconduct. *Id.* § 3.0.

#### A.

##### 1.

[3] Turning to the merits of the charges against Mr. Liotti, we examine them in ascending order of seriousness. First, we assess Liotti's erroneous quoting of the trial transcript in the *Giannone* reply brief (First Charge) and his incorrect claim on appeal that the government had estimated Giannone's trial would last two weeks (Third Charge). On the First Charge, combining two separate parts of the trial transcript—thereby creating the look of a fluid conversation—was clearly inappropriate. Liotti now states that he is "not sure how this oversight occurred but [takes] responsibility for it and regrets that it occurred." Aff. ¶ 5. Nevertheless, Liotti accurately cited the transcript pages for the quotations, revealing—if the record were consulted—that the questions and answers recited in the *Giannone* reply brief were actually obtained from different parts of the transcript. Thus, Liotti's conduct underlying the First Charge is arguably mitigated because a careful reader could access the accurate origins of the misquoted evidence.

With respect to the Third Charge, Liotti's statement in the *Giannone* appeal concerning the government's position on the potential duration of Giannone's trial was \*427

patently wrong, and no one was in a better position to know that than Liotti. When the government corrected Liotti on this point in its response brief, Liotti became antagonistic, asserting in reply:

With respect to the government's strenuous posturing regarding questions about the ultimate length of trial, this Court may now take judicial notice of the government's playground-like tattle-tale approach in this case. If the government lawyers want to be right on this single point, so be it.

J.A. 240. Put simply, Liotti's initial statement of the parties' positions, set forth in the *Giannone* opening brief, was a misrepresentation of the record. Liotti's concession in the reply brief, though inartfully made, may have partially corrected the misrepresentation. In his Affidavit, however, Liotti frankly admits that he "was mistaken about who made an estimate for a two-week trial." Aff. ¶ 7. In sum, Liotti's actions in connection with the First and Third Charges constitute misrepresentations to the Court.

##### 2.

As to the Fifth Charge, Mr. Liotti's statement in the *Giannone* reply brief that two of the investigating agents had been fired for misconduct was apparently based on information from an informant and Liotti's own client, coupled with the undisputed fact that the agents were no longer employed by the Secret Service. Confirmation of that fact came from a post-trial declaration of the Service's Deputy Director, which was obtained by Giannone through an FOIA request in another case. The declaration does not, however, discuss or reveal anything about discipline against the agents. In his Affidavit, Liotti admits that, in making the contention that the agents had been fired for misconduct, he "should have couched [his] argument more in terms of which the evidence in the record established." Aff. ¶ 9. The absence of evidence disproving Liotti's allegation that the agents were fired for misconduct, however, does little to ameliorate the impropriety of his unsupported statements. In the circumstances, Liotti should have known that the record did not support his assertion that the Secret Service agents had been fired for misconduct.

##### 3.

On the Fourth Charge, relating to the Declaration of Mr. Liotti concerning the internet chat between Giannone and another individual, Liotti maintains that he has not contravened Rule 3.7 of the New York Rules, which provides that “a lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless ... the testimony is authorized by the tribunal.” New York courts have interpreted Rule 3.7 to require the disqualification of counsel upon the movant’s showing that the attorney’s testimony is necessary and that there is a substantial likelihood of prejudice if the attorney continues to act as an advocate. *See Capponi v. Murphy*, 772 F.Supp.2d 457, 471–72 (S.D.N.Y.2009).

<sup>[4]</sup> Mr. Liotti’s Declaration states that it was his associate, lawyer Drummond Smith—not Liotti himself—who witnessed the internet chat involving Giannone and another person. Because Smith was the witness to the chat, Liotti probably would not have been permitted to testify to what Smith saw. Moreover, evidence regarding the internet chat was otherwise available to the parties at trial, and the government never sought to call Liotti as a witness or urge his disqualification as counsel. As a result, this aspect of the Declaration does not give rise to a violation of Rule 3.7.

Nevertheless, in using the Declaration and the internet chat to support his appellate \*428 contentions, Mr. Liotti neglected to inform this Court that Giannone had already admitted to the government in a post-trial interview that he had faked the internet chat. Liotti apparently made the Declaration on the basis of an internet dialogue that took place in his office but outside his presence, and his Affidavit and brief admit that he is not proficient with computers. *See* Br. of Resp’t 37 (“Liotti is not knowledgeable in the way of computers”); Aff. ¶ 8. Liotti’s failure to reveal in the *Giannone* appeal that his client had already admitted to the government that the internet chat was a fake constituted a failure to correct a prior misrepresentation of material fact. Liotti maintains, however, that he did not know that the internet chat was a fake—even though Giannone had admitted that fact to the government—because Giannone later denied making the admission.<sup>9</sup> Giannone’s recantation carries little weight, however, inasmuch as Smith had witnessed Giannone’s post-trial admission to the government. Consequently, Liotti should have known that the statements in his Declaration with respect to the internet chat were unfounded. And he should have clarified those facts to the Court. *See* N.Y. Rules Prof’l Conduct R. 3.3(a)(1).

<sup>[5]</sup> The most serious of the charges lodged against Mr. Liotti is the Second Charge—Liotti’s false accusation that the district judge suppressed the informant’s letter. Those assertions constitute an unwarranted misrepresentation of the record and an unsupported impugning of the judge’s character. Nevertheless, it appears from his present contentions that Liotti was seeking to argue in the *Giannone* appeal that, because the informant’s letter was dated March 1, 2007, the judge’s finding of fact concerning her receipt of the letter on March 13, 2007, was clearly erroneous.<sup>10</sup> In any event, Liotti now argues that the judge’s finding with respect to the date she received the letter was not conclusive. That is not, however, how he posited the proposition in Giannone’s appeal.

In his Affidavit, Liotti recognizes “that [his] arguments on this point should have been handled differently so as to avoid the appearance that [he] was attacking the court’s credibility or integrity[.]” Aff. ¶ 6. Regardless of whether Liotti thought he was entitled to present a good faith challenge to the court’s findings of fact, his assertions about the trial judge in the *Giannone* appeal, together with the manner in which he presented them, constituted unfounded accusations against the judge and contravened the applicable rules.

## B.

Consistent with the foregoing, we are satisfied that the factual allegations in the Notice regarding misrepresentations to the Court are supported by clear and convincing evidence. More specifically, Mr. Liotti made misrepresentations to the Court, in contravention of Rule 8.4 of the New York Rules, which provides, in pertinent part, that a lawyer shall not “engage \*429 in conduct involving ... misrepresentation[s].” Liotti’s misrepresentations in the *Giannone* appeal encompass the following:

- Presenting two unrelated portions of a trial transcript as a single conversation;
- Incorrectly contending that the government had purposefully overestimated the length of Giannone’s trial;
- Inappropriately alleging, without factual support, that two agents involved in Giannone’s investigation had been fired for misconduct;
- Failing to disclose to the court Giannone’s admission that the internet chat had been faked;



- Relying on the Declaration to support the legitimacy of an internet chat of which he had no personal knowledge; and
- Alleging, without factual support, that the presiding judge had suppressed evidence relating to Giannone’s trial.<sup>11</sup>

Because Mr. Liotti’s conduct during the *Giannone* appeal violated the New York Rules, it also contravened the Local Rules. *See* Local [Rules App. P. 46\(g\)\(1\)\(c\)](#).

#### IV.

As we have heretofore recognized, “our adversary system depends on a most jealous safeguarding of truth and candor.” *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir.1993). One of the most important aspects of the work of an appellate lawyer is the obligation to provide the court with a fair and accurate presentation of the relevant facts. Indeed, many of our colleagues on the bench would characterize that obligation as paramount, and there is no valid reason for any lawyer to do otherwise. As John Adams explained in his successful defense of the British soldiers charged in the Boston Massacre, “facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” David McCullough, *John Adams* 52 (Simon & Schuster 2001). Our good colleague Judge Niemeyer, writing for the Court in *Shaffer Equipment*, emphasized the importance of an accurate presentation of the pertinent facts, aptly relating:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice.... Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process.

[11 F.3d at 457](#). Misrepresentations of fact by an officer of the court will, if ignored, cast a menacing shadow on a judicial system that is designed to illuminate truth and promote fairness.

As Mr. Liotti’s response brief acknowledges, a lawyer is charged with the challenging role of advocating zealously for his client and at the same time observing the applicable rules of professional conduct. Sustaining a

lawyer’s “dual obligations to clients and to the system of justice” is a far from trifling responsibility. *In re Snyder*, 472 U.S. 634, 644, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985). As a result, the privilege of bar membership must be jealously guarded, and loose footing on the high standards of professional conduct must find its purchase in balanced discipline.

**\*430** <sup>[6]</sup> Although Mr. Liotti’s conduct reflects, at best, a troublesome pattern of carelessness, his misrepresentations appear to have been largely discovered by the Court, through its own diligence and the opposing counsel’s efforts, prior to the *Giannone* appeal being resolved. As a result, there was no resulting prejudice to either party. We agree with the prosecuting counsel that Liotti’s extensive experience and competence as a lawyer constitutes an aggravating factor—rather than a mitigating one—in our evaluation of the discipline issues. In mitigation, however, the record fails to show a history of misconduct on the part of Liotti, and his client was not harmed by his transgressions here. There also does not appear to have been any selfish motive underlying Liotti’s actions.

To his credit, Mr. Liotti handled Giannone’s appeal on a court-appointed basis and achieved success for his client on the sentencing issues. Furthermore, we readily accept the proposition that Liotti is a capable attorney and that, as a trial lawyer, he possesses a fine reputation for being a zealous advocate for his clients.<sup>12</sup> Thus, Liotti’s misconduct in the underlying appeal appears as an isolated event, and it is inconsistent with his otherwise fine career. And it is commendable that Liotti has now largely recognized and apologized for his misrepresentations, acknowledging that several of his actions resulted from mistakes and poor judgment.

Notwithstanding the foregoing considerations in mitigation, we are constrained to conclude that Mr. Liotti’s cumulative conduct warrants some measure of discipline. Our assessment of the pertinent legal principles and authorities reveals that potential disciplines such as disbarment, suspension, or fine generally apply to more serious misconduct than that found here.<sup>13</sup> Nevertheless, Liotti’s violations of the applicable rules should not be ignored. According to the ABA Standards, another type of discipline, known as an admonition, may appropriately be utilized

when a lawyer [has engaged] in ... isolated instance[s] of neglect in determining whether submitted statements ... are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or

no adverse or potentially adverse effect on the legal proceeding.

ABA Standards § 6.14.

The ABA Standards advise that the purpose of lawyer discipline is to “protect the public and the administration of justice from lawyers who have not discharged ... \*431 their professional duties to clients, the public, the legal system, and the legal profession.” ABA Standards § 1.1. The unsettling repetition of Mr. Liotti’s misrepresentations and the need to deter others from engaging in similar conduct militate in favor of public discipline. In light of the various mitigating factors, however, the purposes of discipline will be sufficiently served in this proceeding if we temper our disposition with a strong measure of leniency. As a result, the

appropriate disposition is the imposition of one of the less severe disciplines available—a public admonition.<sup>14</sup>

Pursuant to the foregoing, Mr. Liotti is hereby

*PUBLICLY ADMONISHED.*

#### All Citations

667 F.3d 419

#### Footnotes

- 1 On March 8, 2007, Mr. Liotti’s client in the underlying proceedings, Jonathan Giannone, was convicted by a jury in the District of South Carolina of three counts of violating [18 U.S.C. § 1343](#) (wire fraud), plus two counts of violating [18 U.S.C. § 1028A](#) (aggravated identity theft). Giannone was sentenced to sixty-five months in prison. Liotti was retained to represent Giannone at trial, and he handled Giannone’s appeal to this Court on a court-appointed basis. By our unpublished decision of January 7, 2010, we affirmed Giannone’s convictions, vacated his sentence, and remanded for resentencing. See *United States v. Giannone*, 360 Fed.Appx. 473 (4th Cir.2010) (per curiam).
- 2 Until now, these disciplinary proceedings have for the most part been under seal.
- 3 The informant’s letter was submitted to our Court in the *Giannone* joint appendix, but was filed by the district court in the informant’s criminal case with the following docket entry:  
ORDER as to Brett Shannon Johnson: This court received a letter from Defendant Brett Johnson on March 13, 2007. This letter appears to have been postmarked March 12, 2007, although the letter itself is dated March 1, 2007. The Clerk is directed to file this letter as of the filing date of this order and maintain the original letter and its envelope until further order of this court. Signed by Judge Cameron McGowan Currie on 3/16/2007.  
Docket Entry No. 54, *United States v. Johnson*, No. 3:06–cr–01129 (D.S.C. Mar. 16, 2007). The informant’s letter to the judge is also logged on the docket sheet of Giannone’s district court proceedings as an exhibit to Giannone’s pro se habeas corpus petition. See *United States v. Giannone*, No. 3:06–cr–01011 (D.S.C. Sept. 7, 2010).
- 4 After setting forth the details of the five charges, the Notice summarized the charges as follows:  
The [First Charge] described supports the conclusion that Respondent Liotti combined transcript excerpts in a manner that enabled him to misstate the evidence of record in support of defendant Giannone’s appeal. The [Second Charge] shows that Respondent falsely accused the trial judge of suppressing evidence during trial when the record clearly supported the trial judge’s explicit finding that the evidence was received *after* trial. The [Third Charge] indicates that Respondent falsely accused the government of misleading the trial court and, when corrected, criticized opposing counsel in a discourteous manner. In the [Fourth Charge], Respondent submitted a witness declaration in a case in which he was serving as advocate and failed to correct inaccuracies in the declaration. And the [Fifth Charge] shows that Respondent made factual allegations in support of his client for which he had no basis.  
[Notice 8–9.](#)
- 5 Citations herein to “J.A. —” refer to the contents of the joint appendix filed by the parties in this disciplinary proceeding.
- 6 One exception set forth the remarks of attorney Michael Kelly of New York, who acknowledges that “as much as I respect and like Tom [Liotti] he seems to have gone overboard in the case at issue here and I certainly do not condone what occurred here.” J.A. 325.
- 7 [Rule 46\(g\)](#) of the Local Rules provides that when, as here, a respondent in disciplinary proceedings requests a hearing, the matter shall be heard by the Standing Panel on Attorney Discipline. See Local [R.App. P. 46\(g\)\(9\)](#).

- 8 For a discussion of New York caution letters, see “Report Concerning Letters of Caution and Admonition,” Supreme Court of the State of New York Appellate Division, Attorney Grievance Committees, *available at* <http://www.nycourts.gov/courts/ad4/AG/AG-caution.htm>.
- 9 In his reply to the government’s response to his pro se motion for a new trial, filed in the district court on August 11, 2008, Giannone denied admitting to a government agent that he faked the internet chat in Liotti’s office. See J.A. 85–86.
- 10 In her findings, the district judge perceived the postmark on the envelope containing the informant’s letter to be March 12, 2007, and she specifically found that the letter was not received by the court until March 13, 2007. The envelope was stamped “Postage Due 48c,” and reflects “Item X–Rayed by USMS DM 3/13.”
- 11 We deem it unnecessary to resolve any issue concerning whether Mr. Liotti’s conduct contravened any other provision of the New York Rules. As a result, we dispose of this proceeding solely on the basis of our Rule 8.4 findings. In so doing, we confirm that we agree with the prosecuting counsel that the admissions made in Liotti’s Affidavit are alone sufficient to justify the imposition of discipline.
- 12 We are satisfied to reject Liotti’s counsel’s oral argument suggestion, however, that he was without notice that the misconduct identified herein could warrant the imposition of discipline. By virtue of Liotti’s membership in the New York bar and the bar of this Court, he was plainly on notice that conduct violating the applicable rules could result in discipline.
- 13 See, e.g., *In re Roman*, 601 F.3d 189 (2d Cir.2010) (attorney suspended for seven months for misrepresenting evidence and signing his name to briefs that his staff wrote without reviewing them); *Williams v. Leach*, 938 F.2d 769 (7th Cir.1991) (attorney fined \$1000 when she failed to obtain proper service on defendants, failed to follow court rules in litigating claim, failed to address legal issues in her brief, and recited facts without foundation in record); *DCD Programs, Ltd. v. Leighton*, 846 F.2d 526 (9th Cir.1988) (suspension imposed when attorney made false statements to court and misrepresentations went to heart of appeal); *In re Grimes*, 364 F.2d 654 (10th Cir.1966) (attorney disbarred for making unsubstantiated claims that judge accepted bribes). *But cf. Holland v. Washington Homes, Inc.*, 487 F.3d 208 (4th Cir.2007) (declining to impose Rule 46(g) sanctions on counsel for allegedly misrepresenting record).
- 14 The result of this proceeding is, in part, a testament to the skills of Liotti’s lawyer, who has ably represented him. It is worth noting that we are equally pleased with the prosecuting counsel’s handling of his important duties. The efforts of both of these lawyers are commended.

111 A.D.3d 98  
Supreme Court, Appellate Division, First  
Department, New York.

In the Matter of Thomas F. **LIOTTI** (admitted as  
Thomas Francis **Liotti**), an attorney and  
counselor-at-law:  
Departmental Disciplinary Committee for the First  
Judicial Department, Petitioner,  
Thomas F. **Liotti**, Respondent.

Sept. 26, 2013.

#### Synopsis

**Background:** In attorney disciplinary proceedings, Departmental Disciplinary Committee moved for order imposing reciprocal **discipline** based on same conduct for which attorney was publicly admonished by federal Court of Appeals.

**[Holding:]** The Supreme Court, Appellate Division, held that public censure was warranted as reciprocal **discipline**.

Motion granted.

West Headnotes (2)

<sup>[1]</sup> **Attorney and Client**  
↔ Reciprocal **discipline**; effect of other  
**discipline**

Public censure of attorney was warranted as reciprocal **discipline**, based on same conduct for which attorney was publicly admonished by federal Court of Appeals; attorney had no defense to reciprocal **discipline**, in that he had been advised of allegations at issue in notice to show cause issued by Court of Appeals, he submitted responsive declaration and brief to Court of Appeals, and he had opportunity, through counsel, to present oral argument to Court of Appeals, and that court's substantive misconduct findings were amply supported by record and by attorney's admissions, including express finding that attorney violated New York professional conduct rule regarding misconduct related to maintaining integrity of profession. *McKinney's Judiciary Law* § 90(2); *N.Y.Ct.Rules*, § 603.3(c); *Rules of*

*Prof.Conduct*, Rule 8.4.

Cases that cite this headnote

<sup>[2]</sup> **Attorney and Client**  
↔ Reciprocal **discipline**; effect of other  
**discipline**

Generally in reciprocal disciplinary matters, the court gives significant weight to the sanction imposed by the jurisdiction in which the charges were initially brought. *McKinney's Judiciary Law* § 90(2); *N.Y.Ct.Rules*, § 603.3(c).

Cases that cite this headnote

#### Attorneys and Law Firms

**\*\*231** *Jorge Dopico*, Chief Counsel, Departmental Disciplinary Committee, New York (*Naomi F. Goldstein*, of counsel), for petitioner.

Respondent pro se.

*LUIS A. GONZALEZ*, Presiding Justice, *JOHN W. SWEENEY, JR.*, *DIANNE T. RENWICK*, *LELAND G. DeGRASSE*, *SALLIE MANZANET-DANIELS*, Justices.

#### Opinion

PER CURIAM.

**\*99** Respondent Thomas F. **Liotti** was admitted to the practice of law in the State of New York by the Second Judicial Department on September 7, 1977, as Thomas Francis **Liotti**. At all times relevant herein, respondent maintained an office for the practice of law within the Second Department. By order entered November 20, 2009, the Second Department transferred jurisdiction over all complaints against respondent to the First Judicial Department.

**\*\*232** By order entered December 2, 2011, the United States Court of Appeals for the Fourth Circuit publicly admonished respondent for conduct committed before that court in connection with a criminal appeal (*Matter of Liotti*, 667 F.3d 419 [2011], *cert. denied* — U.S. —,

132 S.Ct. 2735, 183 L.Ed.2d 69 [2012] ). The facts supporting the federal disciplinary sanction, which is equivalent to a public censure in this jurisdiction, are set forth in detail in the Fourth Circuit decision, and will not be repeated here.

To summarize, the Circuit Court found that respondent: (1) improperly joined unrelated quotations of a witness's testimony in his brief so as to give the appearance that he was citing to a continuous stream of testimony; (2) accused the trial judge, without factual witness support, of suppressing evidence; (3) wrongly accused the government of purposely overestimating the anticipated length of the trial in order to defeat his motion to change venue; (4) submitted and relied on a declaration to support the legitimacy of a purported on-line conversation about which he had no personal knowledge; and (5) asserted, without factual support, that two Secret Service Agents involved in the investigation of his client had been terminated for misconduct.

<sup>[1]</sup> By this motion, the Departmental Disciplinary Committee seeks an order, pursuant to [Judiciary Law § 90\(2\)](#) and the Rules of the Appellate Division, First Department (22 NYCRR) § 603.3, **disciplining** respondent predicated upon the misconduct which gave rise to the **discipline** imposed by the Fourth Circuit and sanctioning him as this Court deems appropriate under the circumstances. In response, respondent, pro se, asks that the Committee's \*100 petition be withdrawn or denied, or, alternatively that he be granted a hearing. Respondent further requests that, if this Court determines that the Committee's petition is frivolous, that costs and sanctions be imposed.

Respondent has no defense to reciprocal **discipline** under [22 NYCRR 603.3\(c\)](#). With respect to due process, respondent was advised of the allegations at issue in the

Fourth Circuit's Notice to Show Cause, he submitted a declaration in response, and, with representation by counsel, submitted a brief to the federal appeals court. He also had the opportunity, again through counsel, to present oral argument. Moreover, the Fourth Circuit's substantive misconduct findings are amply supported by the record and by the admissions made by respondent in his written submissions. Finally, the Fourth Circuit expressly found that respondent violated New York Rules of Professional Conduct (22 NYCRR 1200.00) rule 8.4.

<sup>[2]</sup> As a general rule in reciprocal disciplinary matters, this Court gives significant weight to the sanction imposed by the jurisdiction in which the charges were initially brought (*see Matter of Jaffe*, 78 A.D.3d 152, 158, 908 N.Y.S.2d 623 [1st Dept.2010]; *Matter of Jarblum*, 51 A.D.3d 68, 852 N.Y.S.2d 98 [1st Dept.2008] ).

Accordingly, we grant the Committee's petition to the extent of publicly censuring respondent pursuant to [22 NYCRR 603.3](#), in accordance with the **discipline** imposed by the United States Court of Appeals for the Fourth Circuit.

Respondent publicly censured.

All concur.

#### All Citations

111 A.D.3d 98, 972 N.Y.S.2d 231, 2013 N.Y. Slip Op. 06095

## **Ethics Opinion 323**

### **Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties**

Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

#### **Applicable Rules**

- Rule 8.4 (Misconduct)

#### **Inquiry**

The Committee has received an inquiry on a matter relating to the obligation of an attorney under Rule 8.4(c). We are asked to determine whether attorneys who are employed by a national intelligence agency violate the Rules of Professional Conduct if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties.

#### **Discussion**

Rule 8.4(c) of the Rules of Professional Responsibility makes it professional misconduct for a lawyer to “engage in conduct involving fraud, deceit, or misrepresentation.” This prohibition applies to attorneys in whatever capacity they are acting—it is not limited to conduct occurring during the representation of a client and is, therefore, facially applicable to the conduct of attorneys in a non-representational context. *See* ABA Formal Op. No. 336 (1974) (lawyer must comply with applicable disciplinary rules at all times).<sup>1</sup>

The prohibition on misrepresentation would, therefore, facially apply to attorneys conducting certain activities that are part of their official duties as officers or employees of the United States when the attorneys are employed in an intelligence or national security capacity. Thus, though the inquirer asked specifically about misrepresentations made by intelligence officers acting in their official capacity as authorized by law, the principles enunciated in this opinion are equally applicable to other governmental officers who are attorneys and whose duties require the making of misrepresentations as authorized by law as part of their official duties.

Such employees may, on occasion, be required to act deceitfully in the conduct of their official duties on behalf of the United States, as authorized by law. It is easy, for example, to imagine attorneys whose work for the CIA might require their personal clandestine work and falsification of their identity, employment status, or fidelity to the United States. We are confronted with the question whether such misrepresentations run afoul of Rule 8.4’s anti-deceit prohibition.<sup>2</sup>

For three reasons, we conclude that Rule 8.4 does not prohibit conduct of the nature described.

First, our conclusion is premised on our understanding of the purposes for which Rule 8.4 was adopted. The prohibition against engaging in conduct “involving dishonesty, fraud, deceit, or

misrepresentation” applies, in our view, only to conduct that calls into question a lawyer’s suitability to practice law. The Comments to Rule 8.4 discuss why the current version discarded earlier references to a prohibition on conduct involving “moral turpitude” (as the conduct that had been proscribed was referred to in our former Code of Professional Responsibility).

Comment [1] explains that this somewhat archaic formulation,

can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

D.C. Rule 8.4, Comment [1]; *see also In re White*, 815 P.2d 1257 (Or. 1991) (concluding that Rule applies to conduct in violation of criminal law if it “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

Thus, in rejecting the formulation of “moral turpitude” and substituting the current anti-deceit formulation, the District of Columbia Court of Appeals has indicated its intention to limit the scope of Rule 8.4 to conduct which indicates that an attorney lacks the character required for bar membership. As the Comments elaborate, this may include “violence, dishonesty, breach of trust, or serious interference with the administration of justice.” D.C. Rule 8.4, Comment [1].<sup>3</sup> But, clearly, it does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer’s availability for a social engagement.

Given this understanding of Rule 8.4, in our judgment the category of conduct proscribed by the Rule does not include misrepresentations made in the course of official conduct as an employee of an agency of the United States if the attorney reasonably believes that the conduct in question is authorized by law. An attorney’s professional competence and ability are not called into question by service in our intelligence or national security agencies in conformance with legal authorization, nor is it called into question by the use of effective covert means to achieve legitimate national security goals. *Cf. Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998) (concluding that investigator’s and tester’s misrepresentation of identity is not a misrepresentation of “such gravity as to raise questions as to a person’s fitness to be a lawyer”). As a consequence, we do not believe that Rule 8.4(c) is intended to reach lawful, authorized official conduct, even if there is a deceitful component to that conduct.

Second, our conclusion in this regard is buttressed by an analogous provision of the Rules and its construction within this jurisdiction. Rule 4.2 prohibits certain communications between a lawyer and an opposing party who is represented by counsel. This jurisdiction has construed the Rule to permit lawful law enforcement activity. Thus, our Commentary says that:

This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and the

laws of the United States or the District of Columbia. The “authorized by law” proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law.

Rule 4.2, Comment [8].<sup>4</sup>

The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In *Va. Legal Ethics Opinion 1738* (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia Standing Committee concluded that it did not. In *Va. Legal Ethics Opinion 1765* (2003), the Virginia Standing Committee then considered whether the policies animating the exception for law enforcement undercover activities expressed in *Opinion 1738* also authorized the use of non-consensual tape recording and other covert activities by attorneys working for a federal intelligence agency. Reasoning by analogy to its earlier decision concerning law enforcement undercover activities, the Committee agreed that covert intelligence activities also serve “important and judicially-sanctioned social policies.” Accordingly *Opinion 1765* concluded that “when an attorney employed by the federal government uses lawful methods such as the use of ‘alias identities’ and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore such conduct will not violate the prohibition in Rule 8.4(c).” That reasoning is equally persuasive to this Committee.

To be sure, Rule 8.4 does not have an “authorized by law” proviso, like that in Rule 4.2, and the absence of such a provision authorizing deceit in the intelligence, national security, or other foreign representational context might be construed as indicating that such conduct is not permitted. Nonetheless, we agree with Virginia that the treatment of law enforcement activity is instructive of the proper treatment of intelligence activity. A better construction is to view Comment [8] to Rule 4.2 as expressing a general approval of lawful undercover activity by government agents and the failure to mention the myriad ways in which the issue might arise simply reflects the drafters’ focus on the more immediate issue of law enforcement activity that was before them. We do not think that the Court of Appeals intended to authorize legitimate law enforcement undercover activity while proscribing covert activity in aid of our national security; we would not impute so illogical an intent to the drafters absent far stronger evidence.

