RUTGERS Law School

C. WILLARD HECKEL Inn of Court

TEST YOUR ETHICS:

HOW WELL DO YOU KNOW THE RULES OF PROFESSIONAL CONDUCT?

John M. Fietkiewicz
Heckel Inn Master of the Bench
Senior Counsel | Arnold & Porter

Samuel P. Moulthrop
Heckel Inn Master of the Bench
Of Counsel | Riker Danzig Scherer Hyland & Perretti LLP

Jeffrey D. Smith
Heckel Inn Master of the Bench
Partner | DeCotiis, FitzPatrick, Cole & Giblin, LLP

Justice Walter F. Timpone (Ret.)
Heckel Inn Master of the Bench
Senior Counsel | Calcagni & Kanefsy

With thanks to Inn masters and executive committee members, vice president, Sabrina Comizzoli, and secretary/treasurer, Andy Rossner for planning the meeting.

CLE Materials | March 16, 2022

Table of Contents

Test Your Ethics

By Professor Andrew Rossner

Hypo	**Notes**
1. Your client, facing a DWI charge after an accident, tells you in an initial interview that she had 7 drinks at the bar prior to her being stopped. You later learn that at the hospital after the accident, she told the police officer she had only three drinks at the bar. Blood alcohol test results show a level higher than needed for conviction. Prior to trial, your client states that she will testify that she had only three drinks. She also tells you that her friend, who was in the car and was at the bar, will corroborate her testimony. You had previously interviewed the friend who told you she was not with your client the whole evening. What do you do?	

Hypo	Notes
2. You are at a meeting with an incarcerated client, Freddy Felon, who is pending trial on aggravated assault and robbery charges. Freddy has three prior convictions for aggravated assault. As you enter the privacy of the prison meeting room, you ask Freddy how he is and he says "Great. Looks like they won't be pinning that bungled job at the Main Street bodega on me. Johnny Jones, the guy the police nabbed got convicted of the murder. Felt bad for a minute 'cuz he didn't do it, but then came to my senses - its him or me and I'd rather it be him." When Freddy sees your face, he says, "Hey, lighten up, you're my lawyer and you can't tell and it ain't our fault, the police nabbed the wrong guy, the prosecutor believed the cops and the jury believed them all. You and I didn't do nothin' to harm that guy. It's the system, man, it's the system." When you ask whether Freddy is serious, he says, "Dead serious !" When you get back to your office, you look online and you see that Johnny Jones was convicted of a murder at a bodega on Main Street. You think nothing of it for a few days, you read in the paper that Johnny Jones has been sentenced to life in prison. What do you do?	
3. Watch: Anatomy of a Murder - Plea discussions video	

Hypo	Notes
4. You have been retained by a client who believes she is a target of a criminal investigation into allegations of insurance fraud at the company where she works. No charges have yet been brought, but there has been active investigation. Indeed, your client believes that the investigation began because Maida Deal, one of her co-workers, got caught with a large amount of cocaine, got a former AP as an attorney and may be cooperating to work off those charges an avoid responsibility for the insurance fraud. Your paralegal is collecting information for the file. The paralegal informs you that (1) Maida Deal has an internet blog about lawyers, (2) the blog has links to a Facebook account and (3) that the Facebook pages are only available to Facebook "friends." Luckily, the paralegal tells you, an employee in word processing, Neita Friend, is already a Facebook "friend" of the Maida Deal. The paralegal suggests that she ask Neita to, (1) look through the web pages for relevant information, (2) post questions on Maida Deal Facebook Wall for comment, and (3) chat with Maida Deal through the Facebook account. Further, the paralegal suggest that if Neita is unwilling to do so, she, the paralegal, try to "friend" Maida Deal. a. What do you do? b. Does your answer change if the suggestion is to collect information about a potential co-defendant? c. Does you answer change if this occurs after charges are brought?	