Third, “[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” D.C. Rules, Scope, Comment [1]. Some activities conducted on behalf of the United States necessarily involve circumstances where disclosure of one’s identity or purpose would be inappropriate – and, indeed, potentially dangerous. We do not think that the Rules of Professional Conduct require lawyers to choose between their personal safety or compliance with the law, on the one hand,<sup>5</sup> and maintenance of their bar licenses, on the other. *See Utah State Bar Ethics Advisory Committee Op. No. 02-05* (2002) (relying on “rule of reasons” provision to conclude that government attorneys’ “lawful participation in a lawful government operation” does not violate Rule 8.4 if deceit is “required in the successful furtherance” of the undercover or covert operation).

For these several reasons we are convinced that the anti-deceit provisions of Rule 8.4 do not



prohibit attorneys from misrepresenting their identity, employment or even allegiance to the United States if such misrepresentations are made in support of covert activity on behalf of the United States and are duly authorized by law.<sup>6</sup>

Finally, we emphasize the narrow scope of this opinion. It applies only to misrepresentations made in the course of official conduct when the employee (while acting in a non-representational capacity, *see supra* n.1), reasonably believes that applicable law authorizes the misrepresentations. It is not blanket permission for an attorneys employed by government agencies to misrepresent themselves. Nor does it authorize misrepresentation when a countervailing legal duty to give truthful answers applies. Thus, for example, false testimony under oath in a United States court or before the Congress is prohibited, *see In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), notwithstanding any countervailing intelligence or national security justification. And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively, have a reasonable belief that applicable law authorizes the actions in question.

With that limitation, our conclusion is as follows: Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

March 2004

---

1. This opinion applies only to the conduct of attorneys acting in a non-representational capacity. It does not address potentially applicable requirements under Rule 4.1 (communication with clients), or Rule 4.3 (dealing, on behalf of clients, with unrepresented parties) which, inter alia, prohibits attorneys from making a false statement of material fact to a third party “in the course of representing a client.”
2. Rule 8.4(c) prohibits a lawyer from engaging in conduct “involving dishonesty, fraud, deceit, or misrepresentation.” And “fraud” is, of course, separately defined by the Rules. See D.C. Rules of Prof. Conduct, Terminology (defining “fraud” and “fraudulent” as “conduct having a purpose to deceive”). For convenience sake, we refer to Rule 8.4(c) as the anti-deceit provision, while recognizing that the scope of the prohibition may depend upon a close analysis of the meaning of each of the four related prohibitions.
3. In March 2003, the Virginia Supreme Court made this connection explicit by amending the Virginia version of Rule 8.4(c) to prohibit “dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer’s fitness to practice law.” Va. R. Prof. Cond. 8.4(c).
4. Some other jurisdictions have construed this provision to preclude law enforcement agents, acting at the direction of a lawyer, from conducting covert, undercover activity against individuals who are represented by counsel. Cf. *In re Gatti*, 8 P.3d 966 (Or. 2000), overruled, Or. DR 1-102(D) & Or. Formal Op. 2003-173.

5. In some circumstances, federal law affirmatively prohibits disclosure of information relating to the identity of covert agents, for example. See, e.g., 50 U.S.C. § 421.

6. This Committee lacks the expertise to precisely identify, for example, which covert activities are authorized by law. Moreover, such an enumeration would exceed our charter, which ordinarily limits our opinions to interpretations of the District of Columbia Rules of Professional Conduct. We emphasize, however, that for conduct to come within the safe-harbor of this opinion the lawyer must reasonably believe that the conduct in question was both authorized by law and reasonably intended to further the attorney's official duties.



(<https://www.ipethicslaw.com/>)



## Patent Attorney Who Lied to Client and Bar Counsel Receives Two-Month Suspension

Michael E. McCabe, Jr. / October 9, 2014 /

[Misrepresentations \(https://www.ipethicslaw.com/category/misrepresentations/\)](https://www.ipethicslaw.com/category/misrepresentations/),

[Patent Attorney Disciplinary Matters \(https://www.ipethicslaw.com/category/patent-attorney-disciplinary-matters/](https://www.ipethicslaw.com/category/patent-attorney-disciplinary-matters/)

[USPTO Director Decisions \(https://www.ipethicslaw.com/category/uspto-director-decisions/\) /](https://www.ipethicslaw.com/category/uspto-director-decisions/)

[http://www.ipethicslaw.com/wp-](http://www.ipethicslaw.com/wp-content/uploads/2014/10/lucky.jpg)

[content/uploads/2014/10/lucky.jpg](http://www.ipethicslaw.com/wp-content/uploads/2014/10/lucky.jpg)“It is strange the way the ignorant and inexperienced so often and so undeservedly succeed when the informed and the experienced fail.”

– Mark Twain in *Eruption*

Phillip Pippenger is one very lucky patent attorney. In the world of attorney discipline, the mental state of the attorney is an important factor in determining the type and severity of discipline bar counsel will seek. When the USPTO imposes discipline, an intentionally false representation quite often leads to a suspension from practice before the Office. Depending on the circumstances, the suspension could be from several months to several years. When a patent or trademark practitioner commits multiple separate deceitful acts and lies to investigators about his conduct, the USPTO would usually not think twice about seeking that practitioner’s disbarment. Phillip Pippenger lied to his client, tried to cover up his lies, and lied to bar counsel, and yet he received only a sixty (60) day suspension. How and why this happened requires diving into the procedural nuances of multi-jurisdictional attorney discipline.



Mr. Pippenger’s ethical problems began in August 2010, when he agreed to represent an individual inventor (Mr. Thomas) in connection with a smart phone application invention. Mr. Pippenger requested and received \$4,000 to complete and file a U.S. patent application. On September 16, 2010, in response to an

email from Mr. Thomas, Mr. Pippenger falsely represented that the application had been filed. He also said he would have his secretary forward the application serial number, but failed to do so. Mr. Pippenger's statements caused the client to believe that the patent application had been filed.

Fifteen months later, Mr. Pippenger filed Mr. Thomas' patent application. It is unclear from the facts why he waited so long, or what caused him to file the application after doing nothing for over one year. After filing the application, the attorney sent his client the USPTO electronic acknowledgement receipt confirming the filing of the application. The receipt, however, reflected the actual filing date. To avoid any problems with this inconvenient fact, Mr. Pippenger redacted the filing date from the receipt.

Mr. Thomas became concerned about the status of his application. He directly contacted the USPTO and learned the application was not filed until January 25, 2012.

In a second and unrelated matter involving the same client, Mr. Pippenger, in December 2010, agreed to represent Mr. Thomas in preparing and filing a breach of contract lawsuit. He received \$2,000 from his client to pursue the claim. As of January, 2012, however, no complaint had been filed. Nevertheless, Mr. Pippenger falsely told Mr. Thomas that he had filed the lawsuit and also represented the judge said the case was "not viable." Mr. Pippenger then told Mr. Thomas he had been "scammed" by someone impersonating a judge. Finally, on January 30, 2012, Mr. Pippenger revealed to Mr. Thomas the truth – no lawsuit had been filed. Mr. Thomas hired new counsel at additional expense to pursue the claim, which was settled.



(<http://www.ipethicslaw.com/wp-content/uploads/2014/10/Illinois-ARDC.png>) Mr. Thomas filed a grievance with the Illinois bar. This turned out to be quite a lucky break for Mr. Pippenger.

Upon being notified by the Illinois disciplinary counsel that Thomas had requested an investigation of his conduct, Mr. Pippenger submitted a written response to Thomas' allegations. In his response, counsel falsely stated that Thomas had agreed to delay filing both the patent application and the lawsuit. The attorney also falsely stated that he and Thomas had agreed that Mr. Pippenger would redact the filing date from the USPTO filing receipt in order to conceal that information from Thomas' companion. Mr. Pippenger later confessed that these statements to disciplinary counsel were false.

Disciplinary counsel concluded that Mr. Pippenger's conduct violated the following Illinois Rules of Professional Conduct:

1. failure to act with reasonable diligence and promptness in representing a client;
2. failure to keep a client reasonably informed about the status of a matter;

3. making a statement of material fact known by the lawyer to be false in connection with a lawyer disciplinary matter;
4. engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and
5. engaging in conduct which is prejudicial to the administration of justice.

Disciplinary counsel recommended to the Supreme Court of Illinois a suspension of 60 days, based on Illinois precedent. Disciplinary counsel stated that three mitigating factors were that Mr. Pippenger had not previously been disciplined in 15 years of practice, admitted he lied to bar counsel, and expressed remorse. No aggravating factors were identified, although it is frankly unclear why not considering the multiple acts of misconduct, deceit to bar counsel, and harm to the client.

In any case, the Supreme Court of Illinois agreed with disciplinary counsel's recommendation, finding that Pippenger lied to his client on multiple occasions, attempted to cover-up his lies, and then lied to Illinois disciplinary counsel about the lies to his client. The Illinois Supreme Court suspended Mr. Pippenger's state law license for sixty (60) days. See *In re Phillip McKinney Pippenger* (<http://www.state.il.us/court/SupremeCourt/Announce/2014/031414.pdf>), No. M.R. 26586 (Ill. Sup. Ct. Mar. 14, 2014).

That decision was Mr. Pippenger's lucky break. Once Illinois imposed its suspension, the USPTO was obliged to follow its rules on reciprocal discipline, codified in Section 11.24 of Title 37 of the Code of Federal Regulations. Section 11.24 sets forth a step-by-step procedure that specifically applies whenever a "practitioner" (i.e., an individual subject to the disciplinary jurisdiction of the USPTO) has been ethically disciplined by another jurisdiction.

Section 11.24(a) states that, "upon receiving notification . . . that a practitioner subject to the disciplinary jurisdiction of the Office has been so publicly censured, publicly reprimanded, subjected to probation, disbarred, suspended, or disciplinarily disqualified, the OED Director shall. . . file with the USPTO Director a complaint complying with Section 11.34 against the practitioner . . ." predicated on the discipline received in the other jurisdiction.

Under 37 C.F.R. §11.24(b), the USPTO Director is required to issue an order to the practitioner to show cause within forty days why the imposition of the identical public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification would be unwarranted and the reasons for that claim. The OED Director lacks standing to seek a greater level of punishment than what was imposed in the other jurisdiction. Moreover, the USPTO Director "shall impose the identical" discipline "unless the practitioner clearly and convincingly demonstrates, and the USPTO Director finds there is a genuine issue of material fact" that: (1) he was denied due process in the other proceeding; (2) an infirmity of proof existed in the other jurisdiction; or (3) imposition of the same disciplinary sanction would result in "grave injustice." 37 C.F.R. § 11.24(d)(1)(i)-(iv).

Mr. Pippenger failed to file any response with the USPTO Director, Consequently, on July 15, 2014, the USPTO entered an order pursuant to Section 11.24 imposing a 60-day suspension from practice before the Office. *In re Pippenger* ([http://e-foia.uspto.gov/Foia/RetrievePdf?system=OED&fNm=0774 DIS 2014-07-15](http://e-foia.uspto.gov/Foia/RetrievePdf?system=OED&fNm=0774_DIS_2014-07-15)), Proceeding No. D2014-16 (USPTO Dir. July 15, 2014).

This matter illustrates the importance of what disciplinary agency handles the investigation. The client could have just as easily filed his grievance with the USPTO instead of the Illinois bar and Section 11.24 would not have applied at all. If the OED followed its usual precedent and procedure, then it most likely would have sought a multi-year suspension or disbarment. Since the matter was adjudicated by Illinois, however, the USPTO was required by Section 11.24 to give full faith and credit to the Illinois judgment; it could not re-litigate the facts, issues, or conclusions found in Illinois. Thus Mr. Pippenger received only a 60-day suspension from the USPTO in a matter that might have otherwise resulted in his disbarment.

In Pippenger’s case, sometimes it is better to be lucky than good.

[1Share](#)

**Related**

The OED Redemption: Director Expediting Petitions To Reinstate Suspended Practitioners (<https://www.ipethicslaw.com/the-oed-redemption-director-expediting-petitions-to-reinstate-suspended-practitioners/>)  
 March 1, 2016  
 In "Discipline"

“Super Lawyer” Resigns From USPTO Bar Following Ethics Complaint (<https://www.ipethicslaw.com/super-lawyer-resigns-from-uspto-bar-following-ethics-complaint/>)  
 September 26, 2014  
 In "Patent Attorney Disciplinary Matters"

Lessons in Ethics: Lying About CLE Attendance Is Just So Wrong (<https://www.ipethicslaw.com/lessons-in-ethics-lying-about-cle-attendance-is-just-so-wrong/>)  
 December 13, 2016  
 In "Continuing Legal Education"

Tags: [communications \(https://www.ipethicslaw.com/tag/communications-2/\)](https://www.ipethicslaw.com/tag/communications-2/), [deceit \(https://www.ipethicslaw.com/tag/deceit/\)](https://www.ipethicslaw.com/tag/deceit/), [diligence \(https://www.ipethicslaw.com/tag/diligence/\)](https://www.ipethicslaw.com/tag/diligence/), [dishonesty \(https://www.ipethicslaw.com/tag/dishonesty/\)](https://www.ipethicslaw.com/tag/dishonesty/), [false statements \(https://www.ipethicslaw.com/tag/false-statements/\)](https://www.ipethicslaw.com/tag/false-statements/), [fraud \(https://www.ipethicslaw.com/tag/fraud/\)](https://www.ipethicslaw.com/tag/fraud/), [prejudicial to the administration of justice \(https://www.ipethicslaw.com/tag/prejudicial-to-the-administration-of-justice/\)](https://www.ipethicslaw.com/tag/prejudicial-to-the-administration-of-justice/), [reciprocal discipline \(https://www.ipethicslaw.com/tag/reciprocal-discipline-2/\)](https://www.ipethicslaw.com/tag/reciprocal-discipline-2/)

Leave a Reply

Your email address will not be published. Required fields are marked \*



## GEORGETOWN LAW

**Abbe Smith**  
Professor of Law

February 20, 2017

Office of Disciplinary Counsel  
Board on Professional Responsibility  
District of Columbia Court of Appeals  
515 5th Street NW  
Building A, Suite 117  
Washington, DC 20001

To the Office of Disciplinary Counsel:

Please be advised that the below signed law professors, all of whom teach courses relating to legal ethics, are hereby filing a disciplinary complaint against District of Columbia bar member Kellyanne Conway, currently listed as a member of the bar under her name before marriage, Kellyanne E. Fitzpatrick,<sup>1</sup> under DC Rule of Professional Conduct 8.4(c) [hereinafter DC Rules].

As Rule 8.4(c) states, “It is professional misconduct for a lawyer to [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” This is an admittedly broad rule, as it includes conduct outside the practice of law and, unlike 8.4(b), the conduct need not be criminal. We are mindful of the Rule’s breadth and aware that disciplinary proceedings under this Rule could lead to mischief and worse. Generally speaking, we do not believe that lawyers should face discipline under this Rule for public or private dishonesty or misrepresentations unless the

<sup>1</sup> Ms. Conway, née Fitzpatrick, was admitted to the DC bar on January 19, 1995 and is currently suspended for nonpayment of dues. Presumably, if she resumes payment she would be readmitted.

lawyer's conduct calls into serious question his or her "fitness for the practice of law," DC Rule 8.4, Comment 1, or indicates that the lawyer "lacks the character required for bar membership." DC Bar, Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, at <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm>.

However, we believe that lawyers in public office—Ms. Conway is Counselor to the President—have a higher obligation to avoid conduct involving dishonest, fraud, deceit, or misrepresentation than other lawyers. Although the DC Rules contain no Comment specifically relating to 8.4(c), the American Bar Association's Model Rules of Professional Conduct (MR) make this point. MR 8.4(c), Comment 7 states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Cf.* DC Rule 1.11 (on the special conflict of interest rules for lawyers who have served in government).

It is not surprising that the Model Rules distinguish lawyers in public office from other lawyers. The ABA knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate.

Some of the signers of this complaint practice in the District of Columbia and/or are members of the DC Bar. We feel compelled to file such a complaint under DC Rule 8.3(a), which states that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Those of us who do not practice in DC are members of other state and federal bars. We all believe it is critically important that lawyers in public office—especially those who act as spokespersons for the highest levels of government—be truthful.

The DC Bar has issued an Ethics Opinion on lawyers working in government in a non-representational capacity that supports this complaint. *See generally* Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm>. In addressing an inquiry about attorneys employed by an intelligence or national security agency who engage in clandestine activities, the Opinion distinguishes those government officials whose official duties require them to "act deceitfully" from other lawyers in government. Though the Opinion finds lawyers "whose duties require the making of misrepresentations as authorized by law as part of their official duties" do not violate Rule 8.4(c), the drafters emphasize the Opinion's narrow scope: it applies "only to misrepresentations made in the course of official conduct when the employee...reasonably believes that applicable law authorizes the misrepresentations."



Significantly, for purposes of this complaint, Ethics Opinion 323 makes plain that its conclusion in the above narrow context does not provide “*blanket permission for an attorney employed by government agencies to misrepresent themselves.*” [Emphasis added] The drafters further explain:

Nor does [the Opinion] authorize misrepresentation when a countervailing legal duty to give truthful answers applies.... And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively have a reasonable belief that applicable law authorizes the actions in question.

Ms. Conway’s misconduct under DC Rule 8.4(c) is as follows:

- On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the “Bowling Green Massacre” to justify President Donald Trump’s executive order banning immigrants from seven overwhelmingly Muslim countries. Not only was there no “massacre” in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: “I bet it’s brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don’t know that because it didn’t get covered.” See generally Clare Foran, *The Bowling Green Massacre that Wasn’t*, THE ATLANTIC, February 3, 2017, at <https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/>. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. See Aaron Blake, *The Fix: Kellyanne Conway’s ‘Bowling Green Massacre’ wasn’t a slip of the tongue. She has said it before.* WASH. POST, February 6, 2017, at [https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm\\_term=.b2de9c3f0582](https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582).
- Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had “banned” Iraqi refugees from coming into the United States for six months following the “Bowling Green Massacre.” *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. See Glenn Kessler, *Fact Checker: Trump’s facile claim that his refugee policy is similar to Obama’s in 2011*, WASH. POST, January 29, 2017, at [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm\\_term=.87f35b046de2](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2).

- This was not the first time Ms. Conway had engaged in conduct involving “dishonesty, fraud, deceit, or misrepresentation.” On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth “alternative facts” to what the news media reported about the size of Mr. Trump’s inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump’s relationship with intelligence agencies. See Nicholas Fandos, *White House Pushes ‘Alternative Facts.’ Here are the Real Ones*, N.Y. TIMES, January 22, 2017, at <https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html>. As many prominent commentators have pointed out, the phrase “alternative facts” is especially dangerous when offered by the President’s counselor. Moreover, “alternative facts” are not facts at all; they are *lies*. Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES, January 26, 2017, at <https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html>.
- Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within DC Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office “for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity.” The government’s chief ethics watchdog denounced Conway’s conduct in a letter to the White House. Richard Perez Pena, *Ethics Watchdog Denounces Conway’s Endorsement of Ivanka Trump Products*, N.Y. TIMES, February 14, 2017, at <https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html>. See also DC Rule 1.11, Comment 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, “particular heed must be paid to the federal conflict-of interest statutes.”)

We do not file this complaint lightly. In addition to being a member of the DC Bar, Ms. Conway is a graduate of the George Washington University Law School, one of the District’s premier law schools. We believe that, at one time, Ms. Conway, understood her ethical responsibilities as a lawyer and abided by them. But she is currently acting in a way that brings shame upon the legal profession. As the Preamble to the Model Rules states, a lawyer plays an important role as a “public citizen” in addition to our other roles.

If Ms. Conway were not a lawyer and was “only” engaging in politics, there would be few limits on her conduct outside of the political process itself. She could say and do what she wished and still call herself a politician. But she is a lawyer. And her conduct, clearly intentionally violative of the rules that regulate her professional status, cries out for sanctioning by the DC Bar.

Respectfully submitted,

John Bickers  
Professor of Law  
Northern Kentucky University

Susan Brooks  
Professor of Law  
Drexel University

Lawrence Fox  
Visiting Lecturer in Law  
Yale Law School

Bennett Gershman  
Professor of Law  
Pace University

Justin Hansford  
Associate Professor of Law  
Saint Louis University

Vida Johnson  
Visiting Professor of Law  
Georgetown University

Jennifer Kinsley  
Associate Professor of Law  
Northern Kentucky University

Catherine Klein  
Professor of Law  
Catholic University

William Montross  
Visiting Professor of Law  
University of the District of  
Columbia

Russell Pearce  
Professor of Law  
Fordham University

Ilene Seidman  
Professor of Law  
Suffolk University

David Singleton  
Associate Professor of Law  
Northern Kentucky  
University

Abbe Smith  
Professor of Law  
Georgetown University

Michael Tigar  
Professor of Law Emeritus  
American University  
Duke University

Ellen Yaroshefsky  
Professor of Law  
Hofstra University

Reconciling a Lawyer's Competing Duties of **Candor to the Court v. Duty of Confidentiality**

**QUESTION PRESENTED**

May Attorney, under the California Rules of Professional Conduct and the State Bar Act, answer a court's question asking if she has any idea why her client is not in court, when Attorney is aware of incriminating information that she suspects may explain her client's absence?

**ANSWER**

No. Under the California Rules of Professional Conduct and State Bar Act, Attorney may not answer the court's question in any fashion; she must respectfully decline to answer, citing her ethical duty of confidentiality. This is true even though in jurisdictions that follow some version of the ABA Model Rules, the result may be different.

**FACTS**

Attorney, a member of the California State Bar, represents Client on a drug charge. The night before she is scheduled to appear in court with her client, who is out of custody on bond, she receives a call from Client's mother stating "don't expect to see Client in court tomorrow morning; he just left the house high as a kite." Sure enough, Client doesn't appear in court. The judge asks Attorney on the record: "Do you have any idea why your client isn't here?" Ethically, what if anything can Attorney say?

**APPLICABLE LAW AND ETHICAL RULES**

This issue can be analyzed through a combination of California Rules of Professional Conduct, the California Evidence Code, the California Business and Professions Code, California Ethics Opinions, and the ABA Model Rules of Professional Conduct.

**CONFIDENTIAL COMMUNICATION V. THE DUTY OF CONFIDENTIALITY**

Of paramount importance to this opinion is the distinction between confidential communication and the duty of confidentiality. "Confidential communication between client and lawyer" is defined in Section 952 as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Regarding the duty of confidentiality, the conduct of California lawyers is governed by California Business and Professions Code Section 6068 which enumerates the duties of an attorney. Section 6068(e)(1) states that one of these duties is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Regarding the scope of Section 6068(e)(1), several California Ethics Opinions provide useful guidance. California Rule of Professional Conduct 1-100 states that while they are not binding authority, California ethics committee opinions should be consulted by California lawyers "for guidance on proper professional conduct."<sup>1</sup> Cal. State Bar Formal Opinion No. 2003-161 notes that the attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege and extends to cover all of the information gained within the scope of the professional relationship that the client has requested be kept secret, or the disclosure of which would likely be harmful or embarrassing to the client. (citing Cal. State Bar

Formal Opns. No. 1993-133, 1986-87, 1981-58, and 1976-37; Los Angeles County Bar Association Formal Opns. Nos. 456, 436, and 386. See also *In re Jordan* (1972) 7 Cal.3d 930, 940-41 [103 Cal.Rptr. 849].)

In this case, the information about the Client revealed by his mother to Attorney, while not covered by the attorney-client privilege, would fall within the scope of confidential information.

## **DUTY OF LOYALTY TO THE CLIENT V. CANDOR TO THE COURT**

Under the ABA Model Rules, a lawyer's duty to the client is qualified by the duty of candor to the court (Rule 3.3 Comment [2]). In California, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court.<sup>2</sup> The proposed set of California rules, if adopted, will preserve this distinction.<sup>3</sup> While this debate continues, judges and lawyers should be familiar with the distinction, and all of the rules involved.

California Rule of Professional Conduct 5-200, Trial Conduct, states in pertinent part that: in presenting a matter to a tribunal, a member: "(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

Note that the California Rule differentiates between using truthful means of representation, and seeking to mislead the court. This is an important distinction to make, because as trial lawyers know, it is possible to present technically correct bits of evidence or information, but in a manner that is misleading in context. It is also possible to violate the duty of candor by omission. Indeed, ABA Model Rule 3.3 Comment [3] notes that there are circumstances where "failure to make a disclosure is the equivalent of an affirmative misrepresentation."

California Business and Professions Code Section 6068(d) states that it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." California Business and Professions Code Section 6106, which discusses actions of moral turpitude which may result in discipline, states that: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

## **ABA MODEL RULES**

While California has not yet adopted a version of the ABA Model Rules, when California does not have an ethical rule governing a specific issue, courts may look to the ABA for guidance, although they may not consider ABA Rules and Opinions as binding authority.<sup>4</sup> Regarding ABA formal opinions, case law holds that while an ABA formal opinion "does not establish an obligatory standard of conduct imposed on California lawyers," the ABA Model Rules may be considered as a "collateral source" where there is no direct ethical authority in California.<sup>5</sup>

ABA Model Rule 3.3 – Candor Toward the Tribunal, states in pertinent part that "A lawyer shall not knowingly make a false statement of fact or law to a tribunal" (Rule 3.3 (a)(1)). The Rule states in paragraph (b) that a lawyer representing a client "who 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." Paragraph (c) qualifies the duties in paragraphs (a) and (b), stating in pertinent part that they apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6. [Confidentiality]."

In addition to Rule 3.3, which specifically covers candor in the courtroom, several other Model Rules discuss a lawyer's duty of candor generally. Model Rule 4.1 – Truthfulness in Statements to Others also covers the duty of candor. Rule 4.1 states 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; 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.*" (emphasis added). Note the difference between the references to Rule 1.6 in these respective rules. Rule 3.3 requires candor to the court take precedence over the duty of confidentiality, while Rule 4.1, truthfulness in statements to others, recognizes the higher importance of the duty of confidentiality.

Regarding criminal or fraudulent behavior by the client, Rule 4.1 Comment [3] reminds lawyers that "[u]nder Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, *unless the disclosure is prohibited by Rule 1.6.*" (emphasis added).

Model Rule 8.4, Misconduct, also includes several provisions relating to a lawyer's duty of candor. Relevant provisions state that it is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

## ANALYSIS

Analyzing all of these rules and ethics opinions, we conclude that in California, Attorney is not able to answer the judge's question either way. She is not able to be dishonest with the court due to her duty of candor, and she is not at liberty to disclose the information imparted to her by Client's mother the night before, because even though that information was not relayed to her by her client and therefore is not protected by the attorney-client privilege, it nonetheless constitutes confidential information.

The more difficult issue is whether Attorney is permitted to say anything at all in response to the court's question regarding whether she "had any idea why her client was not there." If Attorney answers in the negative, she is in violation of her duty of candor to the court per Rule 5-200 and Bus. and Prof. code section 6068(d) because she does have an idea, as relayed by Client's mother the night before. If, however, Attorney answers "yes," she arguably violates her duty of confidentiality under Cal. Bus. and Prof. code section 6068(e) because that answer would cause a harmful inference to be drawn to the detriment of her client, thus violating Attorney's duty not to reveal client confidential information. Certainly if there were an exculpatory and unexceptional [see parenthetical note] reason Attorney's client was not in court, Attorney would be free to reveal that information, because it would not qualify as information "which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client" (Cal. State Bar Formal Op. 1993-133 [citing Cal. State Bar Formal Opn. Nos. 1980-52 and 1981-58]). Under our facts, Attorney's only ethical option is to inform the court respectfully that due to applicable ethical rules she is not at liberty to answer the question.<sup>6</sup>

This opinion is issued by the San Diego County Bar Association Legal Ethics Committee. It is advisory only, and not binding upon the courts, the State Bar of California, tribunals charged with regulatory responsibilities, or any member of the State Bar.

<sup>1</sup> The Rule also states that "Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

<sup>2</sup> See California Business and Professions Code Section 6068(e) and California Rule of Professional Conduct 5-200.