Hypo	Notes
5. A colleague from another firm tells you he now routinely records conversations with witnesses, adversary attorneys and clients using his smart phone. He says he does so because it is more accurate than his note taking used to be and so he has a better record of what was said. He suggests you take up the practice. You don't think anything of it until you are preparing for a meeting with a difficult client about a pending appearance before the grand jury. You believe the client may be intending to lie before the grand jury and you are going to counsel him not to do so. Yet, you worry he will not take your advice and he will lie. You are thinking this would be a good conversation to record. Can you do so ethically?	
6. You receive a smart speaker for your office for the holidays. You are thrilled, because now you can have music on demand at the office, listen to news on command and the like. When your client enters the room for a meeting to discuss a plea deal, he says "it's plea deal and squeal time." A moment later, your Alexa plays the Muppets' "Interrogation" song, which contains similar lyrics. Aside from the embarrassment of the moment, are there ethical issues involved in having the speaker in your office?	
7. In preparing third party witnesses, a prosecutor typically tells the witnesses the following, "Defense attorney may try to talk with you – you are free to do it, but remember that they just want to get a statement from you that they can use on cross to rip you up" Are there ethical issues?	

Hypo	Notes
8. Your cell phone rings and you answer. It is the judge in one of your criminal cases, who says "Glad I got you. I want to discuss the motions that are coming up next week to see if I have your arguments right. I do not want to look like a fool. I was hoping we could resolve this case through a plea, because I really don't have the time for a trial given this COVID situation. How can we get this resolved?" Your adversary is not on the line. What do you do?	

LEXSEE 6 F3D 336

RESOLUTION TRUST CORPORATION, In its Corporate Capacity, Plaintiff, v. H.R. "BUM" BRIGHT, et al., Defendants-Appellees, Hopkins & Sutter, Peter F. Lovato III and Thomas D. Graber, Appellants.

No. 92-1978

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

6 F.3d 336; 1993 U.S. App. LEXIS 28974

November 9, 1993, Decided

SUBSEQUENT HISTORY: [**1] Petition for Rehearing Denied December 7, 1993, Reported at: *1993 U.S. App. LEXIS 33394.*
Rehearing denied by *Resolution Trust Corp. v. H.R. Bum Bright, 1993 U.S. App. LEXIS 33394 (5th Cir. Tex., Dec. 7, 1993)*
Summary judgment denied by *RTC v. Bright, 1994 U.S. Dist. LEXIS 21690 (N.D. Tex., Aug. 19, 1994)*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER 3:92-CV-995-D. JUDGE Joe Kendall
RTC v. Bright, 1993 U.S. Dist. LEXIS 21466 (N.D. Tex., Aug. 16, 1993)

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For Appellants: BAKER & BOTTS, L.L.P., Thomas Gibbs Gee, Jane Neninger, Houston, TX.

For Defendants-Appellees: FIGARI & DAVENPORT, A. Erin Dwyer, Donald Colleluori, Ernest E. Figari, Jr., Dallas, TX.

JUDGES: Before JONES and DeMOSS, Circuit Judges, and KAZEN, District Judge. [1]

1 District Judge of the Southern District of Texas, sitting by designation.

OPINION BY: KAZEN

OPINION

[*338] KAZEN, District Judge:

This appeal arises out of a lawsuit filed in May 1992 by the Resolution Trust Corporation ("RTC") against H.R. "Bum" Bright and James B. "Boots" Reeder, based on their alleged misconduct in connection with activities at Bright Banc Savings Association, Dallas ("Bright Banc"). Approximately two months after the suit was filed, appellees moved for a protective order and sanctions against the RTC for the manner in which its attorneys, Peter F. Lovato III and Thomas D. Graber, interviewed a former Bright Banc employee. After four days of hearings on the motion for sanctions, the district court issued an oral order on October 19, 1992, finding that the attorneys, appellants herein, impermissibly attempted to persuade the witness to sign an affidavit containing statements which the witness had not previously told appellants. The order disbarred the attorneys from practicing before the district judge and disqualified the attorneys' [**2] law firm, Hopkins & Sutter, from further representing RTC in the underlying case. In a December 28, 1992 written order, the court assessed attorneys' fees against the law firm for costs incurred by appellees in prosecuting the sanctions motion. [2] Appellants timely appealed the district court's decision. We reverse.

2 Because appellants' Notice of Appeal had already been filed when the district court issued its opinion, the court stayed the operation of the award of attorneys fees pending disposition of the appeal.

A. *Factual Background*

On May 14, 1992, the RTC filed suit in federal district court charging appellees Bright and Reeder, as shareholders, directors and officers of Bright Banc, with fraud, negligence, and breach of fiduciary and other duties owed to the bank's shareholders. As part of their pre-filing investigation of the case, attorneys Lovato and Graber conducted several interviews--all voluntary--with Barbara Erhart, formerly the Senior Vice President of Finance Support at Bright Banc. Erhart [**3] had worked closely with defendant Reeder and had contact with defendant Bright on "critical matters."

The primary focus of the Erhart interviews was the method Bright Banc used to calculate the amount of non-cash assets it had converted to cash for a December 1986 report on the bank's financial health to the Federal Home Loan Bank Board ("FHLBB"). The RTC attorneys, including Lovato and Graber, questioned Erhart extensively about who made and authorized the computations used in the report. At the conclusion of the third interview, Lovato and Graber asked Erhart to return to their office the next day--April 9, 1992--to review and sign an affidavit summarizing what she had told them in the course of the prior interviews.

When Erhart arrived at the office of Hopkins & Sutter on April 9th, she was not immediately given the affidavit. Instead, the attorneys questioned her again about the cash conversion calculations. As Lovato and Graber spoke to Erhart, they made some last-minute changes to the draft. The changes were incorporated into a revised draft which Graber then presented to Erhart. [*339] He warned her that it "contained a couple of things [they hadn't] discussed with [her]," but which [**4] the attorneys nevertheless believed to be true. Erhart was instructed to read the affidavit "very carefully."

Erhart made several changes to the draft affidavit. Some related only to semantical differences, while others reflected Erhart's disagreement with substantive claims in the affidavit. Lovato and Graber questioned Erhart extensively about the changes she made. During this questioning, the attorneys asked Erhart whether she could reword some of her changes to emphasize that Bright and Reeder were more directly involved in the decision to use the controversial cash conversion computations. Erhart declined because she did not have personal knowledge of the statements the attorneys wanted her to include in her affidavit. With respect to some of the statements in the affidavit, the attorneys were not content to accept Erhart's initial refusal to revise her changes. In an effort to have Erhart see things their way, Lovato and Graber described their understanding of how certain events transpired at Bright Banc, presented Erhart with independent evidence to support this interpretation of events, and aggressively challenged some of Erhart's assumptions about Bright and Reeder. After [**5] making their case for further revisions, Lovato and Graber asked Erhart whether she believed them and whether she was now convinced that their version of certain events was correct. Erhart, unconvinced, declined to alter the initial changes she had made to the draft affidavit.

When it was clear to the attorneys that Erhart would not sign a statement agreeing with the attorneys' version of some of the disputed events at Bright Banc, they incorporated Erhart's handwritten changes into a new draft affidavit. Erhart read this draft and made a few changes which were then included in a third draft. Erhart read and approved this version of the affidavit, signed it and left the offices of Hopkins & Sutter.

Approximately one month later, Erhart told appellees' attorneys that she had given a statement to appellant-attorneys regarding some of the transactions at issue in the underlying law suit. Appellees' counsel then arranged for Erhart to give them an *ex parte* statement on June 12, 1992 about her meetings with Lovato and Graber. This statement was transcribed by the court reporter but never signed by Erhart. However, she later adopted portions of it during testimony before Judge Kendall [**6] on August 9, 1992.

In that testimony, Erhart stated, among other things, that she did not think Lovato and Graber were asking her to say something she did not believe but rather were trying to determine if she could see the case the way they did. She denied being harassed or intimidated and expressed the view that "they were doing their job, just like everybody else." The district court essentially disregarded this testimony, finding it contrary to Erhart's earlier *ex parte* statement given to appellees' attorneys, and concluding that the change must have been the result of "obvious job pressure." Erhart's earlier statement clearly has a different tone from her subsequent court testimony. For example, she earlier described Lovato as having been particularly aggressive in attempts to persuade her to agree with appellants' version of certain events, "almost like browbeating me." Nevertheless even

in her *ex parte* statement, Erhart indicated that Lovato and Graber were not trying to have her change facts but rather to agree with a different "interpretation" or "slant" from the facts.