<sup>3</sup> <http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx>

<sup>4</sup> See e.g., *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, \*7.

<sup>5</sup> *State Compensation Insurance Fund v. WPS Inc. (State Fund)* (1999) 70 Cal.App.4th 644, 656.

<sup>6</sup> Cf. *In the matter of a Member of the State Bar of Arizona Robert E. Fee* (1995) 182 Ariz. 597, 607 (1995) (Censuring plaintiff's personal injury attorneys who did not disclose to settlement judge separate agreement requiring client to pay attorney's fees beyond those specified in settlement agreement. The plaintiff's attorneys "should have either disclosed the complete [fee] arrangement [with their client] or politely declined any discussion of fees.")

15 F.Supp.2d 456 (1998)

**APPLE CORPS LIMITED, MPL Communications, Inc., Yoko Ono Lennon As Executrix of the Estate of John Lennon, Subafilms, Ltd. and Yoko Ono Lennon, Plaintiffs,**

**v.**

**INTERNATIONAL COLLECTORS SOCIETY, John E. Van Emden, Scott L. Tilson, Jeffrey B. Franz and Howard E. Friedman, Defendants.**

Civ. No. 96-1571(JAG).

**United States District Court, D. New Jersey.**

June 26, 1998.

458 \*457 \*458 Paul V. LiCalsi, Amy J. Lippman, Gold, Farrell & Marks, New York, NY, Robert P. Shapiro, Shapiro & Croland, Hackensack, NJ, for Plaintiffs.

Donald A. Robinson, Robinson, Lapidus & Livelli, Newark, NJ, Bradford J. Badke, Lindal L. Scott, Dewey Ballantine, LLP, New York, NY, for Defendants.

## **OPINION**

GREENAWAY, District Judge.

This matter comes before the Court on the motion for civil contempt of Gold, Farrell & Marks, counsel for plaintiffs Apple Corps Limited, MPL Communications, Inc., Yoko Ono Lennon, as executrix of the estate of John Lennon, Subafilms, Ltd. and Yoko Ono Lennon (collectively "Plaintiffs"). The other motions before the Court are the cross-motion to dissolve the Consent Order and the motion for sanctions of Dewey Ballantine, LLP, counsel for defendants International Collectors Society, John E. Van Emden, Scott L. Tilson, Jeffrey B. Franz and Howard E. Friedman (collectively "Defendants"). These motions arise from the Defendants' alleged breach of a Consent Order that the parties entered into in June 1997. The Consent Order permitted the sale of certain licensed collectors' stamps that bore the images of The Beatles. The Court heard testimony and argument on these various motions over several sessions concluding in April 1998. Based on the arguments presented and the written submissions given to the Court, Plaintiffs' motion seeking civil contempt is granted and Defendants' motion seeking to dissolve the Consent Order and requesting that the Court levy sanctions is denied.

## **PRELIMINARY STATEMENT**

Plaintiffs commenced the above-captioned action against Defendants in April 1996. Plaintiffs alleged that Defendants were unlawfully trading off the good will associated with the legendary rock-n-roll band, The Beatles. Specifically, Plaintiffs alleged that Defendants created, marketed and sold, without any authorization from Plaintiffs, postage stamps featuring images of The Beatles, trademarks and copyrighted photographs (the "Stamps") owned and controlled exclusively by Plaintiffs. In addition to money damages, Plaintiffs sought a permanent injunction enjoining Defendants' exploitation of the Stamps.

459 In October 1996, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction barring Defendants from selling any Stamps bearing the likeness of The Beatles and/or Yoko Ono Lennon. In defense of the motion, Defendants' counsel, Bradford Badke, represented to the Court that Defendants would cease marketing any new Stamps bearing the image of Yoko Ono \*459 Lennon or The Beatles. On November 6, 1996, the Court denied Plaintiffs' motion for a temporary restraining order and scheduled a preliminary injunction hearing for December 20, 1996. On November 8, 1996, Plaintiffs presented evidence to the Court that Defendants had continued selling such Stamps and requested that the Court reconsider its denial of a temporary restraining order. On November 14, 1996, the parties entered into a Consent Order which *inter alia*, preliminarily enjoined Defendants from marketing or distributing Stamps or any other product bearing the image of Yoko Ono Lennon or The Beatles.



In June 1997, the parties agreed to resolve the case by a Consent Order which the Court entered on June 19, 1997. On or about September 24, 1997, Plaintiffs brought a motion for contempt seeking to enforce paragraph O of the Consent Order. Paragraph O of the Consent Order provides:

In the event that defendants or any of them breaches any provision of paragraphs A-I or K-L of this Order and as a result of such breach, plaintiffs or any one of them initiates legal proceedings to enforce their rights under this Order, defendants and each of them hereby: (1) agree that plaintiffs will be irreparably harmed by such breach and entitled to injunctive relief to prevent defendants from selling any further Stamps ... and (3) agree to reimburse plaintiffs for all their costs, including reasonable attorney's fees incurred in connection with any successful action or proceeding brought by plaintiffs (or any one of them) to enforce their rights under this Order.

(Consent Order ¶ O). Accordingly, Plaintiffs seek: (1) an order adjudging Defendants in civil contempt for violating the Consent Order; (2) a permanent injunction barring Defendants from selling any stamps featuring the name and/or likeness of The Beatles (collectively, or individually); and (3) attorneys' fees and costs incurred in connection with enforcing their rights under the Consent Order.

Defendants subsequently filed a cross-motion to rescind the Consent Order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure due to Plaintiffs' alleged breach of the Consent Order. Defendants also filed a separate motion seeking to impose sanctions on Plaintiffs' counsel on the grounds that counsel behaved unethically in procuring the stamps which form the basis of their contempt motion.

This Court heard four days of testimony and argument in connection with all three motions on November 3, 1997, November 24, 1997, January 13, 1998 and April 7, 1998.

## **FACTS<sup>[1]</sup>**

### **A. The Parties**

Pursuant to agreements with former members of The Beatles, Plaintiff Apple Corps Limited ("Apple") is the sole and exclusive owner of rights in and to the name and likeness of The Beatles. Plaintiff MPL Communications, Inc. ("MPL") is the exclusive owner of rights in and to the name and likeness of Paul McCartney. Plaintiff Yoko Ono Lennon, as Executrix of the Estate of John Lennon, is the exclusive owner of rights in and to the name and likeness of John Lennon and the "John Lennon" registered trademarks. Plaintiff Subafilms, Ltd. ("Subafilms") is the copyright owner in and to the full-length animated film "Yellow Submarine" and the images contained therein. Plaintiff Yoko Ono Lennon ("Mrs.Lennon") is the exclusive owner of rights in her own name and likeness.

Defendant International Collectors Society ("ICS") is a Maryland corporation engaged in the direct marketing and sale of products, including postage stamps duly and legally issued by the governments of foreign countries, throughout the United States. Defendant John Van Emden is the President of ICS. Defendants Scott L. Tilson and Jeffrey B. Franz are co-founders and officers of ICS.<sup>[2]</sup>

### 460 \*460 **B. The Consent Order and the Lennon License**

Subject to certain exceptions, the June 1997 Consent Order permanently enjoins Defendants from distributing or selling "postage stamps or any other product ... bearing or referring to (i) the name and/or likeness of The Beatles, John Lennon ... (vi) the John Lennon registered trademark of the John Lennon signature ..." (Consent Order ¶ A(i) and (vi)).

One of the exceptions to the Consent Order's permanent injunction provides that Defendants may continue to sell Stamps featuring John Lennon's name, trademark or image pursuant to a written license agreement from the Lennon Estate (the "Lennon License"). (Consent Order ¶ D). The Lennon License requires that prior to distribution, Defendants submit for approval any "promotional material which incorporates Licensor's Trademarks ... which is intended to be used in conjunction with the sale or distribution of Lennon Stamps. (Lennon License ¶ 3(a)(i)). The Lennon Estate may not unreasonably withhold approval of promotional material; however, material not approved within seven days of Licensor's receipt is deemed disapproved. *Id.* Exhibit

A to the Lennon License provides that "Lennon and John Lennon are trademarks of the Estate of John Lennon."

Another exception to the Consent Order's permanent injunction allows Defendants to sell (i) up to 2,000 of each of the Stamps listed in Exhibit E to the Consent Order for a period commencing February 28, 1997 and ending February 28, 1998; and (ii) the Stamps listed in Exhibit F to the Consent Order for a period commencing February 28, 1997 and ending February 28, 1999 (collectively the "Sell-Off Stamps").<sup>[3]</sup> (Consent Order ¶ E(i)). However, Defendants may sell the Sell-Off Stamps "only to persons who, according to [Defendants'] records, are members of the Beatles/Lennon Club by reason of purchase of stamps other than the Sell-Off Stamps ..." *Id.*

The Beatles/Lennon Club is comprised of people who: (1) have previously purchased a Beatles or John Lennon stamp from Defendants; and (2) are currently enrolled in Defendants' "new issue service." The "new issue service" is a service that periodically ships new stamps to a customer on a "keep or return basis." When a person purchases a Beatles or John Lennon stamp, Defendants assign that person a VIP number. If that person joins the new issue service, Defendants enroll that person in the Beatles/Lennon Club and sends a letter welcoming her to the club.

### C. ICS

ICS uses more than seventy toll-free telephone numbers for marketing to new customers and three toll-free telephone numbers for marketing to existing customers. ICS provided a club membership toll-free telephone number (1-800-606-3490) exclusively to persons who were enrolled in one of ICS's clubs<sup>[4]</sup> dedicated to a celebrity or famous person. Club members received that number with their membership package. This telephone number is not printed on any other material or advertised to the general public.

### D. The Fact Booklets

Defendants publish and distribute booklets containing information about certain celebrities with the sale of certain stamps. These are known as "99 facts booklets." At issue are two versions of these 99 facts booklets: one entitled "99 Little Known Facts About John Lennon and Groucho Marx" (the "Lennon/Marx Fact Book") and one entitled "99 Little Known Facts About John Lennon" (the "Lennon Fact Book"). Defendants included the Lennon Fact Book free with each shipment of Lennon Stamps, and the Lennon/Marx Fact Book free with each shipment of a stamp depicting both John Lennon and Groucho Marx (the "Lennon/Marx Stamp"). \*461 Customers were entitled to keep the free booklets even if they returned the Stamps.

During the course of negotiating the Lennon License, Defendants' counsel submitted to Dorothy Weber, counsel for the Lennon Estate, an ICS advertisement for the Lennon/Marx Stamp for the Lennon Estate's approval. The advertisement referred to a "99 facts booklet." Since Ms. Weber had never seen the booklet referred to in the advertisement, on May 2, 1997, she advised Defendants' counsel that Defendants must submit this booklet for review and approval. However, as of May 30, 1997, when the parties executed the Lennon License, Defendants had not yet sent Ms. Weber a copy of the Lennon Fact Book or the Lennon/Marx Fact Book.

On or about August 1, 1997, Mrs. Lennon provided Ms. Weber with a copy of the Lennon Fact Book. Mrs. Lennon had received it from a fan named Lisa Adams. Ms. Adams was upset about certain statements in the Lennon Fact Book which she believed were false. Ms. Weber telephoned Defendants' attorney, Bradford J. Badke. She told him that a fan had sent the booklet to Mrs. Lennon, and that Mrs. Lennon was very upset about information contained in the Lennon Fact Book. Ms. Weber advised Mr. Badke that she had never seen the Lennon Fact Book nor had she approved it for distribution. Ms. Weber pointed to two of the statements in the Lennon Fact Book which were particularly offensive: one which implied Mrs. Lennon had experienced a miscarriage as a result of physical abuse by John Lennon, and another which stated that John Lennon and Mrs. Lennon were both heroin addicts.

Following their conversation, Ms. Weber wrote to Mr. Badke requesting that he immediately provide copies of any and all advertising and promotional materials as provided for in paragraph 3 of the License Agreement. Mr. Badke replied that "ICS inadvertently continued" to distribute the booklet "after the execution of the license agreement on the mistaken belief that the booklet had been approved." (Weber Aff., Ex. 5, Letter from Badke to Weber of 8/1/97). Mr. Badke added that "ICS [will] immediately cease sending the booklet to customers." *Id.* He also wrote that "[c]onsistent with your earlier letter of today, ICS

will send to you copies of all advertising and promotional material relating to the licensed stamps."<sup>[5]</sup> *Id.*

A few days later, ICS's president, John Van Emden, sent Ms. Weber a package of materials along with a cover letter, which referred to the material he was sending as "packaging and promotional material related to [ICS's] sales of Lennon stamps for your review and approval." (Weber Aff., Ex. 6, Letter from Van Emden to Weber of 8/5/97). Mr. Van Emden's letter referenced the enclosed Lennon Fact Book and the New Issue Alert.<sup>[6]</sup> Mr. Van Emden reiterated Mr. Badke's prior statement that the Lennon Fact Book "is NOT being used now pending your review." *Id.*

Mr. Van Emden did not include the Lennon/Marx Fact Book in his package. At the time Ms. Weber was not aware that there were two versions of the 99 facts booklets so she did not realize that Mr. Van Emden had not submitted the Lennon/Marx Fact Book for approval.

## **E. Investigation Into Defendants' Compliance With the Consent Order<sup>[7]</sup>**

462 Ms. Weber never replied to Mr. Van Emden's letter regarding the materials which \*462 were submitted for approval. The New Issue Alerts, which Mr. Van Emden included in the package of promotional materials submitted for approval, referred to two different prices for Sell-Off Stamps: one for Beatles/Lennon Club members and one for nonmembers even though the Consent Order prohibited the sale of Sell-Off Stamps to nonmembers. On August 11, 1997, prior to the running of the seven day period for the Lennon Estate to approve the materials, Ms. Weber telephoned an ICS "800" number. The ICS sales representative took her order for Sell-Off Stamps even though she was not a member of ICS's Beatles/Lennon Club and had never before purchased stamps from ICS.

That same day Ms. Weber instructed her secretary, Lisa Ann Ruggeri, to call ICS. Ms. Weber wanted to determine whether her secretary could purchase Sell-Off Stamps despite the fact that she was not a member of any ICS club. Ms. Weber also asked Ms. Ruggeri to ask Joshua Glick<sup>[8]</sup> to call ICS to see if he could purchase Sell-Off Stamps from ICS even though he was not a member of any ICS club. Subsequently, Plaintiffs' counsel, Gold, Farrell & Marks, hired private investigators, the James Mintz Group, to telephone ICS to determine whether, as nonmembers, they could purchase Sell-Off Stamps.

### **1. Sale of Sell-Off Stamps to Dorothy Weber**

On August 11, 1997, Ms. Weber dialed the telephone number (1-800-606-3490) which appeared on a New Issue Alert and posed as a consumer. She used her married name, Dorothy Meltzer, and referred the sales representative to the New Issue Alert designated "JL5." Ms. Weber stated that she wished to order certain stamps for her husband who was a John Lennon fan who had seen the stamps. When the sales representative advised Ms. Weber of the price, Ms. Weber questioned why it was higher than the price listed in the New Issue Alert. The sales representative replied that club members received a lower price.

Ms. Weber received her order from ICS which included two different Sell-Off Stamps — LB19 and TB9. (See Weber Aff. ¶ 10 and Ex. 9; LiCalsi Aff. ¶ 11 and Ex. F). ICS charged her the higher, non-member price.

### **2. Sale of Sell-Off Stamps to Lisa Ann Ruggeri**

On August 11, 1997, Ms. Ruggeri called ICS, on behalf of Plaintiffs, to determine whether she could order Sell-Off Stamps. She dialed the telephone number listed on the New Issue Alerts that Ms. Weber had shown her. Ms. Ruggeri was not a member of the Beatles/Lennon Club, and had never purchased stamps from Defendants before that time.

In placing her order, Ms. Ruggeri stated that she had seen certain Beatles stamps that a friend had, that she had been given a copy of a New Issue Alert from her friend and that she now wished to purchase two specific stamps referenced in the New Issue Alert. The ICS sales representative then suggested that Ms. Ruggeri order two additional Sell-Off Stamps (about which Ms. Ruggeri had not asked). The sales representative asked Ms. Ruggeri if she was a Beatles/Lennon Club member. Ms. Ruggeri advised the sales representative that she was not. The sales representative told her that since she was not a club member she could not get the stamps at the member's price.

Ms. Ruggeri received her order from ICS which included three different Sell-Off Stamps — LB8, LB9 and LB24. (See Ruggeri

Aff. ¶ 7 and Ex.; LiCalsi Aff. ¶ 11 and Exs. E and F). ICS charged her the higher, non-member price.

### **3. Sale of Sell-Off Stamps to Joshua Glick**

463 In August 1997, Joshua Glick called ICS, on behalf of Plaintiffs, to determine whether he could order Sell-Off Stamps. Mr. Glick \*463 called the club telephone number which appeared on a New Issue Alert and requested specific stamps. He was not a member of ICS's Beatles/Lennon Club, and had never purchased stamps from ICS before that time. When placing his order, the sales representative asked Mr. Glick if he was a Beatles/Lennon Club member, and he answered that he was not. Mr. Glick purchased Sell-Off Stamps and subsequently received his order which included three different Sell-Off Stamps — LB15, MTB and GFB. (See Glick Aff. ¶ 4 and Ex.; LiCalsi Aff. ¶ 11 and Exs. E and F). ICS charged him the higher, nonmember price for his stamps.

### **4. Sale of Sell-Off Stamps to Jeffrey Mitnick**

On August 28, 1997, Amy Lippman, an associate at Gold, Farrell & Marks, counsel for Plaintiffs, called her husband Jeffrey Mitnick, Esq. and asked him to call ICS and order Beatles stamps. Mr. Mitnick obtained ICS's number (1-800-624-4427) from directory assistance. Mr. Mitnick was not a member of ICS's Beatles/Lennon club, and had never purchased stamps from ICS before that time.

When placing his order, Mr. Mitnick did not specify any particular stamp to the sales representative. He just said that he wished to purchase Beatles stamps. The sales representative suggested that Mr. Mitnick purchase a Sell-Off Stamp as part of a package of three stamps. Mr. Mitnick subsequently received his order which included the Sell-Off Stamp designated in the Consent Order as JLM. (See Mitnick Aff. ¶ 5 and Ex.; LiCalsi Aff. ¶ 11 and Ex. F). ICS charged him the higher, non-member price for his stamps.

### **5. Sale of Sell-Off Stamps to Thea Bournazian**

In September 1997, Thea Bournazian, a private investigator with the James Mintz Group, called ICS, on behalf of Plaintiffs, to determine whether she could order Sell-Off Stamps. In consultation with Plaintiffs' counsel, the James Mintz Group prepared a script which provided investigators with a description of the specific stamps they should order. The script provided ICS's general telephone number (1-800-235-1000). When Ms. Bournazian called that number, the sales representative told her that she had reached the number for Princess Diana stamps. Ms. Bournazian told the representative that she was a Beatles fan seeking to buy Beatles stamps. The sales representative put her on hold and returned with another telephone number for Ms. Bournazian to try (1-800-340-3666).

Ms. Bournazian called that number and advised the sales representative that she wished to purchase two specific Sell-Off Stamps. The sales representative indicated that those two stamps were no longer available. Ms. Bournazian then stated that she was a Beatles fan, and asked the sales representative if she "was sure" that she could not get them. After placing Ms. Bournazian on hold momentarily, the ICS sales representative returned to the line and took her order. Ms. Bournazian sent that telephone number (1-800-340-3666) to the other James Mintz investigators via electronic mail.

Ms. Bournazian subsequently received her order from ICS which included two different Sell-Off Stamps — LB24 and JL30. (See Bournazian Aff. ¶ 4 and Ex.; LiCalsi Aff. ¶ 11 and Ex. F). ICS charged her the higher, non-member price for her Stamps. Ms. Bournazian was not a member of the Beatles/Lennon Club, and had never purchased stamps from ICS before that time.

### **6. Sale of Sell-Off Stamps to Anne Murray**

In September 1997, Anne Murray, a private investigator with the James Mintz Group, called ICS, on behalf of Plaintiffs, to see whether she could order Sell-Off Stamps. She used the number Ms. Bournazian had sent her.

464 In placing her order, Ms. Murray initially inquired whether ICS had a particular stamp which featured John Lennon and Paul McCartney playing guitars. This stamp is not a Sell-Off Stamp. The sales representative advised Ms. Murray that this stamp

was not available. The representative then suggested that Ms. Murray order a particular set of John Lennon stamps which she proceeded \*464 to describe. This was a set which included Sell-Off Stamp "JLM". The ICS representative did not ask Ms. Murray if she was a member of the Beatles/Lennon Club. Ms. Murray did not place an order during that phone call, but called again later that day and asked to speak with the same sales representative she had spoken to earlier. The sales representative took her order.

Ms. Murray subsequently received her order which included the Sell-Off Stamp designated as "JLM" in the Consent Order. (See Murray Aff. ¶ 4 and Ex.; LiCalsi Aff. ¶ 11 and Ex. F). Ms. Murray was not a member of ICS's Beatles/Lennon Club, and had never purchased stamps from ICS before that time. ICS charged her the higher, non-member price for her stamps.

## **7. Offer of Sell-Off Stamps to Lolita Homer**

On September 15, 1997, Lolita Homer, a researcher with the James Mintz Group, called the ICS, on behalf of Plaintiffs, to determine whether she could order Sell-Off Stamps. She used the telephone number Ms. Bournazian had sent to the James Mintz investigators. Ms. Homer was not a member of the Beatles/Lennon Club, and had never purchased stamps from ICS.

Ms. Homer inquired as to the availability of a particular stamp and the ICS sales representative told her that it was not available. The ICS sales representative then offered her several Beatles stamps including the Sell-Off Stamp labeled TB9. The ICS sales representative never asked Ms. Homer if she was a member of the Beatles/Lennon Club.

Ms. Homer declined to order that Sell-Off Stamp because she was not sure that Plaintiffs wanted that stamp. She did, however, call ICS back the following day to order the TB9 Sell-Off Stamp, but the sales representative who answered told her that it was sold out.

## **8. Unsuccessful Attempts to Obtain Sell-Off Stamps**

Two other investigators with the James Mintz group, Nancy Reckler and Douglas Chrisholm, called ICS attempting to purchase Sell-Off Stamps. Ms. Reckler requested the Lennon/Marx Stamp but the sales representative told her that ICS no longer handled that stamp. Mr. Chrisholm called ICS twice. The first time he dialed the wrong number. The second time he called, he reached ICS and requested Sell-Off Stamp TB9. However, the sales representative told him that ICS no longer had Beatles stamps and would not be receiving any more.

## **9. Total Sales of Sell-Off Stamps**

At least six different sales representatives answered the calls made by Plaintiffs' investigators. These sales representatives sold ten different kinds of Sell-Off Stamps to Plaintiffs' investigators even though none of them were club members.

## **F. Mrs. Lennon's Termination of the Lennon License**

Two of the people who called ICS, on behalf of Plaintiffs, Mr. Mitnick and Ms. Murray, received the Lennon/Marx Fact Book along with their order of Stamps. ICS never submitted the Lennon/Marx Fact Book to Ms. Weber for Mrs. Lennon's review and approval. The Lennon/Marx Fact Book contains 50 facts which are virtually identical to facts found in the Lennon Fact Book to which Mrs. Lennon had previously objected, and which Mr. Badke and Mr. Van Emden each indicated in separate letters that ICS had ceased distributing.

After receiving evidence that ICS was distributing the Lennon/Marx Fact Book, Ms. Weber sent a termination letter to Defendants which stated in relevant part:

As you are aware, on August 1, 1997, we determined that you were disseminating John Lennon materials which had not been approved. Notwithstanding that such conduct is a breach not subject to cure (see paragraph 13(b)), we gave you an opportunity to cure based on written representation by your counsel on August 1, 1997 and your written representation on August 5, 1997 that all distribution of the offending material had ceased. Despite such assurance, you have continued to violate the \*465 express provisions of paragraph "3" by

distribution of materials not approved.

This letter shall serve as notice that the Agreement is hereby terminated, effective immediately and that you have no continuing right to sell off inventory.

(Letter from Weber to ICS of 9/24/97).

## **G. ICS's Purchase of Stamps from IGPC**

Paragraph 1(f) of the Lennon License provides that Defendants have the right to purchase stamps from International Governmental Philatelic Corporation ("IGPC"), the Lennon Estate's prior Licensee. Paragraph 1(f) further provides that Defendants may distribute and sell the IGPC stamps in accordance with the terms and conditions of the Lennon License as long as Defendants comply with all the terms and conditions of the License.

On or about August 5, 1997, Defendants purchased stamps from IGPC for resale and distribution at a purchase price of \$78,000. Pursuant to paragraph 1(f) of the Lennon License, Defendants' resale of these stamps would be subject to all of the terms of the License, including its royalty provisions. (See Lennon License ¶ 1(f)). The royalty structure set forth in the Lennon License provides that Defendants would pay the Lennon Estate a royalty of 15% of Defendants' purchase cost of the stamps or 10% of its profits from the sale of the stamps, whichever is greater. (Lennon License ¶ 6(a)). The License further provides that at signing, Defendants must pay the Lennon Estate a minimum of \$55,000 (\$40,000 of which is recoupable against royalties). *Id.* ¶ 6(b). Thus, the smallest royalty Defendants would owe the Lennon Estate from its purchase of stamps from IGPC would be 15% of \$78,000, or \$11,700, with such royalty being recoupable against Defendants' minimum guarantee of \$40,000. *Id.* ¶ 6(b)(ii).

About a week or two after ICS paid the Lennon Estate the \$55,000, one of the lawyers for the Lennon Estate, Peter Shukat, informed Defendant Tilson that Defendants and IGPC must pay the Lennon Estate an additional \$30,000 in order to purchase stamps from IGPC pursuant to paragraph 1(f) of the Lennon License. Defendant Tilson advised Mr. Shukat in various telephone conversations that such payment was contrary to the terms of the Lennon License. Defendant Tilson and Mr. Shukat had a series of very tense telephone conversations in June and July concerning the IGPC payment in which Mr. Shukat made it clear that he did not wish to do business with Defendants.

Mr. Shukat and Defendant Tilson discussed the IGPC payment over a period of two months. The agreement they ultimately reached provided that in lieu of the royalty structure provided for in the Lennon License, ICS would make a one-time payment of \$7,500. This one-time payment would not be recoupable against the minimum guarantee of \$40,000. In order to benefit from this arrangement, ICS would have to sell enough stamps (other than IGPC stamps) to satisfy its minimum royalty of \$40,000 in the first year. However, subject to ICS's risk of not recouping its minimum guarantee against sales of other stamps, ICS would save at least \$4,200 (\$11,700 minus \$7,500) on royalties payable to the Lennon Estate for purchase of the stamps from IGPC.

IGPC paid the Lennon Estate \$13,000 in connection with the sale of the IGPC Stamps.

## **DISCUSSION**

### **I. PLAINTIFFS' MOTION FOR CONTEMPT**

#### **A. Contempt**

A party is liable for civil contempt where (1) a valid court order existed, (2) defendant had knowledge of the order, and (3) defendant disobeyed the order. Harris v. City of Philadelphia, 47 F.3d 1311, 1326 (3d Cir.1995); Roe v. Operation Rescue, 54 F.3d 133 (3d Cir.1995). In this Circuit "absent extraordinary reasons, such as fraud or impossibility" failure to obey a court judgment constitutes contempt. Harley-Davidson, Inc. v. Morris, 19 F.3d 142, 146 (3d Cir.1994). "Willfulness is not a necessary element of civil contempt" and "good faith is not a defense to civil contempt." Robin Woods Inc. v. Woods, 28 F.3d 396, 398 (3d Cir.1994); see also Harley-Davidson, 19 F.3d at 148 (evidence \*466 of good faith does not bar conclusion that defendant acted in contempt of consent judgment); CBS Inc. v. Pennsylvania Record Outlet, Inc., 598 F.Supp. 1549, 1557 (W.D.Pa.1984)

("behavior may be construed as contemptuous even in the absence of wilfulness") (citing *McComb v. Jacksonville Paper Company*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949)).