B. *The Motion For Sanctions*

On July 15, 1992, Bright and Reeder moved for sanctions and a [**7] protective order against the RTC based on Lovato and Graber's conduct during the Erhart interviews. The motion alleged that the manner in which the RTC's attorneys interviewed Erhart violated Texas Disciplinary Rules of Professional Conduct 3.04, 4.01(a) and 4.04(a) and probably violated *18 U.S.C. §§ 1503, 1512*. Appellees also called upon the court to exercise its "inherent powers" to sanction the RTC for intimidating Erhart. The motion asked the court to prevent the RTC from using any notes or statements obtained through the Erhart interviews, to order the RTC not to make any further contact with Erhart, and to award attorneys fees to Bright and Reeder [*340] for their efforts in bringing and prosecuting the motion for sanctions.

On July 20, 1992, the district court ordered that both sides refrain from contacting Erhart while the sanctions motion was pending. Hearings on the sanctions motion were held over the course of several days from August to October 1992.

C. The District Court's Decision

The district court issued an oral ruling on the motion for sanctions on October 19, 1992. This ruling was further clarified in separate written orders issued [**8] on October 23 and December 28, 1992.

The court found that Lovato and Graber "knowingly attempted to get a key witness. to commit to a sworn statement that they knew contained assertions of fact she had not made or told them previously in matters highly relevant to the plaintiff's civil claim." It found that the attorneys were "going to try to talk her into" those statements. The Court was particularly troubled because the draft affidavit given to Erhart added matters only in areas "that established or buttressed the [RTC's] claims." The court characterized the attorneys' actions concerning the draft affidavit as "tampering with" or attempting to "manufacture" evidence to "cause, or aid in, Defendants' downfall."

Based on its inherent power to regulate the conduct of attorneys, Judge Kendall disbarred Lovato and Graber from practicing before him. He assessed $ 110,000 in attorneys fees against Hopkins & Sutter for expenses incurred by Bright and Reeder in the prosecution of the sanctions motion. [3] Pursuant to its authority under Local Rule 13.2 (N.D.Tex.), [4] the court removed Hopkins & Sutter from further representing the RTC in the underlying action. Finally, it ordered the firm [**9] not to charge the RTC for defending against the sanction motion. No sanctions were assessed against the RTC. Lovato, Graber and Hopkins & Sutter timely appealed. [5]

3 The court explained that the award of attorneys fees was not intended as a sanction, but that it "flows from equity in light of the Court's inherent power or the purpose of reimbursement rather than sanction." December 28, 1992 Order at 3 n. 1.

4 Local Rule 13.2 of the U.S. District Court For the Northern District of Texas states, in pertinent part,

> Any member of the bar of this Court, who proves to be incompetent to practice before this Court because of unethical behavior, is subject to revocation of admission to practice in this District and to other appropriate discipline, after such hearing as the Court may direct in each particular instance.

5 The notice of appeal purports to appeal all sanctions imposed in the Order of December 28, 1992. However, an order disqualifying counsel in a civil case is not a final judgment on the merits of the litigation and does not fall under the "collateral order" exception. *Richardson-Merrell, Inc., v. Koller, 472 U.S. 424, 430, 105 S. Ct. 2757, 2761, 86 L. Ed. 2d 340 (1985).* Appellants' brief generally attacks the "sanctions" imposed by the trial court but does not specifically mention the disqualification order. Their Statement of Jurisdiction refers to counsel "who have perforce withdrawn from the case." Appellees' Statement of Jurisdiction asserts that appellants "have not attempted to appeal from that portion of the order disqualifying them as counsel to the RTC."