Civil contempt is a "severe remedy." *Nelson Tool & Mach. Co. v. Wonderland Originals, Ltd.*, 491 F.Supp. 268 (E.D.Pa. 1980) (quoting *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 5 S.Ct. 618, 28 L.Ed. 1106 (1885)). The petitioner in a civil contempt proceeding must prove a violation of the Court's order by "clear and convincing evidence." *Robin Woods*, 28 F.3d at 399 (citations omitted); *Harley-Davidson*, 19 F.3d at 146. "[W]here there is ground to doubt the wrongfulness of the conduct," a court will not adjudge a party in contempt. *Robin Woods*, 28 F.3d at 399 (citations omitted).

## **B. Violation of Paragraph A of the Consent Order**

Plaintiffs allege that Defendants violated Paragraph A of the Consent Order by distributing the Lennon Fact Book and the Lennon/Marx Fact Book. The Court agrees.

Paragraph A of the Consent Order prohibits "distributing ... postage stamps or any other product ... bearing or referring to: (i) the name and/or likeness of ... John Lennon ..." Both booklets feature John Lennon's name and likeness on the front page.

Defendants argue that the fact booklets are not "products" under the Consent Order. Defendants contend that the plain and ordinary meaning of the word "products" within the context of the Consent Order is merchandise that is sold such as stamps or coins. Defendants assert that since the Lennon Fact Book and the Lennon/Marx Fact Book are included free with each shipment of the Lennon or Lennon/Marx Stamps, they are not "products". This argument is without merit.

Paragraph A of the Consent Order prohibits Defendants from "distributing, selling or otherwise disposing of or exploiting in any manner, postage stamps or any other product, including, but not limited to, coins, bearing or referring to: (i) the name and/or likeness of ... John Lennon ..." The express language of Paragraph A is unequivocal; the term "products" does not pertain only to items that are sold. Paragraph A prohibits "distributing, selling or otherwise disposing of ..." Furthermore, Paragraph A clearly refers to products other than stamps or coins. It prohibits distributing "postage stamps or any other product, including, but not limited to, coins ..."

The Consent Order does not define the term "products"; therefore, the Court must look to the plain meaning of the term. The dictionary defines "product" as "something produced". *Merriam-Webster's Collegiate Dictionary* 930 (10th ed.1996). Therefore, the fact booklets are clearly "products."

The Court entered the Consent Order on June 19, 1997. Mrs. Lennon received the Lennon Fact Book sometime after the parties executed the Consent Order. Defendants' attorney admitted that Defendants continued distributing the Lennon Fact Book after the execution of the Lennon License and the Consent Order, albeit inadvertently. (Letter from Badke to Weber of 8/1/97). Two of Plaintiffs' investigators, Mr. Mitnick and Ms. Murray, received the Lennon/Marx Fact Book on September 2 and 16, 1997, respectively, with their orders of the Lennon/Marx Stamp. It is evident that Defendants continued distributing both fact booklets after they entered into the Consent Order and after they told Ms. Weber that they were not distributing the fact booklets pending review and approval from the Lennon Estate. Since the Lennon Estate did not approve the fact booklets within seven days of receipt, they were deemed disapproved. (See Lennon License ¶ 3(a)(i)). Accordingly, Defendants violated Paragraph A of the Consent Order.

## **C. Violation of Paragraph B of the Consent Order**

467 Plaintiffs asserted for the first time in their Proposed Findings of Fact and Conclusions \*467 of Law violations of Paragraph B of the Consent Order. Since Plaintiffs did not provide Defendants with proper notice of these claims, the Court will dismiss these assertions.

## **D. Violation of Paragraph D of the Consent Order**

Plaintiffs claim that Defendants violated Paragraph D of the Consent Order by distributing the Lennon Fact Book and the Lennon/Marx Fact Book without approval from the Lennon Estate.<sup>91</sup> The Court agrees.

Paragraph D of the Consent Order provides that Defendants may continue to sell Lennon Stamps only "in accordance with the express terms" of the Lennon License. The Lennon License requires that Defendants submit for approval "promotional material which incorporates Licensor's Trademarks ... which is intended to be used in conjunction with the sale or distribution of" Lennon Stamps. (Lennon License ¶ 3(a)(i)).

### **(a) Promotional Material**

Defendants contend that the Lennon Fact Book and the Lennon/Marx Fact Book do not constitute promotional material and hence they were not required to obtain approval before distributing them. In support of their argument, Defendants note that customers received the booklets as a gift without being aware of the gift when they placed their order for stamps.

The term "promotional" is not defined in the Consent Order or the Lennon License so the Court will look to the dictionary for guidance.<sup>[10]</sup> The dictionary defines "promotional" as "the furtherance of the acceptance and sale of merchandise through advertising, publicity, or discounting." *Merriam-Webster's Collegiate Dictionary* 933 (10th ed.1996).

Defendants distributed the booklets free with the purchase of Lennon stamps as an incentive to increase sales of stamps and to induce customers to continue purchasing stamps from them in the future. Therefore, the fact booklets are promotional material.<sup>[11]</sup>

### **(b) Licensor's Trademarks**

Exhibit A to the Lennon License provides that "Lennon and John Lennon are trademarks of the Lennon Estate." However, Defendants assert that the Lennon Fact Book and the Lennon/Marx Fact Book do not incorporate Licensor's Trademarks.

Defendants argue that the use of the phrase in Exhibit A "Lennon and John Lennon are trademarks of the Lennon Estate" is not the definition of "Licensor's Trademarks." Defendants claim that the term "Licensor's Trademarks" refers to the registered trademark of the stylized John Lennon signature referred to in the Consent Order. The Court finds Defendants' argument unpersuasive.

The Lennon License does not reference any other definition of "trademarks" other than the attached Exhibit A. It does not reference the Consent Order. The Lennon License refers to more than one trademark; it specifically reads "Licensor's Trademarks." \*468 Exhibit A refers to the plural form.<sup>[12]</sup> In light of the language of Exhibit A and the use of the plural form in the Lennon License, the Court finds that "Licensor's Trademarks" includes the names "Lennon" and "John Lennon" as incorporated on the first page of the Lennon Fact Book and the Lennon/Marx Fact Book.

Consequently, Defendants' distribution of the Lennon Fact Book and the Lennon/Marx Fact Book, without approval from the Lennon Estate, violated paragraph 3 of the Lennon License and by extension, paragraph D of the Consent Order.

## **E. Violation of Paragraph E of the Consent Order**

Plaintiffs allege that Defendants violated Paragraph E of the Consent Order by selling Sell-Off Stamps to Plaintiffs' investigators even though they were not Beatles/Lennon Club members.

Paragraph E of the Consent Order provides that Defendants may not sell the Sell-Off Stamps to anyone other than members of the ICS Beatles/Lennon Club. ICS has computerized records of all Beatles/Lennon Club members and of each purchase made by that customer. Every time a customer calls, the sales representative must look up that customer's record. Thus, each of the sales representatives who took Plaintiffs' investigators' orders knew or should have known that none of the investigators were Beatles/Lennon Club members, as none of them had any record of membership or prior purchase. Additionally, at least half of Plaintiffs' investigators specifically advised the sales representatives that they were not Beatles/Lennon Club members. Furthermore, the ICS representatives charged all of Plaintiffs' investigators the higher, non-member price because they were not Beatles/Lennon Club members.

## **Substantial Compliance**



Defendants assert as a defense that they have substantially complied with the terms of Paragraph E and the rest of the Consent Order. The Third Circuit has found that "[t]here is general support for the proposition that a defendant may not be held in contempt as long as it took all reasonable steps to comply." *Harris*, 47 F.3d at 1324 (citations omitted). "If a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." *Robin Woods, Inc.*, 28 F.3d at 400 (quoting *General Signal Corp. v. Donalco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986)).

Defendants have testified that they took reasonable steps to ensure that only Beatles/Lennon Club members could purchase Sell-Off Stamps. Defendants claim that they: (1) instructed their sales representatives to sell the Sell-Off Stamps only to Beatles/Lennon Club members; (2) ceased advertising or promoting the Sell-Off Stamps; (3) removed all promotional literature depicting the Sell-Off Stamps from the sales representatives; and (4) made the Sell-Off Stamps available for sale only through the in-house club telephone line. (Van Emden Aff. ¶¶ 5-11, 18-23; Flowers Aff. ¶¶ 3-4). However, some sales representatives must have had literature about the Sell-Off Stamps because three different sales representatives suggested specific Sell-Off Stamps to three of Plaintiff's investigators — Mr. Mitnick, Ms. Murray and Ms. Homer. See *supra* pp. 463-464. Furthermore, Mr. Mitnick did not call the club telephone line. He obtained ICS's telephone number from directory assistance. The James Mintz investigators dialed the number an ICS telemarketer gave Ms. Bournazian. It is evident that Plaintiffs' investigators were able to order Sell-Off Stamps even though they did not have the in-house club telephone number.

469 Even if this Court were to find that Defendants substantially complied with Paragraph E of the Consent Order, it would nevertheless have to enforce the remedies Defendants stipulated to in Paragraph O of the Consent Order. "Consent decrees are interpreted under ordinary contract law principles." *Harris*, 47 F.3d at 1323 (citing *Fox v. United States Dep't. of Hous. & Urban Dev.*, 680 F.2d 315, 319 (3d Cir.1982)) ("Although consent decrees are judicial acts, they have many of the attributes of contracts voluntarily undertaken"); see also *Harley-Davidson*, 19 F.3d at 148 (consent judgment is to be interpreted as a contract, to which the governing rules of contract interpretation apply). "The agreement memorializes the bargained for positions of the parties and should be strictly construed to preserve those bargained for positions." *Halderman v. Pennhurst State School & Hosp.*, 901 F.2d 311, 319 (3d Cir.1990).

Paragraph O of the Consent Order provides that breach of "any provision" of paragraphs A through I or K through L entitles Plaintiffs to an injunction barring Defendants from selling any further stamps. Whether Defendants substantially complied is not relevant because the plain language of the Consent Order dictates the remedies in the event that Defendants violate "any provision". Here, Plaintiffs bargained for language which specifically avoids the necessity of an inquiry into the degree of neglect or willfulness involved, and affords them clear remedies based solely on breach (intentional or negligent) of "any provision" of specified paragraphs of the Consent Order. The Court must "strictly construe" the Consent Order to preserve those "bargained for positions." *Halderman*, 901 F.2d at 318; see also *Harris*, 47 F.3d at 1323 (enforcing plain language of consent decree providing for the imposition of stipulated penalties).

In addition to the consideration of Paragraph O, the evidence is such that this Court cannot logically conclude that Defendants substantially complied with the Consent Order. The violation of Paragraph E is beyond serious dispute.

## F. Sanctions

Defendants have violated Paragraphs A, D and E of the Consent Order. Paragraph O of the Consent Order entitles Plaintiffs to an injunction barring Defendants from selling any further stamps; therefore, the Court must and shall enforce this remedy.

Paragraph O of the Consent Order also provides that Defendants "agree to reimburse plaintiffs for all their costs, including reasonable attorneys' fees incurred in connection with any successful action or proceeding brought by plaintiffs to enforce their rights under this Order." Based on the plain language of Paragraph O, the Court must award costs, including reasonable attorneys' fees, to Plaintiffs.

## II. DEFENDANTS' MOTION TO DISSOLVE THE CONSENT ORDER

Defendants seek to dissolve the Consent Order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Defendants claim that the Lennon Estate breached the Lennon License and the implied covenant of good faith and fair dealing by: (1) extorting money from Defendants in connection with the IGPC Stamps; (2) withholding approval of the Lennon Fact Book, the

Lennon/Marx Fact Book and the New Issue Alerts; (3) terminating the Lennon License; (4) testing Defendants' compliance with the Consent Order; and (5) bringing the contempt motion in bad faith. Defendants assert that this breach justifies setting aside the Consent Order.

Rule 60(b) provides in relevant part:

[T]he Court may relieve a party ... from a[n] ... order ... for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party ... (5) ... it is no longer equitable that the judgment should have a prospective application; or (6) any other reason justifying relief from the operation of judgment.

Fed.R.Civ.P. 60(b).

The United States Supreme Court has "stressed that a district court should [set aside a judgment pursuant to Rule 60(b)] only in extraordinary circumstances." *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982) (citing *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950)). "This Circuit has consistently held that in order to grant a motion under Rule 60(b)(6), the movant must allege and prove such extraordinary circumstances as will be sufficient to overcome [the Court's] overriding interest in the finality of judgments." \*470 *Wilson*, 684 F.2d at 251 (internal quotations and citations omitted); see also *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 976, 981 (3d Cir.1982). The party seeking to set aside a judgment or order must show that "without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir.1993).

Defendants claim that the Lennon Estate's purported breaches of the Lennon License justify setting aside the Consent Order. The Third Circuit has held that breach of a settlement agreement does not constitute "extraordinary circumstances" under Rule 60(b)(6) justifying setting aside an order because a breach of a settlement agreement gives the aggrieved party the right to file a separate action on the agreement. *Sawka*, 989 F.2d at 140. Therefore, even if the Lennon Estate breached the Lennon License, Defendants merely have the right to pursue a separate action for breach of the License, but not a Rule 60(b)(6) motion. *Id.*<sup>[13]</sup> In any event, this argument is moot since Defendants have failed to show that the Lennon Estate breached the Lennon License or the Consent Order.

## **A. Implied Covenant of Good Faith and Fair Dealing**

Implied in every contract is the requirement that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of a contract." Williston on Contracts, Third Ed. § 670 (1961); see also *Tagare v. NYNEX Network Sys., Co.*, 921 F.Supp. 1146 (S.D.N.Y.1996). This concept is known as the implied covenant of good faith and fair dealing.

Defendants claim that the Lennon Estate breached the implied covenant of good faith and fair dealing by: (1) extorting additional payments from ICS in connection with the purchase of stamps from IGPC; (2) unreasonably withholding approval of the submitted materials; (3) terminating the Lennon License; (4) attempting to provoke Defendants' breach of the Consent Order; and (5) bringing a motion for contempt. The Court will address each allegation separately.

### **1. Defendants' Claim of Extortion**

Defendants claim that the Lennon Estate breached the Lennon License because their counsel, Mr. Shukat, attempted to extract additional payments from Defendants in connection with Defendants' purchase of stamps from IGPC. Defendants claim that they only agreed to pay the Lennon Estate \$7,500 in lieu of the royalty structure set forth in the Lennon License to save their relationship with the Lennon Estate. The Court finds that the Lennon Estate did not extort money from Defendants.<sup>[14]</sup>

Defendants' agreement to pay the Lennon Estate \$7,500 in lieu of \$11,700 in royalties was the product of two months of negotiations. The Lennon Estate obtained the \$7,500 payment but in exchange, Defendants saved \$4,200 in royalties that they would have had to pay under Paragraph 6(a) of the Lennon License. Defendant Tilson admitted that the agreement was a "business deal" which resulted from telephone "negotiations" and that ICS could benefit financially from the deal. (Jan. 13, 1998 Tr. at 72:23-24; \*471 98:2-22). Furthermore, Defendants had counsel available to them at all relevant times during negotiation

of the \$7,500 payment. In fact, prior to the consummation of the deal, Defendants' counsel spoke with Mr. Shukat directly regarding the IGPC stamps.

## **2. Approval of Materials Submitted by Defendants**

Defendants claim that the Lennon Estate breached the Lennon License by unreasonably withholding approval of the materials that Defendants sent to Ms. Weber on August 5, 1997.

Pursuant to the terms of the Lennon License, the Lennon Estate may not unreasonably withhold approval of promotional materials. (Lennon License ¶ 3(a)(i)). The Lennon Estate did not approve the materials because shortly after Defendants submitted them, Ms. Weber, Ms. Ruggeri and Mr. Glick telephoned ICS and were able to place orders for Sell-Off Stamps even though they were not members of the Beatles/Lennon Club. Thus, the Lennon Estate had reason to believe that Defendants were violating the Consent Order. It was not unreasonable for the Lennon Estate to withhold approval of Defendants' materials when it was believed that Defendants were violating the Consent Order.

Furthermore, the Lennon Fact Book and the Lennon/Marx Fact Book contain several scandalous and defamatory statements about John Lennon and Mrs. Lennon. Mrs. Lennon had expressed her disapproval of the Lennon Fact Book, based on these inaccuracies. Therefore, Mrs. Lennon's disapproval of the Lennon Fact Book was reasonable and did not evidence bad faith.

## **3. Termination of the Lennon License**

Defendants claim that the Lennon Estate had no basis for terminating the Lennon License based on Defendants' distribution of the Lennon Fact Book and the Lennon/Marx Fact Book. As shown in *supra* Part I.D, the Lennon Fact Book and the Lennon/Marx Fact Book were "promotional material which incorporates Licensor's Trademarks" (see Lennon License ¶ 3(a)(i)) and hence Defendants were required to obtain approval prior to their distribution. Defendants did not obtain the required approval; consequently, they breached Paragraph 3 of the Lennon License.

Paragraph 13(b) of the Lennon License provides that a breach of Paragraph 3 is "non-curable" and grounds for termination. Accordingly, the Lennon Estate had the right to terminate the Lennon License.<sup>[15]</sup>

## **4. Testing Compliance**

Defendants assert that Plaintiffs, through Ms. Weber, persons acting under her direction and the James Mintz investigators, provoked Defendants' breach of Paragraph E of the Consent Order prohibiting the sale of Sell-Off Stamps to persons who were not members of the Beatles/Lennon Club. Defendants contend that Plaintiffs' investigators used misrepresentation, intimidation and unethical conduct in testing Defendants' compliance with Paragraph E.

Defendants have not produced a scintilla of evidence demonstrating that Plaintiffs' investigators intimidated ICS's sales representatives into selling them Sell-Off Stamps or provoked Defendants' breach of the Consent Order. Furthermore, as discussed *infra* Part III, the misrepresentations made by Plaintiffs' counsel and investigators were necessary to discover Defendants' violations of the Consent Order and did not constitute unethical behavior.

## **5. Contempt Motion**

Defendants argue that Plaintiffs brought their motion for contempt in bad faith and this justifies setting aside the Consent Order pursuant to Rule 60(b). Defendants have not submitted any evidence showing that Plaintiff brought their contempt motion in bad faith. Moreover, pursuant to Paragraph O of \*472 the Consent Order, Plaintiffs had a right to bring an action to enforce their rights after they discovered that Defendants had breached "any provision" of the Consent Order. Finally, this Court's resolution of the motion seeking a finding of civil contempt belies a finding of bad faith.

## **B. Injustice to Defendants**

Defendants argue that they will suffer gross injustice if the Court does not set aside the Consent Order because they no longer derive any benefit from it. Defendants assert that they entered into the Consent Order in exchange for the exclusive Lennon License. Since the Lennon Estate terminated the Lennon License, the consideration which induced them to enter into the Consent Order no longer exists.

Defendants have paid Plaintiffs \$97,500 and executed notes for an additional \$140,000 payable over the next four years. When Plaintiffs filed their contempt motion in September 1997, Defendants voluntarily ceased sales of all stamps which they were allowed to sell under the Consent Order. Their right to sell certain of those stamps expired on February 28, 1998. Defendants spent \$78,000 to purchase additional Lennon stamps from IGPC.<sup>[16]</sup> With the termination of the Lennon License, Defendants have no right to sell new stamps or to advertise any stamps to enable them to enroll additional Beatles/Lennon Club members to help them sell the Sell-off Stamps, which pursuant to the Consent Order they had a right to do until February, 1999.<sup>[17]</sup>

The parties agreed that a breach of Paragraph 3 of the Lennon License is non-curable and grounds for immediate termination. (See Lennon License ¶ 13(b)). Defendants breached Paragraph 3; therefore, the Lennon Estate had the right to terminate the Lennon License. The Court cannot set aside the Consent Order to avoid consequences resulting from Defendants' own breach.

### III. DEFENDANTS' MOTION FOR SANCTIONS

Defendants claim that Plaintiffs' counsel violated attorney disciplinary rules in connection with the purchase of Sell-Off Stamps by (1) speaking to ICS's sales representatives without the consent of ICS's counsel; and (2) not revealing to ICS's sales representatives that they were attorneys or persons acting under the direction of attorneys. Defendants claim this behavior violates three disciplinary rules: (1) the rule forbidding attorneys from engaging in deceitful conduct (Rule 8.4(c)); (2) the rule restricting attorneys from communicating with parties represented by counsel concerning the subject of the representation (Rule 4.2); and (3) the rule regarding an attorney's dealings with an unrepresented party (Rule 4.3). Both New York and New Jersey have disciplinary rules proscribing such behavior by attorneys.

#### A. Choice of Law

The parties disagree as to which jurisdiction's disciplinary rules apply. Defendants claim that since the parties are represented by counsel who practice principally in New York, the Court should apply the New York Rules of Professional Responsibility. Plaintiffs argue that New Jersey's Rules of Professional Conduct ("RPC") apply to counsels' conduct in a proceeding before the District of New Jersey.

Plaintiffs refer the Court to ABA Model Rules of Professional Conduct, Rule 8.5. New Jersey's version of Rule 8.5 provides that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The 1993 Amendment to ABA Model Rule 8.5 provides in part:

473 In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which a \*473 lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rule of the jurisdiction in which the court sits, unless the rules of the court provide otherwise ...

ABA Model Rule 8.5(b)(1). New Jersey has not yet adopted this 1993 amendment. However, when there is no controlling precedent in New Jersey regarding the application of a choice of law rule to a legal ethics case, the Court is empowered to fashion its own rule. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F.Supp. 148, 151 (D.N.J. 1995) (where neither New Jersey RPC 8.5 nor the New Jersey Supreme Court dictate which ethics rules the court should apply, the district court is authorized to fashion its own choice of law rule); see also L. Civ. R. 103.1(a).<sup>[18]</sup>

New Jersey's Rules of Professional Conduct apply to an attorney's conduct "in connection with a proceeding" in New Jersey, even if the conduct at issue took place outside of the jurisdiction and even if the attorney's practice is located outside of New Jersey. See *In re Prudential*, 911 F.Supp. at 151 (applying ABA Model Rule 8.5 and holding that it would enforce only New Jersey ethics rules to conduct in connection with a proceeding in New Jersey, "[a]lthough another jurisdiction may obviously exercise concurrent control over the members of its bar.").

Defendants argue that ABA Model Rule 8.5(b)(1) does not apply unless the proceeding is pending and there was no proceeding pending at the time of Plaintiffs' investigation. This argument is without merit. Rule 8.5(b)(1) applies to "conduct in connection with a proceeding" whether or not the proceeding is still pending. Furthermore, the conduct at issue was directly related to enforcement of the Consent Order over which this Court has continuing jurisdiction.<sup>[19]</sup>

## B. New Jersey RPC 4.2

New Jersey's attorney disciplinary rules prohibit an attorney from communicating with represented parties concerning the subject of the representation. RPC 4.2 states in relevant part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows or by the exercise of reasonable diligence should know to be represented by another lawyer in the matter including members of an organization's litigation control group as defined by RPC 1.13 unless the lawyer has the consent of the other lawyer, or is authorized by law to do so ...

RPC 4.2 (as amended effective September 1, 1996). RPC 1.13 states in relevant part:

For the purposes of RPC 4.2 ... the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for or significantly involved in the determination of the organization's legal position in the matter whether or not in litigation, provided however, that significant involvement requires involvement greater and other than the supplying of factual information or data respecting the matter.

The Comments to RPC 4.2 make it clear that the only persons represented by an entity's attorney are those that fall within the "litigation control group" as defined by RPC 1.13. See Pressler, Current N.J. Court Rules, Comment R.1:14[2] (Gann 1997) 474 ("The thrust \*474 of the amendments is to define the persons represented by the entity as its litigation control group.").<sup>[20]</sup>

RPC 4.2 "seeks to protect the lay person who may be prone to manipulation by opposing counsel." *Michaels v. Woodland*, 988 F.Supp. 468, 470 (D.N.J.1997). It was intended to "prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact." *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990); see also *Weider Sports Equipment Co., Ltd. v. Fitness First, Inc.*, 912 F.Supp. 502 (D.Utah 1996) (Rule 4.2 was designed to avoid "artful" legal questioning). "It is not the purpose of [RPC 4.2] to protect a corporate party from the revelation of prejudicial facts." *Weider*, 912 F.Supp. at 510. To read RPC 4.2 broadly

could prevent any pretrial inquiry that would gather evidence from an employee of an organization. In most instances, this would block acquisition of important evidence about corporate practices, e. g. civil right violations, age discrimination, improper corporate or labor practices, improper commercial practices, and frauds. This application of Rule 4.2 would preclude, prior to litigation, the gathering of the necessary factual information to determine if a valid claim for relief could be maintained and in its most exaggerated context leave a party without a factual basis to assert an avenue of redress.

*Id.* at 508; see also *Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437 (D.Colo.1996) (Rule 4.2 must "remain[] a rule of ethics, rather than of corporate immunity" and to read the rule expansively would "stifle[] the truth-seeking function of courts and treat[] corporate employees as a form of company property").

Defendants' sales representatives do not fall within the "litigation control group" as defined by RPC 1.13. The sales representatives were not "responsible for or significantly involved in the determination of [ICS]'s legal position in the matter." See RPC 4.2. Furthermore, to be part of the litigation control group, the sales representatives would have had to do more than merely "supply[] ... factual information or data respecting the matter" which they clearly did not do. *Id.* Since the sales representatives were "not within the litigation control group and ha[d] not obtained other representation, *ex parte* contact is permitted" under RPC 4.2.<sup>[21]</sup> *Michaels*, 988 F.Supp. at 472.

There is no evidence that any of Plaintiffs' investigators asked the sales representatives any questions about instructions given or received with regard to Beatles/Lennon stamps. Plaintiffs' investigators did not ask the sales representatives about

Defendants' practices or their own practices or policies with regard to Beatles/Lennon stamps. The sales representatives' communication with Plaintiffs' counsel and investigators were limited to recommending which stamps to purchase and accepting an order for Sell-Off Stamps. The investigators did not ask any substantive questions other than whether they could order the Sell-Off Stamps. The only misrepresentations made were as to the callers' purpose in calling and their identities. They posed as normal consumers. The investigator did not make any misrepresentation that he or she was a Beatles/Lennon Club member. In most instances, Plaintiffs' investigators told the sales representative that he or she was not a Beatles/Lennon Club member. Furthermore, Defendants charged all of Plaintiffs' investigators' the higher, non-member price for the Sell-Off Stamps.

475 RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn \*475 about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. See, e.g., *Weider*, 912 F.Supp. 502. Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate RPC 4.2.

### C. New Jersey RPC 8.4(c)

The attorney disciplinary rules prohibit an attorney from engaging in deceitful conduct. RPC 8.4(c) states that an attorney may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." RPC 8.4(c) is not by its terms limited only to material representations. It applies to lawyers not only when they are acting as lawyers but also when they are acting otherwise than in a lawyerly capacity. See David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers; An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 816 (1995).<sup>[22]</sup> However, RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes. *Id.* at 812, 816-18.

Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. *Id.* at 792-94. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. *Id.* at 794-795, 800; see also Green Declaration ¶ 7.<sup>[23]</sup> The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. (Green Declaration ¶¶ 6-7).

Courts which have addressed the issue have approved of attorneys' use of undercover investigators who pose as interested tenants to detect housing discrimination or as prospective employees to detect employment discrimination. See Isbell & Salvi, *supra*, 8 Geo. J. Legal Ethics at 799; *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir.1983) (observing that the evidence provided by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); see also *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir.1990); *Wharton v. Knefel*, 562 F.2d 550, 554 n. 18 (8th Cir.1977); *Hamilton v. Miller*, 477 F.2d 908, 909 n. 1 (10th Cir.1973).

Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling ICS directly and attempting to order the Sell-Off Stamps. If Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business.