> Appellants have not challenged that assertion. We conclude that the disqualification sanction is not before us on this appeal. The remaining three sanctions are ripe for appeal. *Markwell v. County of Bexar, 878 F.2d 899 (5th Cir.1989).*

[**10] D. *Disbarment* of Lovato and Graber

The district court disbarred attorneys Lovato and Graber from practicing before it pursuant to the court's inherent powers to discipline attorneys. It is beyond dispute that a federal court may suspend or dismiss an attorney as an exercise of the court's inherent powers. *In re Snyder, 472 U.S. 634, 643-644, 105 S. Ct. 2874, 2880, 86 L. Ed. 2d 504 (1985)*; *Matter of Thalheim, 853 F.2d 383, 389 (5th Cir.1988)*. However, before sanctioning any attorney under its inherent powers, the court must make a specific finding that the attorney acted in "bad faith." *Thalheim, 853 F.2d at 389*. The United States Supreme Court has held that a court's imposition of sanctions under its inherent powers is reviewable under the abuse-of-discretion standard. *Chambers v. NASCO, Inc.,* U.S. , , *111 S. Ct. 2123, 2138, 115 L. Ed. 2d 27 (1991)*. A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly [*341] erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)*. [**11] In the specific context of a disqualification motion, this circuit reviews fact findings for "clear error" while "carefully examining" the district court's application of relevant ethical standards. *In re American Airlines, Inc., 972 F.2d 605, 609 (5th Cir.1992), cert. denied U.S. , 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)*.

Because disbarment is a quasi-criminal proceeding, any disciplinary rules used to impose this sanction on attorneys must be strictly construed, resolving ambiguities in favor of the person charged. *Thalheim, 853 F.2d at 388*. The Texas Disciplinary Rules of Professional Conduct do not expressly apply to sanctions in federal courts, but a federal court may nevertheless hold attorneys accountable to the state code of professional conduct. *See In re Snyder, 472 U.S. at 645 n. 6, 105 S. Ct. at 2881 n. 6*; *In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir.1990)*.

The district court failed to make specific findings of how appellants violated the Disciplinary Rules. [**12] In its oral findings, the court concluded that Lovato and Graber engaged in "inappropriate conduct, conduct that probably violates the DRs, unethical conduct, as well as a probable violation of the obstruction of justice statutes." We shall assume that the district court's comments referred to the Disciplinary Rules invoked by Appellees in their motion for sanctions.

The sanctionable conduct found by the district court was the attorneys' inclusion of statements in draft affidavits that had not been previously discussed with Erhart, combined with the attorneys' attempts to persuade Erhart to agree with their understanding of how certain events transpired at the bank. Placing statements in a draft affidavit that have not been previously discussed with a witness does not automatically constitute bad-faith conduct. *See U.S. v. Brand, 775 F.2d 1460, 1469 (11th Cir.1985)* (giving witness affidavit with statements not previously discussed not obstruction of justice). It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, [**13] that her initial version of a certain fact situation is not complete or accurate. Disciplinary Rules 3.04(b) and 4.01(a) concern the former circumstance, not the latter. The district court never found that appellants asked Erhart to make statements which they knew to be false. Indeed, the district court pretermitted any consideration of the truth of the draft affidavits. Appellees nevertheless argue that because appellant attorneys attempted to persuade Erhart to adopt certain statements which she had not expressly made and which she refused to adopt, the attorneys thereby were either making or urging the making of "false" statements in violation of DRs 3.04(b) and 4.01(a). We disagree. The district court characterized the attorneys' behavior as "manufacturing" evidence, but there is no indication that the attorneys did not have a factual basis for the additional statements included in the draft affidavit. *See Koller v. Richardson-Merrell, 237 U.S. App. D.C. 333, 737 F.2d 1038, 1058-59 (D.C.Cir.1984), vacated on other grounds 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985)*. On the contrary, appellants have attempted [**14] to demonstrate in a detailed chart that the contested portions of the affidavit were based either on their notes of interviews with Erhart or on evidence from other sources (e.g., internal bank memorandum).

We recognize that the Texas Disciplinary Rules are not the sole authority governing a motion to disqualify in federal court; rather, such a motion must be determined

by standards developed under federal law. *In re Dresser Industries, Inc., 972 F.2d 540, 543 (5th Cir.1992)*. Our source for professional standards has been the canons of ethics developed by the American Bar Association. *Id.* The district court opinion, however, makes no reference to any national canons which would add to the analysis here, nor do appellees. A court obviously would be justified in disbarring an attorney for attempting to induce a witness to testify falsely under oath, *see Thalheim, 853 F.2d at 390* (citing *U.S. v. Friedland, 502 F. Supp. 611, 619 (D.N.J.1980), aff'd. 672 F.2d 905 (3d Cir.1981))*, but this record does not support [*342] the conclusion that Lovato and Graber engaged in such [**15] behavior. While the attorneys were persistent and aggressive in presenting their theory of the case to Erhart, they nevertheless made sure that Erhart signed the affidavit only if she agreed with its contents. The attorneys never attempted to hide from Erhart the fact that some statements were included in draft affidavits that had not been discussed with her previously. Instead, they brought the statements to her attention and warned her to read them carefully. Additionally, Lovato and Graber never claimed to be neutral parties. Erhart knew that these attorneys were advocates for a particular position, and she was also in communication with attorneys who were advocating the contrary position. Were Erhart giving testimony at a deposition or at trial, the attorneys for either side would not be required to accept her initial testimony at face value but would be able to confront her with other information to challenge her testimony or attempt to persuade her to change it.

Appellees also alleged that RTC attorneys violated Disciplinary Rule 4.04(a), which prohibits an attorney from burdening a third party without a valid "substantial purpose" or violating a third party's legal rights. [**16] The district court findings do not reveal that Lovato and Graber committed either wrong. The attorneys' sometimes laborious interviews with Erhart were conducted with the goal of eliciting an accurate and favorable affidavit from a key witness in the underlying case. Additionally, the district court made no findings that the interviews violated Erhart's legal rights, nor does the record contain any evidence to support such a finding.

E. Sanctions Against The Law Firm

The district court ordered the firm of Hopkins & Sutter to pay $ 100,000 in attorneys' fees to appellees for their prosecution of the sanction motion and also restrained the firm from charging the RTC for defending against the motion. The court assessed attorneys' fees under its inherent power to do so against counsel who have conducted themselves "in bad faith." *Chambers*, U.S. at , 111 S. Ct. at 2133. It found that Lovato and Graber acted in bad faith because they tampered with or attempted to manufacture evidence and concluded that "a law firm may not escape the consequences of misconduct committed by one of its attorneys." The Supreme Court in *Chambers* described three exceptions to the [**17] so-called "American Rule," which prohibits fee shifting in most cases. The exception pertinent to the instant case is that a court may assess attorney's fees when a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." U.S. at , 111 S. Ct. at 2133. The Supreme Court compared this exception to the requirement under *Rule 11, Fed.R.Civ.P.*, providing that the signer of a paper warrants that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Id.* at n. 10. We understand the district court's finding of "bad faith" to be grounded exclusively on the proposition that attorneys Lovato and Graber wrongfully tried to tamper with or manufacture evidence. Because we have already found that the record does not support that conclusion, the assessment of attorney's fees cannot be sustained.

The trial court did not elaborate, either orally or in writing, on its order restraining Hopkins & Sutter from charging the RTC for time spent defending the motion for sanctions. Neither side has specifically addressed that sanction on appeal. Nevertheless, in view of the conclusions [**18] we have heretofore announced, there would likewise be no justification for this sanction.

F. Conclusion

We conclude that the district court abused its discretion when it issued its sanctions ruling against appellants. [6] We REVERSE and REMAND for proceedings not inconsistent with this opinion.

6 Appellants advance several additional grounds for the reversal of the district court's decision, including due process violations and an impermissible *ex parte* contact between the district court judge and an FBI agent. We need not reach these issues.

wisdom of attorneys accepting representations when former clients are involved," *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motor Corp.*, 518 F.2d 751, 760 (2d Cir. 1975) (Adams, Jr., concurring). For reasons indicated in part 2 of this opinion, we do not perceive a problem under DR 5-105 even though here we are dealing with actual former clients and not merely the lingering effects of the lawyer's representation of the trade association. We find no reason to believe that, in bringing an enforcement action against a former client, the lawyer's exercise of his independent professional judgment on behalf of his present client, the agency, or his loyalty to that client would likely be adversely affected by the prior representation.

We do have a Code-based concern about the possible breach or misuse of confidences that Canon 4 guards against. The inquiring lawyer, in his previous employment, prepared for several clients disclosures to state agencies under state laws concerning the same general subject area as the new federal rules. In this work, the lawyer arguably may have received confidential information. If, at any later date, it becomes apparent that such confidences may be related to the information relevant for the federal enforcement program, the lawyer should immediately recuse himself from enforcement efforts against the company.