476 Furthermore, the literal application of the prohibition of RPC 8.4(c) to any "misrepresentation" by a lawyer, regardless of its materiality, is not a supportable construction of the rule. The language of RPC 8.4(c) must be interpreted in the context of the statutory scheme of which it is a part. In \*476 this regard, it is significant to take note of RPC 4.1(a) which provides that "[i]n 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 ...". If the drafters of RPC 8.4(c) intended to prohibit automatically "misrepresentations" in all circumstances, RPC 4.1(a) would be entirely superfluous. As a general rule of construction, however, it is to be assumed that the drafters of a statute intended no redundancy, so that a statute should be construed, if possible, to give effect to its entire text. *U.S. v. Nordic Village*, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (it is a "settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect"); *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (it is

an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Commonwealth of Pennsylvania Dep't. of Pub. Welfare v. United States Dep't. of Health & Human Svcs.*, 928 F.2d 1378, 1385 (3d Cir.1991).

As stated by Mr. Isbell and Professor Salvi:

That principle [of statutory construction] would require that Rule 8.4(c) apply only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud, and deceit. In other words, it should apply only to grave misconduct that would not only be generally reprov'd if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person's fitness to be a lawyer. Investigators and testers, however, do not engage in misrepresentations of the grave character implied by the other words in the phrase [dishonesty, fraud, deceit] but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence.

Isbell & Salvi, *supra*, 8 Geo. J. Legal Ethics at 817. Accordingly, Plaintiffs' counsel and investigators did not violate RPC 8.4(c).

### **D. New Jersey RPC 4.3**

The attorney disciplinary rules also restrict an attorney's communications with an unrepresented party. New Jersey RPC 4.3 specifically provides protection for unrepresented employees. RPC 4.3 states that:

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 ...

It is clear from the language of RPC 4.3 that it is limited to circumstances where an attorney is acting in his capacity as a lawyer — "dealing on behalf of a client." See RPC 4.3, see also Isbell & Salvi, *supra*, 8 Geo. J. Legal Ethics at 824. Therefore, its prohibitions on allowing the unrepresented person to misunderstand that the lawyer is disinterested only apply to a lawyer who is acting as a lawyer. *Id.* at 825. Like RPC 4.2, RPC 4.3 was intended to prevent a lawyer who fails to disclose his role in a matter from taking advantage of an unrepresented third party. See *Michaels*, 988 F.Supp. at 470.

Plaintiffs' counsel and investigators in testing compliance were not acting in the capacity of lawyers. Therefore, the prohibitions of RPC 4.3 do not apply here. RPC 4.3 does not apply to straightforward transactions undertaken solely to determine in accordance with Rule 11 of the Federal Rules of Civil Procedure, the existence of a well-founded claim — in this case a claim of contempt.

Accordingly, Defendants' motion for sanctions is denied.

## **ORDER**

This matter having come before the Court on the motion for contempt of Gold, Farrell & Marks, counsel for plaintiffs Apple Corps Limited, MPL Communications, Inc., Yoko Ono Lennon as executrix of the estate of John Lennon, Subafilms, Ltd. and Yoko Ono Lennon (collectively "Plaintiffs"); and it appearing that the other motions before the Court are the motion for sanctions and the \*477 motion to dissolve the Consent Order of Dewey Ballantine, LLP, counsel for defendants International Collectors Society, John E. Van Emden, Scott L. Tilson, Jeffrey B. Franz and Howard E. Friedman (collectively "Defendants"); and the Court having considered the submissions of the parties; and good cause appearing;

IT IS on this 26th day of June, 1998,

ORDERED that Plaintiffs' motion for contempt pursuant to Paragraph O of the Consent Order is granted;

IT IS FURTHER ORDERED that Defendants' motion to dissolve the Consent Order is denied;

IT IS FURTHER ORDERED that Defendants' motion for sanctions is denied;

IT IS FURTHER ORDERED that Defendants are permanently enjoined from selling any Stamps as defined in the Consent Order;

IT IS FURTHER ORDERED that Defendants shall reimburse Plaintiffs for all their costs, including reasonable attorneys' fees incurred in bringing their motion for contempt;

IT IS FURTHER ORDERED that Plaintiffs shall have fourteen (14) days from the date of this Order to submit an application for costs and attorneys' fees;

IT IS FURTHER ORDERED that Defendants shall have seven (7) days after receipt of Plaintiffs' application for costs and attorneys' fees to submit opposition thereto; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

[1] Unless otherwise indicated, the following facts are undisputed.

[2] Plaintiffs alleged in the Complaint that Howard E. Friedman is the principal of ICS. (See Complaint ¶ 9). Defendants denied this in their Answer to the Complaint. However, in the Answer, counsel for Dewey Ballantine entered an appearance for Mr. Friedman.

[3] The Sell-Off Stamps are designated in the Consent Order by code — e.g., JLM, LB8, LB9, MTB, GFB and TB9.

[4] In addition to the Beatles/Lennon Club, ICS has other clubs dedicated to other celebrities.

[5] The Lennon License provides that a breach of paragraph 3, requiring written approval for all promotional material, is non-curable and grounds for immediate termination. (Lennon License ¶ 13(b)). Although Defendants had distributed the Lennon Fact Book after the execution of the Lennon License and Consent Order, Ms. Weber did not take any steps at that time to terminate the License on behalf of the Lennon Estate based on Mr. Badke's assurances that distribution of the Lennon Fact Book had ceased.

[6] "New Issue Alerts" are letters which accompany monthly mailings of stamps to Beatles/Lennon Club members. The New Issue Alerts inform customers that the next shipment of stamps is enclosed and they have the option of keeping or returning the stamps.

[7] The Court obtained the facts concerning Plaintiffs' investigation into Defendants' compliance with the Consent Order from the testimony and affidavits of the relevant witnesses.

[8] Joshua Glick is the stepson of Peter Shukat, Ms. Weber's partner and counsel for the Lennon Estate.

[9] Plaintiffs also claim that Defendants violated Paragraph D of the Consent Order by distributing the New Issue Alerts and form solicitation letters for the Beatles/Lennon Club without approval from the Lennon Estate. However, Plaintiffs failed to assert these allegations in their moving papers and only raised them for the first time in their Proposed Findings of Fact and Conclusions of Law. Accordingly, the Court will dismiss these assertions because Plaintiffs did not provide Defendants with proper notice of these claims.

[10] Defendants do not contend that "promotional" is a term of art. In fact, they refer to the Court to the dictionary for the definition of "promotional".

[11] In their letter to Ms. Weber, Defendants refer to the Lennon Fact Book and other enclosed materials as "packaging and promotional material" submitted for approval. (Letter from Van Emden to Weber of 8/5/97). However, Defendants assert that Mr. Van Emden's letter is not a concession that the Lennon Fact Book and the Lennon/Marx Fact Book are promotional material. Defendants assert that in response to Ms. Weber's request for all materials, Mr. Van Emden sent her all the written material ICS possessed relating to Lennon without first determining which materials had to be approved by the Lennon Estate pursuant to the Lennon License. (See Jan. 13, 1998 Tr. at 13:9-14:13).

[12] At the bottom of the Lennon Fact Book, Defendants included the statement: "Lennon and John Lennon are trademarks of the Estate of John Lennon."

[13] Other circuits have held that a court should set aside a settlement agreement when one party has committed a material breach. See *United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir. 1987); *Fairfax Countywide Citizens Ass'n v. County of Fairfax*, 571 F.2d 1299, 1302-03 (4th Cir.1978).

[14] Defendants argue that Plaintiffs have engaged in extortion. To assert a claim of extortion under New Jersey law, a plaintiff must allege that the extorter purposely and unlawfully obtains the property of another under threat of injury to person or property. See *United States v. De Cavalcante*, 440 F.2d 1264, 1276 (3d Cir.1971); N.J. Stat. Ann. § 2C:20-5 (West 1995). The essence of extortion is duress. See *United States v. Addonizio*, 451 F.2d 49, 77 (3d Cir.1971). Furthermore, "[a] person extorts if he purposely threatens to ... [i]nflict ... harm which would not substantially benefit the actor but which is calculated to materially harm another person." N.J. Ann. § 2C:20-5. Defendants have not stated a claim of extortion because they have not alleged that Mr. Shukat made any threats in connection with his request of the \$7,500 payment. In addition, they have not shown that they agreed to pay the \$7,500 under duress.



[15] Even though a violation of Paragraph 3 of the Lennon License is non-curable and grounds for immediate termination, the Lennon Estate gave Defendants an opportunity to cure because Defendants had said that they were not distributing the Lennon Fact Book pending approval. However, Defendants continued to breach Paragraph 3 of the Lennon License by distributing the Lennon/Marx Fact Book even though they had never submitted it for approval or obtained approval.

[16] Since the Lennon Estate terminated the Lennon License, IGPC has agreed to allow Defendants to return the IGPC stamps to them. According to Defendants, IGPC will refund most, if not all, of the \$78,000.

[17] In light of this Court's finding of civil contempt against Defendants', they may no longer sell the Sell-Off Stamps.

[18] Local Civil Rule 103.1 provides:

(a) The Rules of Professional Conduct of the American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law.

[19] A federal court has continuing jurisdiction to enforce a settlement agreement when it incorporates the agreement into its judgment or order. See *Sawka v. Healtheast, Inc.*, 989 F.2d 138 (3d Cir.1993). Here, the Consent Order was the judgment of this Court which dismissed the underlying litigation without prejudice. (See Consent Order ¶ S). Thus, this Court has continuing jurisdiction over the pending motions.

[20] In so amending RPC 4.2, New Jersey rejected the test applied in *In re Prudential*, 911 F.Supp. 148, based on whether an employee's conduct may directly impute liability to the corporation. See Report of the Special Supreme Court Committee on RPC 4.2, 139 N.J. L.J. 1161 (1995), at 14 (those persons who are deemed to be represented by the corporation's attorney and who may not be communicated with ex parte do "not include persons whose actions bind the organization or are imputable to the organization ... unless they meet the 'legal position' test").

[21] However, the *ex parte* contact must be conducted in accordance with RPC 4.3. See *infra* Part III.D.

[22] David B. Isbell is the former chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility.

[23] Professor Bruce A. Green is the co-chair of the ABA Litigation Section's Committee on Ethics and Professionalism. He also serves as vice-chair of the New York State Bar Association's Committee on Professional Ethics and is a member of the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department. Professor Green has published more than 20 articles in the area of legal ethics.

Save trees - read court opinions online on Google Scholar.

**SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiff,**  
**v.**  
**TRAVIS KALANICK and UBER TECHNOLOGIES, INC., Defendants.**

No. 15 Civ. 9796.

**United States District Court, S.D. New York.**

July 25, 2016.

Spencer **Meyer**, Plaintiff, represented by Brian Marc Feldman, Harter, Secrest & Emery, LLP, Bryan Lee Clobes, Cafferty Faucher LLP, David Alan Scupp, Constantine Cannon, LLP, Edwin Michael Larkin, III, Harter Secrest & Emery LLP, Ellen Meriwether, Miller Faucher & Cafferty, LLP, James Hartmann Smith, McKool Smith, Jeffrey A. Wadsworth, Harter Secrest & Emery LLP, John Christopher Briody, McKool Smith, Lewis Titus LeClair, McKool Smith, P.C., pro hac vice, Matthew L. Cantor, Constantine Cannon, LLP & Andrew Arthur Schmidt, Andrew Schmidt Law PLLC.

Travis **Kalanick**, Defendant, represented by Peter M. Skinner, Boies, Schiller & Flexner LLP, Alanna Cyreeta Rutherford, Boies, Schiller & Flexner LLP, Joanna Christine Wright, Boies, Schiller & Flexner LLP, Karen L. Dunn, Boies, Schiller & Flexner LLP, Ryan Young Park, Boies, Schiller & Flexner LLP & William A. Isaacson, Boies, Schiller & Flexner LLP.

Uber Technologies, Inc., Defendant, represented by Reed Michael Brodsky, Gibson, Dunn & Crutcher, LLP.

## **OPINION AND ORDER**

JED S. RAKOFF, District Judge.

**It is a sad day** when, in response to the filing of a commercial lawsuit, a corporate defendant feels compelled to hire unlicensed private investigators to conduct secret personal background investigations of both the plaintiff and his counsel. It is sadder yet when these investigators flagrantly lie to friends and acquaintances of the plaintiff and his counsel in an (ultimately unsuccessful) attempt to obtain derogatory information about them. The questions here presented, however, are whether such dubious practices result in waiver of attorney-client privilege and work-product protection, and whether disciplinary action is warranted.

The lawsuit in question is the putative antitrust class action commenced on December 16, 2015 by plaintiff Spencer **Meyer** against defendant Travis **Kalanick**, co-founder and CEO of Uber Technologies, Inc. ("Uber"), to which Uber was later added as a co-defendant.<sup>[1]</sup>

## **FACTS**

The following facts are undisputed. Immediately after the filing of the lawsuit on December 16, 2015, see Dkt. 1, Uber's General Counsel, Salle Yoo, Esq., wrote to Uber's Chief Security Officer, Joe Sullivan, Esq., saying: "Could we find out a little more about this plaintiff?" See Declaration of James H. Smith in Support of Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Smith Decl."), Exhibit A, Dkt. 104-1, at UBER-0000001. Mr. Sullivan then forwarded Ms. Yoo's email to Uber's Director of Investigations, Mat Henley, saying "Please do a careful check on this plaintiff." Id. Mr. Henley asked Mr. Sullivan: "Want me to outsource or keep in house/open source?" to which Mr. Sullivan responded "Whoever can do it well and under the radar is fine." UBER-0000041.<sup>[2]</sup>

Mr. Henley thereupon retained Global Precision Research LLC d/b/a Ergo ("Ergo") to conduct the investigation. See Smith Decl., Exhibit C (Henley Dep.), Dkt. 104-3, at 9:18-20. Specifically, on December 17, 2015, Mr. Henley emailed Ergo Managing Partners Todd Egeland (a former Chief Strategy Officer at the CIA) and Matthew Moneyhon (a former State Department employee), saying "I have a sensitive, very under the radar investigation that I need on an individual here in the U.S." See Smith Decl., Exhibit E, Dkt. 104-5, at ERGO-0001170. On December 18, 2015, Messrs. Egeland and Moneyhon of Ergo

indicated that they were "happy to undertake the requested research; we do quite a bit of this work for law firms." Id. at ERGO-0001174. On December 24, 2015, Mr. Henley emailed Messrs. Egeland and Moneyhon attaching the Complaint in the instant case and asking whether, in Ergo's statement of work, Ergo could be "general enough so that the research remains discreet from a discovery perspective." Id. at ERGO-0001176.

At all times relevant, Ergo's investigators were not licensed to conduct private investigations in New York. See N.Y. General Business Law § 70; Smith Decl., Exhibit F (Egeland Dep.), Dkt. 104-6, 17:24-18:6. Nevertheless, on December 28, 2015, Ergo's Mr. Egeland sent to Uber's Mr. Henley a proposal for Ergo's investigation that included plans for

[a]n initial "light-touch" reputational due diligence, engaging in 7 primary source interviews that . . . should highlight any issues for further digging, such as participating in any past lawsuits (particularly with Andrew Schmidt [plaintiff's counsel]), and his relationship with Andrew Schmidt. As part of this effort on **Meyer**, we will also look to determine the likelihood that the attorney, Mr. Schmidt, is actually the driving force behind the complaint.

Smith Decl., Exhibit E, Dkt. 104-5, at ERGO-00011/8. The proposal further stated that, following the investigation, Ergo would prepare a report that "highlights all derogatories." Id. On January 4, 2016, Mr. Henley accepted the proposal, stating "[a]ll looks good guys, thanks." Id. at ERGO-0001185; Smith Decl., Exhibit G, Dkt. 104-7, at UBER-0000055.

Ergo's Managing Partner Mr. Egeland then forwarded the proposal to an Ergo investigator, Miguel Santos-Neves. See Smith Decl., Exhibit H, Dkt. 104-8. Mr. Santos-Neves embarked on the investigation, reaching out to 28 acquaintances or professional colleagues of plaintiff **Meyer** and plaintiff's counsel Schmidt. See Smith Decl., Exhibit L, Dkt. 104-12. In approaching these sources, Mr. Santos-Neves made materially false statements about why he was contacting them. For instance, having learned that plaintiff **Meyer** was a conservationist associated with Yale University, Mr. Santos-Neves told sources that "[a]s part of a research project, [he was] attempting to verify the professional record and/or previous employment of various up-and-coming researchers in environmental conservation," Smith Decl., Exhibit I, Dkt. 104-9, at ERGO-0000467. Likewise, having learned that Mr. Schmidt's law practice focused on labor law matters, Mr. Santos-Neves told a source that he was engaged in a "project profiling top up-and-coming labor lawyers in the US," Smith Decl., Exhibit J, Dkt. 104-10, at ERGO-0000626. In still another instance, in an outreach to plaintiff's landlord, Mr. Santos-Neves represented that "[a]s part of the real estate market research project for a client, [he was] interviewing property owners in New Haven" in order "to find out what due diligence steps property owners take to vet a potential tenant." Smith Decl., Exhibit K, Dkt. 104-11 at 223:6-11.<sup>[3]</sup>

Following up on these initial contacts, Mr. Santos-Neves conducted phone interviews with eight individuals, which he recorded without the knowledge or consent of the individuals with whom he was speaking. See Smith Decl., Exhibit L; Transcript dated July 14, 2016 ("Tr."), at 4:23-25. Mr. Santos-Neves then synthesized his research and corresponded with Ergo Managing Partners Egeland and Moneyhon regarding a draft of the report. See, e.g., Smith Decl., Exhibit N, Dkt. 104-14; Smith Decl., Exhibit Q, Dkt. 104-17. As part of this correspondence, Mr. Santos-Neves wrote to Mr. Egeland on January 15, 2016 that "[a]ll the sources believe that I am profiling **Meyer** for a report on leading figures in conservation; I think this cover could still protect us from any suspicion in the event that I ask such a question [regarding plaintiff's involvement in a lawsuit against Uber]." Smith Decl., Exhibit O, Dkt. 104-15, at ERGO-0000665. Mr. Santos-Neves further noted that "[a]sking such a question could have all sorts of consequences for **Meyer** himself, as it would get the academic rumor mill going." Id. Mr. Egeland responded: "Miguel, yes, please go back to one or two sources that you believe may have some background on the out of character issue [i.e., whether it was out of character for plaintiff **Meyer** to be involved in the instant lawsuit]." Id. Additionally, on January 19, 2016, Mr. Egeland asked Mr. Santos-Neves whether there were "enough negative things said about **Meyer** to write a text box." Smith Decl., Exhibit N, at ERGO-0000697.

On January 19, 2016, Ergo delivered its report to Uber's Mr. Henley. See Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Pl. Br."), Dkt. 103, at 7; Defendants Uber Technologies, Inc. and Travis **Kalanick's** Joint Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Defs. Opp. Br."), Dkt. 108, at 6. The report speaks about plaintiff almost entirely in positive or neutral terms, but it states that "**Meyer** may be particularly sensitive to any publicity that tarnishes his professional reputation." Smith Decl., Exhibit R, Dkt. 104-18, at ERGO-0000823; Declaration of Nicola T. Hanna in Support of Defendants Uber Technologies, Inc. and Travis **Kalanick's** Joint Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Hanna Decl."), Exhibit H, Dkt. 109-9, at UBER-0000059. Mr. Henley sent the report to Mr. Sullivan, Uber's Chief Security Officer, and to Craig Clark, Esq., Uber's Legal Director of Security and Enforcement. See id.; see also Letter dated May 20, 2016, Dkt. 79. Mr. Sullivan, in turn, passed on the report to Uber's

General Counsel Salle Yoo. See Hanna Decl., Exhibit H, at UBER-0000059.

Meanwhile, in early to mid-January 2016, plaintiff's cocounsel Brian Feldman, Esq., was alerted to the fact that Mr. Santos-Neves had contacted acquaintances of plaintiff and plaintiff's counsel Mr. Schmidt. See Declaration of Brian M. Feldman in Support of Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Feldman Decl."), Dkt. 98, at ¶¶ 2-5. Mr. Feldman reached out to defendant **Kalanick's** outside counsel, Peter Skinner, Esq., who, on January 20, 2016, wrote Mr. Feldman saying "I followed up. Whoever is behind these calls, it is not us." See Feldman Decl. at ¶ 7; Plaintiff's Letter dated June 3, 2016, Exhibit C, Dkt. 78. Plaintiff's counsel, however, continued to make inquiries of Mr. **Kalanick's** counsel, and eventually indicated to Mr. Skinner that he was prepared to bring the matter to the attention of the Court in order to seek a subpoena directed to Ergo. See Feldman Decl. at ¶¶ 8-9; Tr. 45:3-46:2. At that point, Mr. Skinner initiated further inquiries of Uber's in-house counsel, who ultimately confirmed that Uber had initiated the investigation. See Tr. 46:3-23. On February 19, 2016, Mr. Skinner in turn phoned Mr. Feldman and stated that Uber had, in fact, hired Ergo. See Feldman Decl. at ¶ 10; Uber Opp. Br. at 8.

Over the course of the next two months, plaintiff and defendants engaged in further communications. For example, on April 25, 2016, Mr. **Kalanick's** counsel Mr. Skinner offered to provide plaintiff's counsel with information about the individuals contacted by Ergo and how these individuals were contacted, but only if plaintiff would agree "not to use the information in this litigation for any purpose whatsoever." Smith Decl., Exhibit T, Dkt. 104-20. Plaintiff declined the offer. See Smith Decl., Exhibit Z, Dkt. 104-26. On May 18, 2016, Mr. **Kalanick's** co-counsel, Alanna Rutherford, Esq., also provided plaintiff's counsel with a "List of People Who Communicated with Ergo," containing 11 of the 28 individuals to whom Ergo's investigator reached out. See Smith Decl., Exhibit U, Dkt. 104-21.

## INITIATION OF JUDICIAL INVOLVEMENT

On May 19, 2016, plaintiff brought the Ergo matter to the Court's attention via a joint telephone call by the parties to the Court. Because it appeared likely that the Ergo investigation was intended, at least in part, to affect (directly or indirectly) the case pending before the Court, the Court thereupon convened two in-court conferences on the Ergo matter, on May 20, 2016 and May 27, 2016, respectively. As a result of these hearings and associated telephone conferences, the Court authorized plaintiff to depose Uber's Joe Sullivan, Craig Clark, and Mat Henley, and Ergo's Todd Egeland and Miguel Santos-Neves. See Memorandum Order dated June 7, 2016, Dkt. 76, at 4. The Court also authorized plaintiff to serve document subpoenas on Uber and Ergo, albeit after narrowing the subpoenas' parameters. See *id.* at 4-5. In response to the subpoenas, Uber and Ergo claimed attorney-client privilege and/or work-product protection over numerous documents and voice recordings, and the Court indicated that it would need to review these materials in camera to determine whether privilege was correctly asserted and/or whether the "crime-fraud" exception to the privilege applied. See *id.* at 5. The Court further stated that in camera review would also be needed to determine whether plaintiff would be authorized to depose Uber's General Counsel Salle Yoo. See *id.* at 4-5.

On June 2, 2016, Uber moved for reconsideration of the Court's decision to conduct such in camera review, and the Court denied this motion on June 3, 2016, explaining the reasons for this denial in a Memorandum Order dated June 7, 2016. See *id.* at 1. Specifically, the Court noted that courts commonly review in camera subpoenaed documents as to which an assertion of privilege has been raised in order to see whether the privilege has been properly asserted. See Memorandum Order dated June 7, 2016, at 6-7. Moreover, the Court stated, plaintiff had provided a sufficient basis to suspect that Ergo had committed a fraud in investigating plaintiff through the use of false pretenses, and to suspect that communications from Uber — which had hired Ergo to conduct an investigation of the plaintiff and given Ergo, in Uber's words, "instructions or assignments" — had furthered such a fraud. See *id.* at 7-8. The Court also indicated that another relevant area of inquiry was whether Uber or defendant **Kalanick**, or their counsel, had made misrepresentations to plaintiff's counsel in response to plaintiff's initial inquiries about the investigation. See *id.* at 9. The Court noted that it had no way to know, prior to reviewing the relevant materials, whether or not the crime-fraud exception did in fact apply to some or all of the materials, but that plaintiff had made the threshold showing sufficient to justify in camera review. See *id.* at 10.

## DISCOVERY RULINGS (INCLUDING CRIME-FRAUD EXCEPTION)

The Court then proceeded to conduct the in camera review, and on June 9, 2016, issued an Order indicating the results of this review. See Order dated June 8, 2016, Dkt. 82, at 1-2. In that Order, the Court denied all claims of privilege and work-product

protection as to materials submitted by Ergo; upheld Uber's claims of privilege and work-product protection as to certain materials but not as to others; and denied plaintiff's application to take the deposition of Ms. Yoo. See *id.* The Court also indicated that an explanation for the Court's rulings would issue in due course. See *id.* The Court now provides the promised explanation.

Regarding the materials that Ergo submitted, Ergo asserted work-product protection, but not attorney-client privilege, over all these materials. See Ergo Privilege Log. As Ergo subsequently clarified, the decision to assert work-product protection "was based on direction from Uber and Ergo's understanding that the protection belonged to Uber and therefore only Uber could waive it." See Ergo's Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Ergo Opp. Br."), Dkt. 114, at 8. But whether asserted by Ergo or Uber, the claim of work-product protection for Ergo's materials fails, for several reasons:

To begin with, Uber is, by its own statements, estopped from asserting that these materials were "prepared in anticipation of litigation." Fed. R. Civ. P. 26 (b) (3) (A). Both Uber and Mr. **Kalanick** have repeatedly represented — accurately or not — that Uber commissioned the investigation of plaintiff in order to determine whether plaintiff constituted a safety threat to Mr. **Kalanick** or other Uber employees. See Smith Decl., Exhibit S, Dkt. 104-19; Uber Opp. Br. at 2-4; Tr. 30:23-32:12. Although the Court is profoundly skeptical that this explanation — which is nowhere reflected in the underlying documents — was the real reason for the investigation, defendants, having so represented, cannot then claim that the materials relating to the investigation were prepared "in anticipation of litigation," since this contradicts their own assertion of why the investigation was done.

Of course, it is more likely, the Court finds (based on the facts detailed above), that the purpose of the investigation was to try to unearth derogatory personal information about Mr. **Meyer** and his counsel that could then be used to try to intimidate them or to prejudice the Court against them. But even then, while Ergo's communications might have been in some sense prepared "in anticipation of litigation," any possible such protection would be overcome in light of plaintiff's substantial need for, and inability to obtain by other means, the Ergo materials or their substantial equivalent, without undue hardship. See Fed. R. Civ. P. 26 (b) (3) (A) (ii). Plaintiff, who had (along with his counsel) become the target of an intrusive and clandestine investigation that included inquiries into plaintiff's family life, career prospects, and living arrangements, sought essential information about the ways in which the investigation was committed and for what purposes. Ergo's communications contained crucial details about, for example, the nature of the investigator's contacts and Ergo's analysis of the discovered information, as well as Ergo's responses once Ergo was asked to provide details on its investigation in connection with inquiries made by the plaintiff and the Court. Moreover, previous attempts by plaintiff to gain information about the Ergo investigation had resulted, first, in false denials, and then in an effort by defendants to impose conditions on plaintiff's access to this information, see, e.g., Smith Decl., Exhibit T, as well as to limit the documents and individuals to which plaintiff would have access for review and deposition purposes. See Uber Opp. Br. at 9-10. In this situation, any possible work-product protection attaching to Ergo's communications was clearly overcome. See Fed. R. Civ. P. 26 (b) (3) (A) (ii).

Furthermore, there is a "crime-fraud" exception to the work-product doctrine, as there is to the attorney-client privilege. See In re Richard Roe, Inc. (Roe I), 68 F.3d 38, 39 (2d Cir. 1995); In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984). The crime-fraud exception applies when there is "(i) a determination that the client communication or attorney work product in question was itself in furtherance of the crime or fraud and (ii) probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity." In re Richard Roe, Inc. (Roe II), 168 F.3d 69, 71 (2d Cir. 1999) (internal quotation marks omitted). Here, the Court finds that Ergo, in investigating plaintiff, was engaged in fraudulent and arguably criminal conduct, and that many of the documents over which Ergo claimed work-product protection were intended to facilitate this fraudulent and arguably criminal activity. These documents included emails to Uber representatives concerning the scope of the project, the Ergo investigator's emails to sources and his recordings of phone calls with sources, and emails between Ergo employees preparing the report for transmittal to Uber.