The particular facts that lead us to believe that such recusal is not now required are these. First, the inquiring lawyer assures us that it is extremely unlikely he received any such confidential information. In the course of preparation of the disclosure statements, any information remotely relevant to the statutes was disclosed for public scrutiny, thereby losing its confidential character. Second, the requirements of the federal rules are not substantive and do not require particular action. Thus, any confidential information the lawyer may have received is probably irrelevant to federal enforcement action. Third, the federal rules apply only prospectively, so that any confidences the lawyer may have received in the past would not likely relate to matters that may be subject to enforcement action under the rules.

Given these particular facts, we believe that Canon 4 does not require the lawyer to abstain from participating in the enforcement program. The possibility that any confidences will be used against a former client is simply too remote to require a more prophylactic rule. *See* Opinion No. 71.

It is interesting to note that, if the new DR 9-101(F) proposed by the Board of Governors were controlling, the inquiring lawyer would be absolutely prohibited for one year from enforcing the rules against former clients. For that period there would be no factual issues as to whether the nature of a previous client relationship was such as to trigger the inhibitions of Canon 4 (or 5). However, accepting the inquirer's statement of the nature of his prior relationship, we conclude as we do under the present Code's Canon 4.

Inquiry No. 79-5-13
November 20, 1979

Opinion No. 79

DR 7-102(A)(4), (6) and (7); EC 7-26—Limitations on a Lawyer's Participation in the Preparation of a Witness's Testimony

We have been asked to delineate the ethical limitations upon a lawyer's participation in preparing the testimony of witnesses.

The specific inquiry before us arises out of adjudicatory hearings before a federal regulatory agency. The agency's rules of practice provide that direct testimony of witnesses is to be submitted in written form prior to the hearing session at which the testimony is offered; at that session, the witness adopts the testimony and attests that it is true and correct to the best of his or her knowledge and information and then is offered for cross-examination on the testimony thus submitted. The particular questions put by the inquirer are whether it is ethically proper for a lawyer actually to write the testimony the witness will adopt under oath; whether, if so, the lawyer may include in such testimony information that the lawyer has initially secured from sources other than the witness; and whether, after the written direct testimony has been prepared, the lawyer may engage in "practice cross-examination exercises" intended to prepare the witness for questions that may be asked at the hearing.

Although the particular questions posed by the inquiry are appropriate to the procedural background against which they arise, the issues they raise have broader significance. Submission of direct testimony in written form in advance of a hearing at which the witness is subject to questioning about the testimony is a frequent and familiar pattern, but it is by no means the only kind of setting in which lawyers are called upon to assist in the preparation of a witness's testimony. Written testimony is offered in a variety of forms and circumstances; in answers to written interrogatories, for instance; and in all sorts of affidavits. Lawyers are almost invariably involved in the preparation of the former, and frequently in the latter as well. There is also a pattern, somewhat parallel to that of the administrative agency in the present inquiry, to be found in legislative hearings, where witnesses are commonly expected to submit written statements in advance of their appearances before the legislative committees where they then elaborate upon their testimony *viva voce*.[1] Lawyers are frequently involved in the preparation of such legislative statements and testimony also.

In addition, lawyers commonly, and quite properly, prepare witnesses for testimony that is to be given orally in its entirety. In consequence, questions of whether a lawyer may properly suggest the language in which a witness's testimony will be cast, or suggest subjects for inclusion in testimony, do not arise solely in connection with written testimony. For this reason also, the inquirer's questions about "practice cross-examination exercises" is narrower than it needs to be: there may equally well be practice direct examination.

In sum, the ethical issues raised by the inquiry before us apply more broadly than is implied by the particular questions put by the inquirer. In order to present those issues in a more inclusive setting, the questions may usefully be rephrased as follows:

(1) What are the ethical limitations on a lawyer's suggesting the actual language in which a witness's testimony is to be presented, whether in written form or otherwise?

(2) What are the ethical limitations on a lawyer's suggesting that a witness's testimony include information that was not initially furnished to the lawyer by the witness?