As previously noted, it is undisputed that Ergo's investigator, Mr. Santos-Neves, made blatant misrepresentations to individuals that he contacted in order to gain information about plaintiff and plaintiff's counsel. As Ergo's counsel acknowledged at oral argument, Mr. Santos-Neves "dissembled" and "used false pretenses" in the context of reaching out to the individuals that he interviewed. See Tr. 12:4-6. For example, Mr. Santos-Neves was not, in fact, "attempting to verify the professional record and/or previous employment of various up-and-coming researchers in environmental conservation," "profiling top up-and-coming labor lawyers," or conducting a "real estate market research project for a client." Smith Decl., Exhibits I, J, and K.

Ergo contended at oral argument that Mr. Santos-Neves made these misrepresentations "in the written communications . . . to

initiate the conversation . . . and then to have a forthright conversation." Tr. 19:17-25. However, the use of an initial pretext clearly influenced the nature and tenor of the resulting conversation. Moreover, Mr. Santos-Neves engaged in misrepresentations during his phone calls, not merely in his initial outreach emails. For example, Mr. Santos-Neves told one of his "sources" over the phone: "Let me tell you a little bit about the research project. It's actually pretty straightforward, pretty simple. A client hired us to profile up and coming people in environmental conservation, and so there's a number of people we've been researching and profiling." ERGO 073, 00:25-00:44. In response to the source's statement "the whole thing is very mysterious to me," Mr. Santos-Neves stated "Yeah pretty much I think you got a sense it pretty much works like a head hunting thought process." Id. at 1:58-2:10. Mr. Santos-Neves went on to ask the source several questions about the plaintiff, including whether the source knew "of any personal issues that might affect [plaintiff's] professional reputation," id. at 8:35-8:45, and whether the plaintiff had "buted heads with the law in any way." Id. at 9:32-9:42. The Ergo investigator's fraudulent misrepresentations, therefore, broadly influenced his interactions with the sources to whom he spoke.

Moreover, Mr. Santos-Neves was not acting as any kind of rogue investigator; his misrepresentations were condoned by the highest levels of Ergo leadership. Mr. Santos-Neves directly and unabashedly referred to his claims to sources as a "cover" in an email to Ergo Managing Partner Egeland. See Smith Decl., Exhibit O, at ERGO-0000665. Mr. Egeland responded by approving a proposal for Mr. Santos-Neves to return to one or two sources. See id. Further, Mr. Egeland testified at his deposition that at the time he received the email containing the "cover" language from Mr. Santos-Neves, he did not see it as a problem that the sources believed (falsely) that Mr. Santos-Neves was creating a report on leading figures in conservation. See Declaration of James H. Smith in Support of Plaintiff's Reply Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Smith Reply Decl."), Exhibit D (Egeland Dep.), Dkt. 118-4, 97:17-98:9. Indeed, at his deposition, Mr. Egeland testified that Ergo analysts, as a more general matter, mislead sources about the reason why they are reaching out to them to collect information. See id. at 32:21-33:3. Additionally, Ergo has acknowledged that before the project was completed, Mr. Santos-Neves told another Ergo Managing Partner, Mr. Moneyhon, that he had used false pretenses. See Ergo Opp. Br. at 5. Ergo cannot, therefore, disavow responsibility for the fraudulent misrepresentations made by Mr. Santos-Neves.

Furthermore, Ergo's fraudulent misrepresentations were both intentional and material. The fact that Ergo describes its conduct as an effort to "help solicit information while also protecting the identity of his client," Ergo Letter dated June 16, 2016<sup>[4]</sup> at 2, is not inconsistent with the existence of fraudulent intent. Likewise, Ergo's false statements to sources were intended to, and did, induce the investigator's interlocutors to provide information that they would not otherwise have provided. Indeed, Ergo acknowledged that Mr. Santos-Neves used false pretenses "to initiate a conversation, to get over that hump." Tr. 19:17-24; see also, e.g., Smith Reply Decl., Exhibit D (Egeland Dep.), 36:12-20.

Ergo argues, however, that its actions did not constitute fraud because they did not cause actual damages, a requirement of New York's civil fraud statute. See Ergo Letter dated June 16, 2016 at 2-3, citing Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 170 (2d Cir. 2015) ("Under New York law, fraud requires proof of (1) a material misrepresentation or omission of a fact, (2) knowledge of that fact's falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages.") see also Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1373 (N.Y. 1996) ("The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the 'out-of-pocket' rule") (internal quotation marks omitted).

But Ergo's argument fundamentally misapprehends the nature of the crime-fraud exception. The purpose of this exception is "to assure that the seal of secrecy . . . between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563 (1989) (internal quotation marks omitted).<sup>[5]</sup> As the Second Circuit has stated:

The rationale for the [crime-fraud] exclusion is closely tied to the policies underlying these privileges. Whereas confidentiality of communications and work product facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered "sound." Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection.

In re Grand Jury Subpoena, 731 F.2d at 1038. If actual damages had to be shown in order for "fraud" within the meaning of the crime-fraud exception to occur, then the attorney-client privilege and/or work-product doctrine could cover, for example, a communication from a client to a lawyer asking for help in cheating an unsuspecting adversary out of money, as well as the lawyer's response to the client "let's do it, and here's how!" Such a result would be clearly incompatible with the policies underlying the privilege doctrines and exceptions thereto. Moreover, it is worth noting that criminal fraud statutes, such as the

federal criminal mail and wire fraud statutes, do not require a showing of damages. See 18 U.S.C. §§ 1341, 1343; Neder v. United States, 527 U.S. 1, 24-25 (1999). In sum, Uber and Ergo may not escape the application of the crime-fraud exception when many of the Ergo materials they seek to protect so manifestly fall within the categories of communications not to be covered by the cloak of privilege.

Ergo next seeks to defend itself by citing, in particular, two district court cases in which courts concluded that it was not a violation of attorney disciplinary rules for investigators to pose as customers of the opposing party in order to investigate compliance with a cease-and-desist letter in a trademark case, see Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122-23 (S.D.N.Y. 1999), or to determine whether the opposing party was complying with the terms of a consent order, see Apple Corps Ltd. v. Int'l Collectors Soc., 15 F. Supp. 2d 456, 461-62, 475-76 (D.N.J. 1998). See Ergo Letter dated June 16, 2016 at 2; see also Ergo Opp. Br. at 3. The instant case, however, is sharply distinguishable from the cases that Ergo cites. Ergo has not claimed that it was seeking to investigate misconduct that plaintiff had perpetrated vis-a-vis Uber (as was the situation in Gidatex), let alone discover whether plaintiff and his counsel were disobeying an existing court order (as was the situation in Apple).

Furthermore, even if (contrary to the Court's interpretation) Gidatex and Apple could be read to support the proposition that investigators working on behalf of a party to litigation may properly make misrepresentations in order to advance their own interests vis-a-vis their legal adversaries, this Court would reject such a proposition. The New York Rules of Professional Conduct require lawyers to adequately supervise non-lawyers retained to do work for lawyers in order to ensure that the non-lawyers do not engage in actions that would be a violation of the Rules if a lawyer performed them. See N.Y. Rules of Professional Conduct § 5.3; see also Upjohn Co. v. Aetna Cas. & Sur. Co., 768 F. Supp. 1186, 1214-15 (W.D. Mich. 1990). Actions that a lawyer may not ethically take include knowingly making a false statement of fact, see N.Y. Rules of Professional Conduct at § 4.1, and engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," *id.* at § 8.4(c).

Even beyond the rules of professional conduct, moreover, litigation is a truth-seeking exercise in which counsel, although acting as zealous advocates for their clients, are required to play by the rules. See Nix v. Whiteside, 475 U.S. 157, 166 (1986). It would plainly contravene this truth-seeking function if non-lawyers working for counsel, such as Ergo, could make fraudulent representations in order to surreptitiously gain information about litigation adversaries through intrusive inquiries of their personal acquaintances and business associates.

Remarkably, Ergo seeks to distance itself from rules governing attorneys' conduct by contending that Ergo was not "involved in the litigation process at all," Ergo Opp. Br. at 8, "had no intent to affect this litigation in any way," *id.*, and was unaware of any "special duties incumbent on lawyers or others at Uber who were involved in the litigation," *id.* Ergo's protestations of innocent ignorance are at odds with the joint representation of Ergo's Managing Partners, in writing to Uber's Mr. Henley to accept Uber's assignment to investigate plaintiff, that "we do quite a bit of this work for law firms." Smith Decl., Exhibit E, at ERGO-0001174. Furthermore, Ergo's work proposal, sent in response to an request from Uber for "some discreet research on the individual that's filed" a lawsuit, included "highlight[ing] all derogatories," a proposition that Uber immediately approved. See Smith Decl., Exhibit E, at ERGO-0001172, 0001178, 0001185. It bears asking what Ergo's employees could possibly have thought its research would be used for, if not to affect in some way the litigation against plaintiff **Meyer**. The Court therefore finds unconvincing Ergo's effort to disclaim any responsibility for conduct that risked perverting the processes of justice.

For all of these reasons, the Court rejects Ergo's efforts to disavow participation in fraudulent and arguably criminal conduct. Moreover, if Ergo's misrepresentations to sources were not sufficient evidence of the applicability of the crime-fraud exception, two additional features of Ergo's conduct highlight their conduct's impropriety. First, although Ergo was located in New York, Ergo, as previously noted, did not possess a private investigator's license to engage in its investigative activities, as required by New York law. See N.Y. General Business Law § 70. Violation of this licensing provision may itself be prosecuted as a criminal misdemeanor. See *id.*

Ergo seeks to explain this violation as, variously, an "oversight[ ] of a small company with limited resources," see Ergo Opp. Br. at 6, or as a product of Ergo's understanding that its work did not "fit the traditional plain meaning of private investigation work in New York," see Tr. 15:11-18. But if concocting fictitious stories to induce acquaintances of a client's litigation adversary to shed light on the adversary's employment, finances, family life, and motivation for bringing a lawsuit does not constitute private investigation work, then the Court does not know what would. Ergo's failure to obey New York's licensing laws, which carry the threat of criminal penalties, raises serious concerns about Ergo's commitment to legal compliance.

Second, it is undisputed that Ergo's investigator Mr. Santos-Neves recorded his phone calls with sources without their knowledge or consent. See Tr. 4:23-25.<sup>[6]</sup> Some of these individuals, however, had phone numbers traceable to Connecticut and New Hampshire, where it is illegal to record telephone calls without the consent of both parties to the call. See N.H. Rev. Stat. Ann. § 570-A:2; Conn. Gen. Stat. Ann. § 52-570d. Neither Ergo nor defendants has cited a case or other legal provision restricting these laws to scenarios in which both parties, or the party recording the phone call, are physically located in Connecticut or New Hampshire. Cf. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006).<sup>[7]</sup> The Ergo investigator's recording of phone calls without the consent of his interlocutors was at worst illegal and, at best, evidence of reckless disregard of the risk of failing to comply with the law.

For all of the reasons stated above, the Court denied Ergo and/or Uber's claim of work-product protection for Ergo communications that were responsive to plaintiff's subpoena (as narrowed by the Court).

As to Uber-generated materials, Uber asserted attorney-client privilege and work-product protection over numerous documents. The Court denied these assertions with respect to several documents, which were listed in the Court's Order dated June 8, 2016. The primary reason for this denial was that the Court found that, in light of defendants' representations (however doubtful) about the supposed safety-related purpose of the investigation (see supra), they were estopped from claiming that these documents were either "made for the purpose of obtaining or providing legal assistance," In re Cty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007) or were prepared "in anticipation of litigation," Fed. R. Civ. P. 26 (b) (3) (A). Moreover, to the extent that Uber claimed work-product protection over the documents that the Court ordered to be released to plaintiff's counsel, the Court found this protection to be overcome, for reasons substantially similar to those discussed supra in connection with claims of work-product protection for Ergo's materials. See Fed. R. Civ. P. 26(b) (3) (A) (ii).

However, as to certain other communications over which Uber claimed privilege, the Court found that they either were covered by attorney-client privilege and/or were covered by a work-product protection that was not overcome by substantial need. These communications included, for instance, emails between Mr. **Kalanick's** counsel and Uber in-house counsel addressing potential responses to plaintiff's counsel's inquiries and letters about the Ergo investigation. As to the crime-fraud exception, the Court did not find that this exception applied to the documents over which the Court upheld Uber's claims of privilege. For example, the Court did not find that Mr. **Kalanick's** counsel, in making inaccurate representations to plaintiff's counsel about whether Uber had commissioned the Ergo investigation, acted with fraudulent intent. Rather, he was the victim of inaccurate representations made to him by Uber's in-house counsel that, while negligent (maybe even grossly negligent), did not evidence intentional falsity. Finally, the Court denied plaintiff's application to take the deposition of Uber's General Counsel Salle Yoo on the basis that the relevant facts concerning her involvement were clearly a matter of record, and the risk that her deposition would involve potential invasion of the remaining attorney-client privilege was high.

## PLAINTIFF'S PRAYER FOR RELIEF

Following the foregoing discovery, plaintiff, on June 29, 2016, moved for the following relief:

- (1) an order prohibiting Defendants from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same; (2) an order enjoining Defendants and Ergo from undertaking any further personal background investigations of individuals involved in this litigation through the use of false pretenses, unlicensed investigators, illegal secret recordings, or other unlawful means; (3) an order for monetary sanctions, including Plaintiff's attorneys' fees and costs related to the investigation of Plaintiff by Ergo; and (4) any other relief the Court deems just and proper, including against Ergo.

Notice of Motion and Motion for Relief Related to the Ergo Investigation, Dkt. 96. On July 6, 2016, defendants Uber and **Kalanick** jointly opposed plaintiff's motion in part, directing their opposition primarily against plaintiff's request for monetary sanctions. See Defs. Opp. Br.<sup>[8]</sup> On July 7, 2016, third party Ergo also submitted a response to plaintiff's motion. See Ergo Opp. Br. Ergo consented to plaintiff's request for an order enjoining Ergo from undertaking further background investigations in connection with this litigation, but opposed further relief against Ergo. See id. at 10. Plaintiff submitted reply papers on July 8, 2016, and the Court heard oral argument on July 14, 2016. See Tr. Plaintiff and Ergo, as noted supra, had also previously sent letters to the Court regarding the legality and ethical status of Ergo's investigation. See Ergo Letter dated June 16, 2016; Plaintiff Letter dated June 21, 2016; Ergo Letter dated June 23, 2016.



Largely through the commendable subsequent efforts of the parties' outside counsel, however, plaintiff's requests for relief have now been resolved, as follows:

Plaintiff first requests "an order prohibiting Defendants from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same." See Notice of Motion. Defendants Uber and **Kalanick** confirmed at oral argument that they did not object to such an order, provided that it did not involve a concession of wrongdoing on defendants' part. See Tr. 55:9-56:4, 57:7-10. In addition to the fact that defendants do not oppose plaintiff's first request for relief, the Court finds perfectly appropriate an order enjoining defendants from making use of the fruits of their own troubling conduct. See Fayemi v. Hambrecht & Quist, Inc., 174 F.R.O. 319, 324 (S.D.N.Y. 1997). For these reasons, the Court hereby enjoins defendants Uber and **Kalanick** from using in any manner in connection with this case any of the information obtained through Ergo's investigation, including by presenting arguments or seeking discovery concerning the same.

Plaintiff next seeks "an order enjoining Defendants and Ergo from undertaking any further personal background investigations of individuals involved in this litigation through the use of false pretenses, unlicensed investigators, illegal secret recordings, or other unlawful means." See Notice of Motion. Ergo, for its part, immediately consented to an order enjoining "any further background investigation of any individuals involved in this litigation." See Ergo Opp. Br. at 1; see also Tr. 26:20-25. Uber and Mr. **Kalanick** also consented to plaintiff's second request for relief, subject to the limitation that defendants would be able to seek information about plaintiff for purposes genuinely relevant to the litigation, such as information that would bear on whether plaintiff **Meyer** is an appropriate class representative. See Tr. 56:9-57:2; see also Uber Opp. Br. at 20. The Court is of the view that such a limitation is appropriate, and that the clearest way to enforce such a limitation is to enter the following injunction. Specifically, the Court hereby enjoins both defendants and Ergo from undertaking any further personal background investigations of individuals involved in this litigation through the use of false pretenses, unlicensed investigators, illegal secret recordings, or other unlawful, fraudulent, or unethical means.

Plaintiff's third request, which was made against defendants Uber and **Kalanick**, was for monetary sanctions including reimbursement of plaintiff's attorneys' fees and expenses incurred in connection with the aforementioned conduct. See Tr. 27:6-11. A federal district court is authorized to sanction "improper conduct" through its "inherent power," including by assessing attorneys' fees and costs against a party when that party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991) (internal quotation marks omitted).

If the Court were to reach the issue of whether such sanctions were warranted here, it would have to address whether Uber acted with, at least, wanton disregard for its ethical and legal obligations. Ergo, as noted supra, carried out its investigation in a blatantly fraudulent and arguably criminal manner. Furthermore, Uber lawyers were required by New York's Rules of Professional Conduct to adequately supervise the Ergo non-lawyers that Uber hired to do work. See N.Y. Rules of Professional Conduct § 5.3. As it happens, however, the Court need not determine whether Uber failed in these duties, because the defendants have reached agreement to pay plaintiff a reasonable (though publicly undisclosed) sum in reimbursement of plaintiff's attorneys' fees and expenses incurred in conjunction with these matters.

While pleased that the parties have resolved the last prong of plaintiff's requested relief, the Court cannot help but be troubled by this whole dismal incident. Potential plaintiffs and their counsel need to know that they can sue companies they perceive to be violating the law without having lies told to their friends and colleagues so that their litigation adversaries can identify "derogatories." Further, the processes of justice before the Court require parties to conduct themselves in an ethical and responsible manner, and the conduct here fell far short of that standard. As the Supreme Court long ago stated, "courts of law" have inherent "equitable powers . . . over their own process, to prevent abuses, oppression, and in justice," Gumbel v. Pitkin, 124 U.S. 131, 144 (1888). This Court will not hesitate to invoke that power if any further misconduct occurs.

In sum, for the foregoing reasons, the Court, on consent, hereby enjoins defendants Uber and Mr. **Kalanick** from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same; enjoins both defendants and Ergo from undertaking any further personal background investigations of individuals involved in this litigation through the use of false pretenses, unlicensed investigators, illegal secret recordings, or other unlawful, fraudulent, or unethical means; and retains jurisdiction to enforce Uber's agreement to reimburse plaintiff in the sum agreed to by the parties.

The Clerk of Court is directed to close docket entry 96.

SO ORDERED.

[1] Uber was joined as a co-defendant on June 20, 2016. See Memorandum Order dated June 19, 2016, Dkt. 90.

[2] This document, an email chain including messages from Mr. Henley, Mr. Sullivan, and Ms. Yoo, was inadvertently omitted from the documents that the Court intended to release to plaintiff's counsel following in camera review (see *infra*). It has now been released.

[3] Ergo also acknowledges that "Mr. Santos-Neves evidently told Mr. Moneyhon and Mr. Egeland (sometime before the project was completed) that he had used false pretenses." See Ergo's Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Ergo Opp. Br."), Dkt. 114, at 5.

[4] This letter was sent by Ergo to the Court. Plaintiff responded in a letter dated June 21, 2016, and Ergo replied in a letter dated June 23, 2016. All three of these letters will be docketed along with this Opinion and Order.

[5] While this formulation of the crime-fraud exception is based on the attorney-client privilege, the crime-fraud exception also applies to the work-product doctrine, as noted *supra*. See In re Richard Roe, 68 F.3d at 39; In re Grand Jury Subpoena, 731 F.2d at 1038.

[6] While Ergo asserts that no one else at Ergo knew that Mr. Santos-Neves was recording phone calls, see Tr. 16:5-10, Ergo has not suggested that Mr. Santos-Neves was violating Ergo policy in so doing.

[7] Ergo contends that in New Hampshire, an individual cannot be held to have violated the law forbidding the recording of a telephone call without consent if that person acted "with a good faith belief that [his] conduct was lawful." See Ergo Letter dated June 23, 2016, citing Fischer v. Hooper, 732 A.2d 396, 400 (N.H. 1999) (internal quotation marks omitted); see also Tr. 17:5-9. However, the Fischer court distinguished such a "good faith belief" from "intentional or reckless disregard for the lawfulness of [a person's] conduct." See Fischer, 732 A.2d at 400. Here, the Court finds that that Mr. Santos-Neves displayed reckless disregard for the lawfulness of his conduct. Moreover, Ergo's citation of Fischer does not speak to Connecticut law. Further, even if by chance one of the individuals contacted by Ergo was located somewhere different from the location suggested by the area code of his or her phone number, see Tr. 18:7-15, Ergo would have recklessly disregarded the likely possibility that the individual in question was, in fact, located in Connecticut or New Hampshire.

[8] Pursuant to the Court's direction at a joint telephone conference held on June 28, 2016, the parties were permitted to initially file redacted copies of their briefs and exhibits and then re-file copies that were unredacted, with the exception of very limited redactions permitted by the Court.

Save trees - read court opinions online on Google Scholar.

44 N.Y.2d 76 (1978)

**The People of the State of New York, Respondent,**

**v.**

**Sylvester Jones, Appellant.**

**Court of Appeals of the State of New York.**

Argued February 10, 1978.

Decided March 28, 1978.

*William E. Hellerstein* for appellant.

*Mario Merola*, District Attorney (*Alan Seth Adolph* and *Alan D. Marrus* of counsel), for respondent.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, WACHTLER, FUCHSBERG and COOKE concur.

78 \*78JONES, J.

We hold that defendant was not denied due process when the District Attorney's office did not disclose during plea negotiations that it had received information that the complaining witness had died.

On January 5, 1975 as he was entering his car, Juan Rodriguez was approached at gunpoint by three persons including defendant who forced their way into the vehicle, drove him a distance and stole his wallet before releasing him and driving off. Following his arrest defendant was indicted for robbery in the first degree, robbery in the second degree, grand larceny in the third degree and criminal possession of a weapon in the fourth degree and entered pleas of not guilty. The case appeared on the calendar a number of times during 1975 and was adjourned on each occasion for various reasons, among them the inability of the **People** to locate the complaining witness, Rodriguez. On January 15, 1976 investigators for the defense located the witness, and shortly thereafter defense \*79 counsel was informed that the District Attorney's office had also found and conferred with him. On February 3, 1976 the prosecution announced the case ready for trial.

Plea negotiations had been conducted before the complaining witness had been located, were continued after the case had been marked ready, and culminated on April 26, 1976 when defendant withdrew his prior plea of not guilty and pleaded guilty to robbery in the third degree in full satisfaction of the indictment. After defendant admitted his guilt and established a factual basis for the plea, the plea was accepted and sentencing was put over until June 7.

When defendant appeared for sentencing, defense counsel moved to withdraw the plea of guilty on the ground that it had come to his attention the previous day that the District Attorney's office had been informed of the death of Rodriguez, the victim, on April 22, 1976, four days prior to the acceptance of the plea.

In support of the motion to withdraw the plea, counsel for defendant contended that "in the spirit of *Brady versus Maryland* [373 US 83]" the prosecution was obliged to disclose the fact of Rodriguez' death to the defense and averred that had counsel "known that the witness in chief passed away, had I been informed of that fact I would not have allowed, at least I would have advised my client not to make the plea". A hearing was had on defendant's application on June 17, 1976, at the conclusion of which, following submissions of counsel, the application was denied (87 Misc 2d 931). The Appellate Division affirmed defendant's judgment of conviction on the plea, and we now affirm the dispositions of both courts below. At no time did defendant assert, nor does he now, that he was innocent of having committed the criminal acts charged.

It advances analysis to focus on the precise nature of the matter which was not disclosed by the prosecutor during the plea negotiations — information with respect to the death of the complaining witness. The circumstance that the testimony of the complaining witness was no longer available to the prosecution was not evidence at all. Further, to the extent that proof of the fact of the death of this witness might have been admissible on trial, it would not have constituted exculpatory evidence — i.e., evidence favorable to an accused where the evidence is material either to guilt or to punishment. Accordingly, it does not fall within the doctrine enunciated by the Supreme Court of the United States in *Brady v Maryland* (373 US 83, 87; \*80 and cf. *United States v Agurs*, 427 US 97, 112). Counsel does not now claim otherwise. Rather, as counsel tacitly admitted in his

colloquy with the court on the motion to withdraw the plea, the death of Rodriguez would merely have been one of the factors — though a most significant factor — to be weighed by defendant in reaching his decision whether, as a matter of tactics in light of the strength of the **People's** case against him, to interpose a negotiated plea of guilty.

The question remains as to the extent of the prosecution's obligation to disclose information in its possession which, as here, is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself. Analytically the issue is not whether this defendant was entitled to evidence in the possession of the prosecution; the question before us on this appeal is whether the pretrial conduct of the prosecutor in the course of plea negotiation was such as to constitute a denial of due process to defendant in the circumstances disclosed in this record.

81 The Supreme Court has observed that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v United States*, 295 US 78, 88.) Defendant notes that, as the basis for announcing the case ready, the prosecutor had represented to the court and to defense counsel that the complaining witness had been located and would therefore be available to testify at trial. Defendant adds that the prosecutor knew, or at least was chargeable with knowledge, that the plea for which defendant had negotiated was predicated principally on the availability of the Rodriguez testimony. Defendant then argues that it was reprehensible on the part of the prosecutor not to disclose that he \*81 had been informed of Rodriguez' death, before the acceptance of defendant's guilty plea. He asserts that nondisclosure in these circumstances constituted a denial of due process and that the sanction therefor must be to permit a withdrawal of the plea. We reject this contention.

82 Counsel cite no reported case, nor has our independent research disclosed any, in which judicial attention has been focused on the failure of a prosecutor before trial or during plea negotiations to disclose nonevidentiary information pertinent to the tactical aspects of a defendant's determination not to proceed to trial. No particularized rule can or need be laid down; some comments may usefully be assayed, however. At the threshold we assume that, notwithstanding that the responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant, no prosecutor is obliged to share his appraisal of the weaknesses of his own case (as opposed to specific exculpatory evidence) with defense counsel. "A defendant is not entitled to withdraw his plea merely because he discovers \* \* \* that his calculus misapprehended the quality of the State's case". (*Brady v United States*, 397 US 742, 757.) At the other extreme it is equally clear that the courts will allow a defendant to withdraw a guilty plea when the prosecution has either coerced him by threats or persuaded him by affirmative deceit to enter a guilty plea (e.g., *People v O'Neill*, 7 N.Y.2d 867). All the reported instances of deceitful persuasion appear to have involved positive misstatement or misrepresentations; none has considered the effect to be accorded silence only. Consistent with legal principles recognized elsewhere in our jurisprudence, it would seem that silence should give rise to legal consequences only if it may be concluded that the one who was silent was under an affirmative duty to speak (cf., e.g., 24 NY Jur, Fraud and Deceit, § 107, pp 160-161). Whether and to what extent the courts, in the absence of statute or possible rule of court would impose such an affirmative duty on a prosecutor would necessarily be dependent on the circumstances of the individual case. Thus, we do not decide what the rule might be where in the course of plea negotiation a particular defendant staunchly and plausibly maintains his innocence but states explicitly and creditably that as a matter of balanced judgment in the light of the apparent strength of the **People's** proof he wishes to interpose a negotiated plea to reduced charges to avoid the risk of a more severe sentence \*82 likely to attend conviction after trial; failure of the prosecutor to reveal the death of a critical complaining witness might then call for a vacatur of the plea. Silence in such circumstances might arguably be held to be so subversive of the criminal justice process as to offend due process.

It may be of more than passing interest that the formal statements of the professional responsibilities of prosecutors to make disclosure appear to address only the obligation to disclose exculpatory evidence (Code of Professional Responsibility, DR7-103, subd [B]; cf. former canon 5 of the Canons of Professional Ethics).<sup>[1]</sup> None touches on disclosure of tactical data. The applicable provision of the Standards Relating to the Prosecution Function and the Defense Function promulgated by the American Bar Association Project on Standards for Criminal Justice, is found in subdivision (c) of section 4.1: "It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused." Here, too, the formulation of standards appears to consider only affirmative

misrepresentation and possibly, by reasonable extension, misleading silence when there is an affirmative duty of disclosure. The provision does not, however, assist in determining when there may be such an affirmative duty to disclose.

A fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the **People** are not able to establish his guilt.

Turning then to the present case, we hold that there was no obligation on the part of the prosecutor to reveal to defense counsel that Rodriguez had died, prior to acceptance of defendant's plea of guilty. Defendant does not protest his innocence; on the contrary he testified to the factual basis for the charge to which he pleaded. While the prosecutor failed to inform defense counsel of Rodriguez' death, there is no claim of affirmative misrepresentation. And, it is critical, the failure to disclose did not involve exculpatory evidence. We perceive no reason to depart from the principle that a fairly and voluntarily \*83 negotiated plea is the equivalent of a conviction after trial (*Boykin v Alabama*, 395 US 238).

Accordingly, for the reasons stated, the order of the Appellate Division should be affirmed.

Order affirmed.

[\*] Reference to such standards should not be taken to imply that sanction for violation of professional responsibilities on the part of a prosecutor would necessarily inure to the benefit of a defendant. The appropriate remedy might be limited to disciplinary proceedings. In any event, we now express no view on this aspect of the matter.

Save trees - read court opinions online on Google Scholar.

101 Ohio St.3d 14 (2003)  
2003-Ohio-6649

CINCINNATI BAR ASSOCIATION

v.

STATZER.

No. 2003-1109.

Supreme Court of Ohio.

Submitted September 16, 2003.

Decided December 31, 2003.

15 \*15 Clements, Mahin & Cohen, L.L.P., and William E. Clements; Rendigs, Fry, Kiely & Dennis, L.L.P., and Carolyn A. Taggart, for relator.

Timothy A. Smith and Lester S. Potash, for respondent.

O'CONNOR, J.

{¶ 1} Respondent, Joni Elizabeth **Statzer** of Cleves, **Ohio**, Attorney Registration No. 0067179, was admitted to the **Ohio bar** in 1996. On June 17, 2002, relator, **Cincinnati Bar** Association, charged respondent with violations of the Code of Professional Responsibility in a two-count complaint. Relator later amended its complaint to include a third count of misconduct.

{¶ 2} A panel appointed by the Board of Commissioners on Grievances and Discipline heard the cause on May 14, 2003, and made findings of fact, conclusions of law, and a recommendation. The panel dismissed the first and second counts of the complaint, finding no clear and convincing evidence that respondent had violated any Disciplinary Rules. See Gov.**Bar R. V(6)(H)**; **Ohio State Bar Assn. v. Reid** (1999), 85 **Ohio St.3d** 327, 708 N.E.2d 193, paragraph two of the syllabus. The first count alleged that, to avoid discipline, respondent had induced her former legal assistant to execute a false affidavit claiming that her law office had prepared a client's file for retrieval. The second count alleged that respondent knew but did not report to relator that a former associate had induced the same legal assistant to provide false testimony to absolve the associate of blame for having missed a hearing. The panel determined that the testimony of the legal assistant, a central witness on these counts, lacked credibility. The panel also found that respondent's counsel had sufficiently reported to relator that respondent had knowledge of claimed misconduct involving the former associate.

{¶ 3} With respect to the third count, the record shows that respondent deposed her former legal assistant on November 20, 2002, in anticipation of the panel hearing, at the office of one of relator's attorneys. During the proceeding, which was attended by respondent's and relator's legal counsel, respondent conspicuously placed nine audio cassette tapes in front of her former legal assistant. By suggestively labeling the tapes and referring to them during questioning, respondent implied that she had recorded conversations with the legal assistant that could impeach and personally embarrass the legal assistant. Respondent also intermittently cautioned the legal assistant to answer truthfully or risk perjuring herself.

16 \*16 {¶ 4} Respondent's suggestive display of the cassettes was intended to mislead the legal assistant. The tapes were actually blank or held information unrelated to the legal assistant, and consequently, respondent did not offer the tapes as evidence during or after the deposition. The panel found that respondent had thereby violated DR 1-102(A)(4), which prohibits a lawyer from engaging in conduct involving fraud, deceit, dishonesty, or misrepresentation, and DR 7-106(C)(1), which prohibits a lawyer appearing in a professional capacity before a tribunal from alluding to any matter that will not be supported by admissible evidence.

{¶ 5} In recommending a sanction for this misconduct, the panel reviewed the mitigating and aggravating considerations listed in Section 10 of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline of the Supreme Court. The panel determined that in attempting to mislead the legal assistant, respondent "engaged in a deceptive practice during the disciplinary process." The panel found no other aggravating factors and identified no mitigating factors.

{¶ 6} Having found that respondent violated DR 1-102(A)(4), the panel concluded that she should receive an actual suspension of her law license, the sanction ordinarily required for this infraction. See Cincinnati Bar Assn. v. Florez, 98 Ohio St.3d 448, 2003-Ohio-1730, 786 N.E.2d 875, and Disciplinary Counsel v. Fowerbaugh (1995), 74 Ohio St.3d 187, 658 N.E.2d 237. But, see, Cleveland Bar Assn. v. Cox, 98 Ohio St.3d 420, 2003-Ohio-1553, 786 N.E.2d 454, ¶ 18; Toledo Bar Assn. v. Kramer (2000), 89 Ohio St.3d 321, 323, 731 N.E.2d 643 (A lesser sanction may be appropriate for an attorney's violation of DR 1-102[A][4] where the misconduct is an isolated incident in an otherwise unblemished legal career). The panel also found respondent's misconduct similar to that committed in Columbus Bar Assn. v. King (1998), 84 Ohio St.3d 174, 702 N.E.2d 862, wherein two attorneys were disciplined for surreptitiously taping a telephone call in which one of them had solicited arguably slanderous remarks about his client from an opposing party and then added the slander allegation to the pending claim. In *King*, we suspended one attorney from the practice of law for one year, suspended the other attorney for six months, and conditionally stayed both suspensions. Here, the panel recommended suspending respondent's license for one year and staying six months of that sanction on the condition that she engage in no further misconduct. Pursuant to Gov.Bar R. V(6)(L), the board adopted the panel's findings and recommendation.

17 {¶ 7} Relator urges us to find that respondent lied during the investigation leading to Count I about whether she had actually returned the client's case file that was the subject of the prior grievance against her. In response to relator's inquiry, respondent assured the investigator in writing that the client's file had \*17 been copied and made available to the client, and she included with her response the legal assistant's affidavit, later recanted, to this effect. Relator argues that this representation is contradicted by other documents in which respondent stated that she would not release the file until the client paid her legal fees, by the client's new attorneys, who testified that respondent did not comply with their requests for the file, and by her former client, who testified that she never received the file. Relator insists that these contradictions discredit respondent's story, notwithstanding the legal assistant's unreliable account of what may or may not have happened after the client discharged respondent.

{¶ 8} Upon review, we acknowledge that these inconsistencies exist; however, they do not warrant disregarding the panel's findings as adopted by the board. The panel observed the witnesses firsthand and thus possessed an enviable vantage point in assessing the credibility and weight of their testimony. For this reason, we ordinarily defer to a panel's credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings. Cleveland Bar Assn. v. Cleary (2001), 93 Ohio St.3d 191, 198, 754 N.E.2d 235.

{¶ 9} Here, the panel questioned respondent at length and unanimously dismissed Count I after finding insufficient evidence to conclude that she had acted dishonestly. Supplanting the panel's judgment on this issue would require proof of the variety in Findlay/Hancock Cty. Bar Assn. v. Filkins (2000), 90 Ohio St.3d 1, 734 N.E.2d 764, in which we rejected recommended findings of misconduct because the panel had relied largely on the uncorroborated testimony of a witness who had admittedly lied often, including once under oath. The inconsistencies asserted by relator simply do not compare. Relator's first objection, therefore, is overruled, and we adopt the recommendation to dismiss Count I.

{¶ 10} Additionally, relator objects to the panel's unanimous decision to dismiss Count II. Relator argues that respondent had a duty to report under DR 1-103(A) (a lawyer possessing unprivileged knowledge of misconduct as defined by DR 1-102 shall report such knowledge to an appropriate authority) that her legal assistant told respondent that she had testified falsely at the direction of respondent's former associate. We disagree, again out of deference to the panel. The panel found that the allegations in Count II depended "in large part" on the legal assistant's "frail credibility." We take from this that the panel considered the legal assistant's claim so inherently unreliable that, in retrospect, it did not invoke the reporting requirement in DR 1-103(A), regardless of whether the claim ultimately turned out to be true. Moreover, the panel found that respondent's counsel did report to relator other allegations of misconduct against the associate that were based on respondent's personal experience. Accordingly, relator's second objection is also overruled, and Count II is dismissed.

18 \*18 {¶ 11} In her objections to the panel's findings as adopted by the board relative to Count III, respondent asserts that while DR 7-106(C)(1) prohibits an attorney's reference to matters that will not be supported by admissible evidence when appearing "before a tribunal," it does not apply to the deposition respondent conducted at the office of relator's attorney. Respondent also contends that her conduct during the deposition of the legal assistant did not constitute a violation of DR 1-102(A)(4). We reject both arguments.

{¶ 12} "Tribunal" is defined in the Code of Professional Responsibility as "all courts and all other adjudicatory bodies," but we have not construed this term as narrowly as respondent urges us to do today. In Disciplinary Counsel v. Levin (1988), 35 Ohio

St.3d 4, 517 N.E.2d 892, an attorney became verbally abusive during a deposition. We found that in making his insulting and profane remarks, the attorney had acted before a tribunal in violation of DR 7-106(C)(2) (asking any question before a tribunal that the attorney has no reason to believe is relevant to the case and that is intended to degrade a witness or other person), 7-106(C)(5) (failing to comply with known local customs of courtesy or practice while appearing before a tribunal), 7-106(C)(6) (engaging in undignified or discourteous conduct degrading to a tribunal), and 7-106(C)(7) (intentionally or habitually violating an established rule of procedure or evidence). *Id.* at 7, 517 N.E.2d 892.

{¶ 13} We continue to adhere to this view. Although depositions are conventionally conducted without direct judicial supervision, such proceedings are nevertheless always subject to judicial intervention and oversight under Civ.R. 30(D) (court may terminate or limit the scope of a deposition upon a showing of bad faith or harassment on the part of a deponent or party) and, thus, are within the boundaries of the judicial setting. And because there is ordinarily no presiding authority, "it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition." *Matter of Golden (1998), 329 S.C. 335, 343, 496 S.E.2d 619.*

{¶ 14} Depositions may be used to investigate an adversary's case or to preserve testimony for impeachment or for the record. Civ.R. 32(A). Any deposition that is to be used as evidence must generally be filed in court. *Id.* It therefore follows that these proceedings are to be conducted as if before a tribunal, including in accordance with DR 7-106(C)(1). In fact, depositions taken in Gov. **Bar** R. V proceedings must be filed with the board pursuant to Civ.R. 32. Section 3(B) of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline.

19 {¶ 15} Respondent, however, urges us to distinguish trial conduct from "discovery depositions," arguing that the latter require greater freedom of inquiry into matters that may be relevant but inadmissible. See Civ.R. 26(B)(1) (inadmissible \*19 evidence reasonably calculated to lead to the discovery of admissible evidence is also discoverable). This was particularly the case, respondent insists, in the deposition of the legal assistant. She argues that wide latitude was imperative during that proceeding to draw honest testimony from a theretofore untrustworthy witness and that use of the audio cassette tapes was merely a tactic intended to achieve this legitimate end.

{¶ 16} We recognize that the discovery process, particularly the pursuit of information through deposition, cannot be overly restricted if it is to remain effective. We must draw the line, however, when an attorney engages in subterfuge that intimidates a witness. While respondent's primary purpose during the legal assistant's deposition may have been to elicit the truth, her tactic also tricked the legal assistant into thinking that the revelation of embarrassing confidences was at stake.

{¶ 17} Throughout these proceedings, respondent has asserted that her "bluff" worked. Regardless, the success of her tactic is not at issue, and respondent cannot, with any degree of certainty, assert that her witness would not have testified truthfully in the absence of her subterfuge. Further, while such deception may induce truthful testimony, it is just as likely to elicit lies if a witness believes that lies will offer security from the false threat. Respondent's deceitful tactic intimidated her witness by creating the false impression that respondent possessed compromising personal information that she could offer as evidence. For these reasons, we agree that respondent violated DR 1-102(A)(4) and 7-106(C)(1).

{¶ 18} As a sanction for respondent's misconduct, relator advocates respondent's indefinite suspension from the practice of law based on arguments that respondent committed misconduct in connection with Counts I and II, in addition to Count III. Respondent, on the other hand, argues that the complaint should be dismissed. In the alternative, she asserts that the panel and board ignored mitigating evidence and, therefore, the sanction recommended by the board—a one-year suspension with six months conditionally stayed—is too severe. Respondent proposes that a public reprimand would be more appropriate.

{¶ 19} We find that either proposed sanction, as well as the board's recommendation, would be incommensurate with respondent's misconduct. An indefinite suspension would be too harsh in light of our dismissal of Counts I and II, while no more than a public reprimand would unduly minimize the severity of respondent's conduct.

20 {¶ 20} As to the board's recommendation, we find that there are mitigating factors for which the board did not account. Specifically, the panel and board did not mention that there is no evidence of respondent's having been professionally disciplined before now, the grievances lodged against her notwithstanding. Moreover, respondent has a professional history of dutiful service to clients, \*20 including the client whose case file she supposedly has not returned. In fact, another of respondent's associates testified that respondent had worked tirelessly on this client's behalf for years while representing her in a contentious divorce and related allegations of abuse. Finally, respondent cooperated in these proceedings.



{¶ 21} On the basis of these mitigating factors, we temper our disposition in accordance with the rule that a stayed suspension is sometimes warranted by mitigating concerns, notwithstanding a violation of DR 1-102(A)(4). See *Disciplinary Counsel v. Markijohn*, 99 Ohio St.3d 489, 2003-Ohio-4129, 794 N.E.2d 24 (attorney who falsely reported contributions to his law firm's retirement plan violated DR 1-102[A][4], but his good character, lack of any disciplinary record, and personal difficulties were sufficiently mitigating to stay the ordered six-month suspension), and *Disciplinary Counsel v. Wrenn*, 99 Ohio St.3d 222, 2003-Ohio-3288, 790 N.E.2d 1195 (assistant prosecutor who did not disclose potentially exculpatory DNA results violated DR 1-102[A][4] and three other Disciplinary Rules, but his background and acknowledged poor judgment were sufficiently mitigating to stay the ordered six-month suspension).

{¶ 22} Consistent with this authority, we order that respondent be suspended from the practice of law in **Ohio** for six months, and we stay this sanction on the condition that she engage in no further misconduct. If respondent violates this condition, the stay will be lifted, and respondent will serve the entire period of actual suspension. Costs are taxed to respondent.

Judgment accordingly.

RESNICK, PFEIFER, LUNDBERG STRATTON and O'DONNELL, JJ., concur.

MOYER, C.J., and F.E. SWEENEY, J., dissent.

MOYER, C.J., dissenting.

{¶ 23} I respectfully dissent from the sanction imposed on respondent by the majority. For the reasons that follow, I would suspend respondent for one year and stay six months of the suspension on condition that she engage in no further misconduct.

I

## Erroneous Dismissal of Count I

21 {¶ 24} The board dismissed Count I of relator's complaint. Count I alleged facts that, if true, warrant the conclusion that respondent lied to the **bar** association in a written response to a disciplinary grievance filed against her in \*21 2000 and that, to support that lie, she provided the **bar** association with evidence she knew to be misleading at best, i.e., an affidavit that had been executed by her legal assistant.

{¶ 25} In correspondence related to that grievance, respondent stated that a former client had, in fact, been "given copies of all papers in her file" at her request. To support that assertion, respondent provided the **bar** association with an affidavit executed by her legal assistant representing that the assistant had "prepared a complete photocopy of [the former client's] domestic relations file, and left it at the front desk for [the former client] to pick up" in January 1999. The legal assistant averred in her affidavit that she assumed that the file had been "picked up by [the former client] as it is no longer at the front desk."

{¶ 26} If the majority views the first count of the complaint as constituting a charge that respondent *solicited* the execution of a false affidavit, then the board's dismissal of Count I arguably is justified. The respondent testified that she did not ask the legal assistant to prepare the affidavit (although she did declare that she felt justified in supplying the **bar** association with the affidavit because its contents reflected "what Jennifer told [her] to be true"). The legal assistant testified that the respondent had asked her to prepare the false affidavit. In view of the board's conclusion that the legal assistant lacked credibility, the relator did not provide clear and convincing evidence to rebut respondent's testimony that she did not ask the legal assistant to execute a false affidavit.

{¶ 27} When the first count of the complaint is appropriately viewed more broadly, it is clear that the relator did establish, by clear and convincing evidence, that respondent had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, even if the testimony of the legal assistant is disregarded for lack of credibility. The legal assistant's affidavit, offered by the respondent, constitutes a representation by the respondent that the former client was presented with a complete copy of her file in January 1999.

22 {¶ 28} The record contains clear and convincing evidence that the respondent was well aware that the client had not received a copy of her file in January 1999. In December 1998, respondent wrote her client, indicating that she would provide a copy of the

file only upon receipt of a check for \$15,000. On February 23, 1999, subsequent to the time period referenced in the legal assistant's affidavit, respondent wrote to the client's new attorney, "If I receive a check of \$3,000.00, I will, immediately within 24 hours, turn over her file to you." She added, "If I do not receive that token payment, you will not be receiving any files from my office." In November 1999, respondent filed answers to interrogatories served upon her by her former client, whom she had sued for the payment of legal fees. In those answers, respondent asserted that she would not produce her former \*22 client's file because it "is too voluminous to copy, and also there is an attorney's lien on this information." She further answered, "The file is available for inspection at any time in my office. I will also make it available for the court hearing. However, I will not release it because of the lien."

{¶ 29} Her representation to the **bar** that the former client had in fact received the file was clearly and convincingly proven to be "conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of DR 1-102(A)(4). Therefore, I do not believe the board should have dismissed Count I of the complaint.

## II

### Sanction

{¶ 30} Respondent acknowledges that she engaged in a deceptive practice while deposing her former legal assistant during the course of the **bar** association's disciplinary investigation of her. Yet she shows no remorse for that conduct. She continues to assert that her intentional use of deceit was justified and implies that it is perfectly appropriate to deceive a witness in the course of a deposition in order to "encourage" the witness to testify truthfully. She thus apparently believes that the ends (obtaining truthful testimony from a witness) justify the means (intentionally deceiving a witness).

{¶ 31} Respondent affirmatively argues that it was appropriate to intentionally create a false impression in the mind of the deposition witness, her former legal assistant, because the witness herself had been untruthful in the past. She asserts that attorneys frequently engage in competitive endeavors "no different" from other activities in which "two opposing sides vie for victory" and characterizes her actions as meeting "fire with fire." She analogizes litigation to a game of poker, in which "bluffs" are commonly employed.

{¶ 32} In my view, however, attorneys must be held to ethical standards higher than those expected of poker players. Attorneys are not justified in employing deception even when they believe that the person with whom they are dealing is untruthful. Were we to condone such conduct, the practice of law would likely quickly slide to the lowest levels of ethical behavior. The maxim taught us as children remains valid: two wrongs do not make a right.

{¶ 33} The board recommended that respondent be suspended for a period of one year, with six months of the suspension to be stayed on condition that she engage in no further misconduct. I agree with that recommendation. I believe that the mitigation cited by the majority is counterbalanced by the respondent's failure to appreciate the wrongfulness of her conduct. The sanction imposed by \*23 the majority sends the wrong message to the **bar** and to the public. I would adopt the recommendation of the board.

F.E. SWEENEY, J., concurs in the foregoing dissenting opinion.

Save trees - read court opinions online on Google Scholar.

412 N.W.2d 855 (1987)

226 Neb. 585

STATE of Nebraska **ex rel.** NEBRASKA STATE BAR **ASSOCIATION, Relator,**

**v.**

**Ernest H. ADDISON, Respondent.**

No. 87-201.

**Supreme Court of Nebraska.**

September 25, 1987.

BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, District Judge Retired.

PER CURIAM.

856 This is an original disciplinary proceeding brought against Ernest H. **Addison**, a lawyer \*856 duly admitted and licensed to practice law in this **state**.

A formal charge against **Addison** was filed in this court on March 11, 1987, alleging his violation of Canon 1, DR 1-102(A)(1), (4), (5), and (6), and Canon 7, DR 7-102(A)(5), of the Code of Professional Responsibility.

The referee appointed herein held a hearing on the matter, filed his report with findings of fact and conclusions of law, and has recommended that the court suspend the respondent from the practice of law for a period of 6 months.

It appears from the record that the charge in question arose out of an action filed in the district court for Douglas County, **Nebraska**, on behalf of plaintiff Joseph Medina. Medina had retained another attorney and respondent, Ernest **Addison**, to represent him in connection with injuries he sustained in an automobile accident that occurred in Omaha, **Nebraska**, on January 12, 1985. Medina was injured when a vehicle driven by Michael John Kozal collided with another vehicle driven by Susan Teresa Miyeno, which in turn struck Medina, a pedestrian at the time. As a result of the accident Medina was hospitalized at the Lutheran Medical Center in Omaha, **Nebraska**, and incurred expenses there totaling approximately \$112,836.36. Kozal was insured by **State** Farm Automobile Insurance Company, with a policy limit of \$100,000, and also by Sea Insurance Company, Ltd., with an umbrella liability policy having a limit of \$1 million. Miyeno had a liability insurance policy with Allstate Insurance Company, having a limit of \$50,000.

On November 5, 1985, respondent **Addison** visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. **Addison** became aware at this meeting that Winchester was under the false impression that **State** Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, **Addison** negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for \$45,000 of the **State** Farm settlement of \$100,000, and an additional \$15,000 if and when Medina settled with Allstate, plus another \$5,000 if the settlement proceeds from Allstate exceeded \$40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent **Addison**.

In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).

Based upon the violations in this action and in light of the fact that respondent has previously been reprimanded by this court, **State ex rel. Nebraska State Bar Assn. v. Addison & Levy**, 198 Neb. 61, 251 N.W.2d 717 (1977), the referee recommended that respondent be suspended from the practice of law for a period of 6 months. Thereafter, the respondent filed a conditional admission with this court, acknowledging that his conduct constitutes a violation of DR 1-102(A)(1) and (4).

We believe that the referee was correct in his findings of fact and law and that the recommendation and consent thereto was

proper. Accordingly, we enter a judgment of suspension for 6 months, said suspension to commence on December 1, 1987.

JUDGMENT OF SUSPENSION.

Save trees - read court opinions online on Google Scholar.

78 N.Y.2d 184 (1991)

**In the Matter of Elizabeth Holtzman, an Attorney, Appellant. Grievance Committee for the Tenth  
Judicial District, Respondent.**

**Court of Appeals of the State of New York.**

Argued May 29, 1991.

Decided July 1, 1991.

*Norman Redlich, Robert B. Mazur and George T. Conway III* for appellant.

*Grace D. Moran, Frank A. Finnerty, Jr., and Chris McDonough* for respondent.

*Burt Neuborne, Arthur Eisenberg, Alison Wetherfield and Ruth Jones* for the New York Civil Liberties Union and another, amici curiae.

*Daniel J. Capra* for the Committee on Professional Responsibility of the Association of the Bar of the City of New York, amicus curiae.

Judges SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK, JR., and BELLACOSA concur in Per Curiam opinion; Chief Judge WACHTLER taking no part.

188 \*188Per Curiam.

Petitioner brought this proceeding pursuant to 22 NYCRR 691.6 (a) to vacate a Letter of Reprimand issued by the Grievance Committee for the Tenth Judicial District.

The charge of misconduct that is relevant to this appeal was based on the public release by petitioner, then District Attorney of Kings County,<sup>[1]</sup> of a letter charging Judge Irving Levine with judicial misconduct in relation to an incident that allegedly occurred in the course of a trial on criminal charges of sexual misconduct (Penal Law § 130.20), and was reported to her some six weeks later. Specifically, petitioner's letter stated that:

189 "Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted. \* \* \* [T]he victim reluctantly got down on her hands and knees as everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine \*189 profoundly degraded, humiliated and demeaned her."

The letter, addressed to Judge Kathryn McDonald as Chair of the Committee to Implement Recommendations of the New York State Task Force on Women in the Courts, was publicly disseminated after petitioner's office issued a "news alert" to the media.

Following a dispute over the truth of the accusations, Robert Keating, as Administrative Judge of the New York City Criminal Court, conducted an investigation into the allegations of judicial misconduct. His report, dated December 22, 1987, concluded that petitioner's accusations were not supported by the evidence. Upon receipt of the report, Albert M. Rosenblatt, then Chief Administrative Judge, referred the matter to the Grievance Committee for inquiry as to whether petitioner had violated the Code of Professional Responsibility.

Some six months later, the Grievance Committee sent petitioner a private Letter of Admonition in which it stated that "the totality of the circumstances presented by this matter require that you be admonished for your conduct." Petitioner's misconduct, the Committee concluded, violated DR 8-102 (B), DR 1-102 (A) (5), (6) and EC 8-6 of the Code of Professional Responsibility.

In July 1988, after petitioner requested a subcommittee hearing pursuant to 22 NYCRR 691.6 (a), she was served with three formal charges of misconduct under DR 8-102 (B) and 1-102 (A) (5) and (6). Charge 1 alleged that petitioner had engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against Judge Levine. Charge 2 related to petitioner's subsequent videotaping of the complaining witness's statement under oath, and release

of the audio portion of the tape to the media, despite her knowledge that the complainant would be a necessary witness in other investigations. Charge 3 related to a later press release in which petitioner stated that she had knowledge of other allegations of misconduct involving the Judge, thereby further demeaning him. Only Charge 1 is in issue on this appeal.

190 The conduct set forth in Charge 1, allegedly demonstrating petitioner's unfitness to practice law, included release of the letter to the media (1) prior to obtaining the minutes of the criminal trial, (2) without making any effort to speak with court officers, the court reporter, defense counsel or any other \*190 person present during the alleged misconduct, (3) without meeting with or discussing the incident with the trial assistant who reported it, and (4) with the knowledge that Judge Levine was being transferred out of the Criminal Court, and the matter would be investigated by the Court's Administrative Judge as well as the Commission on Judicial Conduct (to which the petitioner had complained).

After hearings, the subcommittee submitted its findings to the full Grievance Committee. The Committee sustained the first and third charges and issued petitioner a Letter of Reprimand, which was also private (22 NYCRR 691.6 [a]). The letter, dated October 19, 1989, stated that the Committee sustained Charges 1 and 3, and concluded that petitioner's conduct was "prejudicial to the administration of justice and adversely reflects on [her] fitness to practice law in violation of DR 1-102 (A) (5) and (6) of the Code of Professional Responsibility." No mention was made of DR 8-102 (B).

Petitioner then brought this proceeding seeking to vacate the Letter of Reprimand. The Appellate Division concluded that the record supported the Committee's findings as to Charge 1, more specifically that petitioner's conduct violated DR 8-102 and 1-102 (A) (6). We now affirm, agreeing with both the Grievance Committee and the Appellate Division that petitioner's conduct violated DR 1-102 (A) (6), and we reach no other question.

Petitioner relies primarily on two arguments. First, she asserts that the allegations concerning Judge Levine's conduct were true or at least not demonstrably false. Second, petitioner asserts that her conduct violates no specific disciplinary rule and further that DR 1-102 (A) (6), if applicable, is unconstitutionally vague. These contentions are without merit.

The factual basis of Charge 1 is that petitioner made false accusations against the Judge. This charge was sustained by the Committee and upheld by the Appellate Division, and the factual finding of falsity (which is supported by the record) is therefore binding on us.

191 As for the contention that petitioner's conduct did not violate any provision of the Code, DR 1-102 (A) (6) (now DR 1-102 [A] [7]) provides that a lawyer shall not "[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law." As far back as 1856, the Supreme Court acknowledged that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an \*191 attorney or counsellor ought to be removed" (*Ex parte Secombe*, 19 How [60 US] 9, 14). Broad standards governing professional conduct are permissible and indeed often necessary (see, *In re Charges of Unprofessional Conduct Against N.P.*, 361 NW2d 386, 395 [Minn], *appeal dismissed* 474 US 976).

Such standards are set forth in Canon 1 and particularly in DR 1-102. An earlier draft of the Code listed "conduct degrading to the legal profession" as a basis for a finding of misconduct under DR 1-102, but this provision was replaced by the "fitness" language of DR 1-102 (A) (6) and the "prejudicial to the administration of justice" standard of DR 1-102 (A) (5) (see, Annotated Code of Professional Responsibility, Textual and Historical Notes, at 12). The drafters of the Code refined the provisions to provide attorneys with proper ethical guidelines. Were we to find such language impermissibly vague, attempts to promulgate general guidelines such as DR 1-102 (A) (6) would be futile.

Rather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed (see, *Committee on Professional Ethics & Conduct v Durham*, 279 NW2d 280, 283-284 [Iowa]; see also, *In re Buffalo*, 390 US 544, 554-555 [White, J., concurring]; *Matter of Cohen*, 139 AD2d 221).

Applying this standard, petitioner was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law. Indeed, her staff, including the person assigned the task of looking into the ethical implications of release to the press, counseled her to delay publication until the trial minutes were received.

Petitioner's act was not generalized criticism but rather release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant, aimed at a named Judge who had

presided over a number of cases prosecuted by her office (see, Matter of Terry, 271 Ind 499, 502-503, 394 NE2d 94, 95-96, cert denied 444 US 1077). Petitioner knew or should have known that such attacks are unwarranted and unprofessional, serve to bring the Bench and Bar into disrepute, and tend to undermine public confidence in the judicial system (see, Matter of Bevans, 225 App Div 427, 431).

192 \*192Therefore, petitioner's conduct was properly the subject of disciplinary action under DR 1-102 (A) (6), and it is of no consequence that she might be charged with violating DR 8-102 (B) based on this same course of conduct (see, In re Huffman, 289 Ore 515, 522, 614 P2d 586, 589; Committee on Professional Ethics & Conduct v Durham, 279 NW2d, at 285, supra; Matter of Terry, 271 Ind, at 501, 394 NE2d, at 94, supra). Indeed, in the present case there are factors that distinguish petitioner's conduct from that prohibited under DR 8-102 (B) — most notably, release of the false charges to the media — and make it particularly relevant to her fitness to practice law.

Petitioner contends that her conduct would not be actionable under the "constitutional malice" standard enunciated by the Supreme Court in New York Times Co. v Sullivan (376 US 254). Neither this Court nor the Supreme Court has ever extended the Sullivan standard to lawyer discipline and we decline to do so here.

Accepting petitioner's argument would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth (see, St. Amant v Thompson, 390 US 727, 731; Trails West v Wolff, 32 N.Y.2d 207, 219). Such a standard would be wholly at odds with the policy underlying the rules governing professional responsibility, which seeks to establish a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." (Code of Professional Responsibility, Preliminary Statement.)

Unlike defamation cases, "[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." (Matter of Terry, 271 Ind, at 502, 394 NE2d, at 95, supra.) It follows that the issue raised when an attorney makes public a false accusation of wrongdoing by a Judge is not whether the target of the false attack has been harmed in reputation; the issue is whether that criticism adversely affects the administration of justice and adversely reflects on the attorney's judgment and, consequentially, her ability to practice law (see, In re Disciplinary Action Against Graham, 453 NW2d 313, 322 [Minn], cert denied \_\_\_ US \_\_\_, 111 S Ct 67).

193 In order to adequately protect the public interest and maintain \*193 the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances (see, Louisiana State Bar Assn. v Karst, 428 So 2d 406, 409 [La]). It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.

Petitioner's course of conduct satisfies any standard other than "constitutional malice," and therefore Charge 1 must be sustained.

We have examined petitioner's remaining contentions and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Order affirmed, without costs.

[\*] Although all proceedings conducted by the Grievance Committee were kept confidential and the decision of the Appellate Division was not published (see, 22 NYCRR 691.4 [j]), petitioner has expressly waived any right to confidentiality on this appeal.

Save trees - read court opinions online on Google Scholar.

27 N.E.3d 182 (2015)  
2015 IL App (5th) 140079

**Randy ROBISON, Plaintiff-Appellee,**  
**v.**  
**ORTHOTIC & PROSTHETIC LAB, INC., Defendant-Appellant.**

No. 5-14-0079.

**Appellate Court of Illinois, Fifth District.**

February 4, 2015.

183 \*183 James L. Smith, Kamykowski, Gavin & Smith, PC, St. Louis, for appellant.

Mark C. Scoggins, Clay B. St. Clair, and Anthony P. Gilbreth, Crowder & Scoggins, Ltd., Columbia, for appellee.

## OPINION

Presiding Justice CATES delivered the judgment of the court, with opinion.

¶ 1 The defendant, **Orthotic & Prosthetic Lab, Inc.**, appeals from an order of the circuit court granting a motion to enforce a settlement agreement in a product liability action. The defendant contends that the settlement agreement is invalid because the attorneys who purportedly represented the plaintiff during settlement negotiations lacked the authority to negotiate a settlement where the plaintiff had died and a proper representative of the estate had not been substituted as the party plaintiff. The defendant also contends that the settlement agreement is invalid because the attorneys who purportedly represented the plaintiff during settlement negotiations failed to disclose the material fact that the plaintiff had died eight months prior to the commencement of the negotiations. For the reasons that follow, we vacate the order granting the motion to enforce the settlement and remand the cause for further proceedings.

¶ 2 On November 24, 2008, the plaintiff, Randy **Robison**, through his attorneys, Crowder & Scoggins, Ltd. (the Crowder firm), filed a product liability action in the circuit court of St. Clair County against the defendant, **Orthotic & Prosthetic Lab, Inc.** The plaintiff alleged that he suffered serious injuries when a prosthesis, which was designed, manufactured, and sold by the defendant, failed while he was using it for its intended purposes. He sought damages for personal injuries, pain and suffering, and past and future medical expenses. The defendant, through its attorneys, Greensfelder, Hemker & Gale, P.C. (the Greensfelder firm), appeared, and the case proceeded on the usual path with motions, discovery, and disclosures of expert witnesses. In March 2013, the trial court noted that there had been little activity in the case between December 2012 and March 2013. The court also scheduled a status conference for April 29, 2013. The status conference was continued and rescheduled for July 1, 2013. The attorneys of record appeared on that date, and the court scheduled the case for a trial in October 2013.

184 ¶ 3 In September 2013, the attorneys of record, James Smith, an attorney with the \*184 Greensfelder firm, and Anthony Gilbreth, an attorney with the Crowder firm, began settlement negotiations via email, and the email communications are a part of the record. On September 19, 2013, Mr. Smith emailed a final offer to settle the case for a sum certain to Mr. Gilbreth. In an email dated September 24, 2013, Mr. Gilbreth provided the following response: "My client has instructed me to accept [amount redacted] in full and final settlement of this matter. Please provide an appropriate release and I will present it to my client for review and approval."

¶ 4 On October 24, 2013, the court was notified that a settlement had been reached, and that the settlement documents were being drafted. The case was continued pending the execution of the settlement documents.

¶ 5 On November 7, 2013, Mr. Smith tendered a settlement agreement and a general release to Mr. Gilbreth. On Friday, November 15, 2013, Mr. Gilbreth sent an email to Mr. Smith and attached an amended version of the proposed release. The email stated, in part, as follows:



"I also attach a Suggestion of Death and Order substituting Randy's son, Matthew, as Plaintiff in this matter. As you may already know, Randy passed away, and his son was appointed Administrator of his Estate in August. So long as you have no objection to Matt being substituted as Plaintiff, I can simply have the Order entered next time I am in Belleville."

It was via the email of November 15, 2013, that the defendant and its attorneys first learned that the plaintiff had died and that the plaintiff's son, Matthew **Robison**, had been appointed as the personal representative of his estate.

¶ 6 On Monday, November 18, 2013, Mr. Smith emailed Mr. Gilbreth regarding the failure to disclose the fact of Randy **Robison's** death. Mr. Smith asked Mr. Gilbreth whether the failure to disclose the fact of the plaintiff's death was intentional or an "unfortunate oversight." He also asked whether Mr. Gilbreth considered the death of the plaintiff to be a material fact in the context of settlement discussions in a personal injury case. In reply, Mr. Gilbreth stated that he and his office had researched the issue and determined that he had no affirmative duty to disclose the information because it was against his clients' interests and he had a duty to protect his clients' interests within the bounds of the rules of professional responsibility. On November 19, 2013, Mr. Smith advised Mr. Gilbreth that the defendant would not consent to the substitution of the plaintiff. He further advised that the defendant did not believe that the settlement was valid.

¶ 7 On December 30, 2013, Matthew **Robison**, personal representative of the estate of Randy **Robison** (the personal representative), by his attorneys of the Crowder firm, filed a motion to substitute plaintiff and a motion to enforce settlement in the product liability case. In the motion to substitute plaintiff, the personal representative sought to be substituted as the party plaintiff, noting that the plaintiff, Randy **Robison**, died on January 20, 2013; that the cause of action survives; and that the personal representative of the probate estate of Randy **Robison** had been appointed by the circuit court in St. Louis County, Missouri, on August 27, 2013.

185 ¶ 8 In the motion to enforce settlement, the personal representative asserted that the plaintiff had accepted the defendant's offer of settlement on September 24, 2013; that the defendant tendered a settlement agreement and a release on November 7, 2013; that counsel for the plaintiff informed the defendant on November 15, 2013, that the plaintiff had died and that \*185 the personal representative of the plaintiff's probate estate would move to be substituted as the plaintiff for purposes of completing the settlement; and that on November 19, 2013, the defendant's counsel advised that the defendant would not consummate the settlement because the defendant was unaware, at the time of the settlement, that the plaintiff was deceased. The personal representative claimed that Randy **Robison's** death was not a proper basis for refusing to complete the settlement and that the settlement agreement should be enforced.

¶ 9 The defendant filed a memorandum in opposition to the motion to enforce the settlement. The defendant claimed that the settlement agreement was invalid because the authority of the Crowder firm to represent the plaintiff in the product case terminated upon the plaintiff's death, and because there was no plaintiff of record when the settlement was negotiated. The defendant further argued that the settlement was invalid because the death of the plaintiff was a material fact that had been concealed from the defendant prior to and during settlement negotiations. The defendant attached the petition for letters of administration seeking the appointment of Matthew **Robison** as personal representative of Randy **Robison's** estate. The petition was filed in the circuit court of St. Louis County, Missouri, on July 9, 2013, by Kathie Blackman Dudley, an attorney with the Crowder firm. The defendant argued that the content of the petition showed that Mr. Gilbreth had knowledge of the plaintiff's death at least two months before settlement negotiations commenced.

¶ 10 The motions were called for hearing January 21, 2014. At the close of the hearing, the trial court granted the motion to substitute the personal representative as the party plaintiff and took the motion to enforce the settlement under advisement. The court entered an order granting the motion to enforce the settlement on January 22, 2014.

¶ 11 On appeal, the defendant contends that the circuit court erred in granting the motion to enforce the settlement. We agree.

¶ 12 In every suit, there must always be a plaintiff, a defendant, and a court. *Mitchell v. King*, 187 III. 452, 459, 55 N.E. 637, 639 (1899). An attorney's employment and his authority are revoked by the death of his client, and an attorney cannot proceed where he does not represent a party to the action. *Mitchell*, 187 III. at 459, 55 N.E. at 639; *Washington v. Caseyville Health Care Ass'n*, 284 III. App.3d 97, 100, 219 III.Dec. 719, 672 N.E.2d 34, 36 (1996). Generally, the attorney-client relationship is terminated by the death of the client, and thereafter, the authority of the attorney to represent the interests of a deceased client must come from the personal representatives of the decedent. *Washington*, 284 III.App.3d at 101, 219 III.Dec. 719, 672 N.E.2d at 36; *In re Marriage of Fredricksen*, 159 III.App.3d 743, 111 III.Dec. 539, 512 N.E.2d 1080 (1987).

¶ 13 In this case, the plaintiff, Randy **Robison**, died on January 20, 2013. Upon Randy **Robison's** death, the product liability action was without a plaintiff, and the Crowder firm's authority to act on behalf of Randy **Robison** terminated. Under our procedural rules, this cause of action is one that survives the death of a party, and the personal representative of the decedent's estate is permitted to file a motion for substitution. See 735 ILCS 5/2-1008(b) (West 2002). The motion for substitution is to be filed within 90 days after the party's death is suggested of record, and the date of the actual death is not a factor. See Ferak v. Elgin, Joliet & \*186 Eastern Ry. Co., 55 III.2d 596, 600, 304 N.E.2d 619, 621 (1973). In this case, the motion to substitute plaintiff was timely filed on December 30, 2013, and the order authorizing the substitution of the personal representative as the party plaintiff was entered on January 21, 2014. Thus, from January 20, 2013, to January 21, 2014, the product liability action was without a plaintiff, and the Crowder firm did not represent a party to the action.

¶ 14 Settlement negotiations commenced in September 2013, and an agreement was ostensibly reached on September 24, 2013. The defendant, however, had no knowledge about the plaintiff's death or the appointment of a personal representative throughout the period of settlement negotiations. Mr. Gilbreth acknowledged that he did not disclose these facts to the defendant until November 15, 2013, weeks after the settlement was reached and months after the plaintiff's death. Mr. Gilbreth also acknowledged that the disclosure of the plaintiff's death would have adversely impacted the settlement value of the case. He stated that he believed that the decision to withhold the information was in his clients' best interest and was in keeping with the rules of professional responsibility. We strongly disagree. We find that the arguments expressed by Mr. Gilbreth are specious and incredible, and we are concerned about his professional judgment in this case. In failing to disclose the fact of the plaintiff's death, Mr. Gilbreth intentionally concealed a material fact that would have reduced the overall value of the claim for damages. In addition, and equally troubling, Mr. Gilbreth led the defendant to believe that he had authority to negotiate a settlement of the litigation on behalf of the party plaintiff, when the action was without a plaintiff as the plaintiff had died and a representative had not been substituted. Given Mr. Gilbreth's intentional misrepresentations and material omissions prior to and during the settlement negotiations, we conclude that the settlement agreement is invalid and unenforceable, and that the trial court erred in granting the motion to enforce it. Accordingly, we hereby vacate the order granting the motion to enforce settlement and remand the cause to the circuit court for further proceedings.

¶ 15 Finally, we believe that we have a profound responsibility to comment on the conduct of the attorneys in this case. Lawyers who are admitted to practice in Illinois, and those who are not admitted but provide legal services within this jurisdiction, are subject to the Illinois Rules of Professional Conduct of 2010 (RPC). III. R. Prof. Conduct (2010) R. 8.5 (eff. Jan. 1, 2010). Rule 8.4(c) of the RPC states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. III. R. Prof. Conduct (2010) R. 8.4(c) (eff. Jan. 1, 2010). Rule 8.3 requires a lawyer to report unprivileged knowledge of misconduct involving fraud, dishonesty, or deceit, or misrepresentation by another lawyer to the Illinois Attorney Registration and Disciplinary Commission (ARDC). See III. R. Prof. Conduct (2010) R. 8.3 (eff. Jan. 1 2010); In re Himmel, 125 III.2d 531, 539, 127 III.Dec. 708, 533 N.E.2d 790, 793 (1988).

¶ 16 In this case, we believe that the material omissions and misrepresentations made by Mr. Gilbreth, which were detailed earlier in this decision, constitute serious violations of Rule 8.4. We also believe that defense counsel possessed sufficient knowledge to trigger a duty to report Mr. Gilbreth's misconduct to the ARDC, and that the failure to report the misconduct constitutes a potential violation of Rule 8.3. See Himmel, 125 III.2d at 540-43, 127 III.Dec. 708, 533 N.E.2d at \*187 793-94. Therefore, we will direct the clerk of this court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for its consideration of the actions of the attorneys in this case. While we bring to light potential violations of the rules of professional conduct by Mr. Gilbreth and Mr. Smith, we express no opinion as to the merits of any charges that may be brought against them in relation to those matters. Disciplinary proceedings and sanctions for unprofessional conduct rest exclusively within the inherent authority of our supreme court. In re Harris, 93 III.2d 285, 291, 66 III.Dec. 631, 443 N.E.2d 557, 559 (1982). We intend that this case will serve as a reminder that the reporting obligations under our rules of professional conduct, though weighty and unpleasant, are influenced by a profound desire to maintain the integrity of our legal profession, to further the ends of justice, and to protect the public. Himmel, 125 III.2d at 544, 127 III.Dec. 708, 533 N.E.2d at 795.

¶ 17 For the reasons stated, we hereby vacate the order of the circuit court granting the motion to enforce the settlement, and we remand this case to the circuit court for further proceedings. We further direct the clerk of this court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for its consideration of the actions of the attorneys in this case.

¶ 18 Order vacated; cause remanded.

Justices CHAPMAN and SCHWARM concurred in the judgment and opinion.

Save trees - read court opinions online on Google Scholar.

# **POWERPOINT PRESENTATION**

# Lies, Damn Lies, and “Alternative Facts”

Bruce A. Green, Fordham University School of Law

Nicole I. Hyland, Frankfurt Kurnit Klein & Selz

November 16, 2017



WASHINGTON, DC



THE WHITE HOUSE

MEET  
THE  
PRESS  
#MTP

# Ethics Complaint Filed Against Conway

Complaint alleges Conway violated DC Rule 8.4(c) by making deceptive statements to the press in her role as Counselor to President Trump

# If Conway lied to the press, should she be disciplined?

- Does it matter that she was not acting as a lawyer?
- Are her statements intentionally false?
- Should she be held to a higher standard than other political actors because she is a lawyer?
- Would disciplining Conway create a troubling precedent for other political actors?
- Should the attorney disciplinary system get involved in political matters?
- Are there First Amendment issues?





# The General Duty of Candor

A lawyer shall not . . . engage in conduct involving *dishonesty, fraud, deceit or misrepresentation.*

- Rule 8.4(c)

# Specific Rules Regarding Candor

- Candor to the Court (Rule 3.3)
- Candor to Third Parties While Representing a Client (Rule 4.1)
- Candor to Your Client (Rule 2.1)
- Candor in Billing (Rule 1.5(a))
- Candor to Potential Clients in Advertising (Rule 7.1)
- Candor in the Admissions Process or disciplinary matters (Rule 8.1)
- Candor in discussing a judge's qualifications, conduct or integrity (Rule 8.2(c))

# Lying vs. Silence: Example

- A drug defendant's lawyer received a call from her client's mother the night before a scheduled court date.
- The client's mother told the attorney that her son would likely not make it to court the next day, as he just left the house "high as a kite."
- How should the lawyer respond the next day when the judge asks why her client is absent from court?

# Result

“[T]he attorney in such a case is advised to respectfully decline to answer, citing his ethical duty of confidentiality. To answer in any other way would violate either the attorney’s duty of confidentiality, or the attorney’s duty of candor.”

–*San Diego County Bar Ethics Op. 2011-1*



*"You're doing fine. A little more perjury and you'll be out of the woods."*

# Lying to a Judge

- Rule 3.3
  - Must not lie about the facts
  - Must not lie about the law
  - Standard is “knowingly”
  - Must correct material misstatements
  - Must comply even if it requires disclosure of confidential information

# Example

- New York criminal lawyer submitted declaration regarding an internet chat that his client had in the lawyer's office
- Internet chat purportedly established client's innocence
- After trial, client admitted to government agent that he fabricated the internet chat
- Lawyer submitted same declaration in support of appeal, despite knowing of client's admission



# Result

## Public Reprimand

- *In Re Liotti* (4<sup>th</sup> Cir. 2011)

# Lying About a Judge

A lawyer shall not *knowingly* make a false statement of fact concerning the *qualifications, conduct or integrity* of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

- Rule 8.2(a)

# Example

- The elected prosecutor sent a letter to the media alleging that a trial judge in a criminal case demeaned the complainant in a sexual assault case by making her reenact the assault.
- The prosecutor relied on second hand information: She released the letter without speaking to the trial assistant, court officers, or others in court at the time, and before obtaining a trial transcript.
- After a judicial investigation found the accusation was in error, the disciplinary authority charged the prosecutor with making a false statement about a judge.
- The prosecutor's argued that she could not be punished because, at the time, she did not seriously doubt the truth of what she said.

# Result

- The state's high court affirmed an order reprimanding the prosecutor.
- The court rejected the prosecutor's argument, explaining: "It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative."

*In re Holtzman* (NY 1991)

# Lying to a Third Party

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

– Rule 4.1

# Lying to a Third Party

- Standard is “knowingly”
- Includes false statements of both fact and law
- “Third party” includes opposing counsel, opposing party, witnesses, etc.
- What about undercover investigations?
- What about silence?

# Example

- New York consumer rights lawyer filed class action lawsuit against Match.com in November 2010
- On July 5, 2011, lawyer called Match.com's customer service department to get the name of a supervisor to depose
- Falsely identified herself as a journalist from a business journal calling for an article
- In further conversations, she again used the false name
- Realizing she had acted improperly, she promptly disclosed her actions to defense counsel

# Result

## Public Censure

– *In Re Hart* (1<sup>st</sup> Dep't 2014)



## Investigations: Example 1

- A law firm represented a client in trademark and copyright litigation against a stamp manufacturer regarding the use of the Beatles' likeness.
- Lawyers and others at the firm, pretending to be stamp collectors, telephoned the company to purchase Beatles stamps in order to obtain evidence that the company was violating a court order forbidding it from making such sales.

# Result

- The court found that the conduct did not violate the rules forbidding deceit or misrepresentations by lawyers: “The prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”
- “[H]iring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation.”

- *Apple Corps Ltd. v. Int’l Collectors Soc’y* (D.N.J. 1998)

## Investigations: Example 2

- To gather information about the opposing party and opposing counsel in a civil lawsuit, lawyers oversaw outside investigators who contacted 28 acquaintances or professional colleagues of the plaintiff and plaintiff's counsel.
- The investigators pretended to be participating in a research project.

# Result

The Court held that the investigation was conducted “in a blatantly fraudulent and arguably criminal manner,” but declined to reach the question of sanctions only because the defendant had agreed to resolve the plaintiff’s sanctions motion by making an undisclosed payment.

*Meyer v. Kalanick* (S.D.N.Y. 2016)

# Investigations: Example 3

- A lawyer is employed as an FBI agent.
- The lawyer, acting undercover, pretends to be a member of the mob, in order to obtain evidence of criminal wrongdoing.

# Result

- No violation of Rule 8.4(c).
- The rule does not apply to a “misrepresentation made in the course of official conduct when the employee (while acting in a non-representational capacity . . .) reasonably believes that applicable law authorizes the misrepresentation.”
- [This is “not blanket permission for attorneys employed by government agencies to misrepresent themselves” and does not “authorize misrepresentation when a countervailing legal duty to give truthful answers applies.”]

*Washington, D.C. Ethics Op. 323 (2004)*

# Lying vs. Silence: Example 1

- A defendant is charged with robbery. The case turns on the complaining witness's testimony.
- Initially, the prosecution cannot locate the complainant, but eventually it does and announces "ready for trial" and the case is marked trial-ready
- Over the next two months, the prosecution and defense negotiate a guilty plea. The defendant accepts a plea offer.
- Days before the scheduled guilty plea, the prosecution learns of the complainant's death. The case is not triable, but the prosecutor does not disclose this, and the defendant enters a guilty plea.

# Result

- Result: No violation of due process (or of ethics rules).
- “[S]ilence should give rise to legal consequences only if it may be concluded that the one who was silent was under an affirmative duty to speak. . . . “[T]he formal statements of the professional responsibilities of prosecutors to make disclosure appear to address only the obligation to disclose exculpatory evidence . . . . None touches on disclosure of tactical data.”

*People v. Jones* (NY 1978)



## Lying vs. Silence: Example 2

- A lawyer deposes her former legal assistant who has falsely accused of her wrongdoing.
- Trying to coax the truth out of her, the lawyer places nine suggestively labeled cassette tapes in front of her, implying that they had recorded conversations that would impeach her.
- The witness admits that the lawyer acted properly, clearing her of wrongdoing.

# Result

The lawyer was disciplined for violating the deceit rule as well as a rule against referring in judicial proceedings to matters not supported by admissible evidence.

*Cincinnati Bar Ass'n v. Statzer* (Ohio 2003)

## Lying vs. Silence: Example 3

- A personal injury lawyer negotiated with a hospital's business manager to reduce the hospital's lien on the proceeds of the plaintiff's lawsuit.
- Believing that the defendants carried only \$150,000 in insurance, the business manager agreed to reduce the lien to \$45,000 (although medical costs exceeded \$100,000).
- The lawyer did not disclose that there was an additional \$1 million policy.

# Result

The lawyer was disciplined for violating the deceit rule and the rule against knowing false statements.

*Nebraska v. Addison* (Neb. 1987)

# Lying vs. Silence: Example 4

- A plaintiff filed a products liability action in 2008.
- In September 2013, a month before the case was to be tried, the parties settled.
- The plaintiff's lawyer did not disclose that the plaintiff had died in January 2013.
- When the defendant discovered that the plaintiff had died, it moved to vacate the settlement.

# Result

- The court vacated the settlement and referred the plaintiff's lawyer to the disciplinary authority for violating the deceit rule.
- The court found that the lawyer intentionally concealed a material fact, because the plaintiff's death mattered to the settlement value.
- Also, the court found that the lawyer misled opposing counsel about his settlement authority, since a representative had not yet been substituted.

*Robison v. Orthotic & Prosthetic Lab, Inc.* (Ill. App. 2015)

# Lying to Clients

- Fiduciary duty includes duty not to lie
- Rule 2.1
  - “In representing a client, a lawyer shall exercise independent professional judgment and *render candid advice*”
- Rule 8.4(c)
  - general rule of candor applies to clients
- Rule 1.5(a)
  - No fraudulent or excessive billing

# Example – False statements to client

- Client hired lawyer to (a) file patent application and (b) file breach of contract lawsuit
- Lawyer falsely told the client that the patent application was filed, but did not file it until fifteen months later
- Lawyer sent client the USPTO acknowledgement receipt for the patent application but redacted the filing date
- Lawyer neglected to file the breach of contract complaint
- He told the client that he had filed the complaint but that the judge said the case was “not viable”



## Example (cont.) - Deception in disciplinary proceeding

- Client filed a disciplinary complaint with the Illinois bar
- In response, lawyer falsely stated that client had agreed to delay the filing of the patent application and the lawsuit
- Lawyer also falsely stated that the client instructed him to redact the filing date from the USPTO receipt, in order to conceal that information from the client's "companion"
- Lawyer later confessed that these statements were false

- *In Re Pippenger* (Ill. 2014)

# Result

## 60-day suspension

- *In Re Pippenger* (Ill. 2014)

# Lying to Potential Clients

Advertisements must not contain  
“statements or claims that are  
false, deceptive or misleading”

– Rule 7.1(a)

# Example

- Attorney mischaracterized legal skills and prior successes
- Falsely stated he handled matters in federal court
- Falsely stated he graduated from law school in 2005
- Listed 50 practice areas in which he had little or no experience
- Used the word “specialist” even though not certified as a specialist

*- Matter of Dannitte Mays Dickey (S.C. 2012)*

# Result

## Public Reprimand

*-Matter of Dannitte Mays Dickey (S.C. 2012)*

# Are some false statements okay?

- Arguments vs. Evidence?

E.g., arguments to the jury based on evidence at trial vs. expressions of personal belief

- Opinion vs. Facts?

- “Puffery”?



# Negotiations: Lying or “Puffery”

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

- Rule 4.2



# Negotiations: Lying or “Puffery”

But see, Rule 4.2, Comment 2:

“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 fact.”

Not “statements of fact”:

- Estimates of price or value placed on the subject
- A party’s intentions as to an acceptable settlement of a claim
- Existence of an undisclosed principal

- Rule 4.2, Cmt. [2]

Questions?