(3) What are the ethical limitations on a lawyer's preparing a witness for the presentation of testimony under live examination, whether direct or cross, and whether by practice questioning or otherwise?

A single prohibitory principle governs the answer to all three of these questions: it is, simply, that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witnesses for examination.

The governing ethical provisions, which are cast in quite general terms, appear to be EC 7-26 and DR 7-102(A)(4), (6) and (7). The Ethical Consideration reads as follows:

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

The disciplinary provisions are these:

> DR 7-102. Representing A Client Within The Bounds Of The Law.
>
> (A) In his representation of a client, a lawyer shall not:
>
> (4) Knowingly use perjured testimony or false evidence. . . .
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

[1] The principal difference between this pattern and that of the adjudicatory proceeding of the kind giving rise to the instant inquiry is, ordinarily, that neither the written statements nor the oral testimony are under oath. This difference is not necessarily a significant one for ethical purposes, however.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Curiously, there appear to be no decisions of bar ethics committees directly addressing the line of demarcation between permissible and impermissible lawyer participation in the preparation of testimony from the perspective involved in this inquiry, focusing on the lawyer's conduct rather than on the nature of the testimony; and while there is some authority from other sources, it is scant, and not brightly illuminating.[3] In any event, it seems to us clear that the proper focus is indeed on the substance of the witness's testimony which the lawyer has, in one way or another, assisted in shaping; and not on the manner of the lawyer's involvement. In this regard, the pertinent provisions of the Code, quoted above, do not call for an excessively close analysis. They employ the terms "false," "fraudulent" and "perjured," the terms "testimony" and "evidence," and the terms "illegal" and "faudulent," in a manner that suggests, not that fine differences are intended, but that the terms are used casually and interchangeably. We think therefore, that all of these provisions, so far as here pertinent, are to the same effect: that a lawyer may not ethically participate in the preparation of testimony that he or she knows, or ought to know, is false or misleading.

It follows, therefore—to address the first question here raised—that the fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view. Herein, indeed, lies the principal hazard (leaving aside outright subornation of perjury) in a lawyer's suggesting particular forms of language to a witness to instead of leaving the witness to articulate his or her thought wholly without prompting: there may be differences in nuance among variant phrasings of the same substantive point, which are so significant as to make one version misleading while another is not. Yet it is obvious that by the same token, choice of words may also improve the clarity and precision of a statement: even subtle changes of shading may as readily improve testimony as impair it. The fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy; and not necessarily that the effect is to debase rather than improve the testimony in these respects. It is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.[3]

We note that in the particular circumstances giving rise to this inquiry, there is some built-in assurance against hazards of this kind, to be found in the fact that the testimony will be subject to cross-examination—which, of course, may properly probe the extent of the lawyer's participation in the actual drafting of the direct testimony, including whether language used by the witness originated with the lawyer rather than the witness, what other language was considered but rejected, the nuances involved, and so forth. The risk of distortion, whether intentional or unintentional, is obviously greater where (as will often be the case with affidavits or written answers to interrogatories) the testimony is not going to be subject to cross-examination. Nonetheless, even in that context there should be no undue difficulty for a lawyer in avoiding such distortion.

The second question raised by the inquiry —as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness—may, again, arise not only with respect to written testimony but with oral testimony as well. In either case, it appears to us that the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance. There are two principal hazards here. One hazard is the possibility of undue suggestion: that is, the risk that the witness may thoughtlessly adopt testimony offered by the lawyer simply because it is so offered, without considering whether it is testimony that he or she may appropriately give under oath. The other hazard is the possibility of a suggestion or implication in the witness's resulting testimony that the witness is testifying on a particular matter of his own knowledge when this is not in fact the cases.[4] For reasons explained above, these hazards are likely to be somewhat less serious in a case like the one giving rise to the present inquiry, where cross-examination can inquire into the source of the testimony, and test its truth and genuineness, than in the numerous situations where written testimony will probably not be followed by any examination of the witness at all. Even in the latter situation, however, there should be no difficulty, for a reasonably skilled and scrupulous lawyer, in avoiding the hazards in question.

We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony—whether the testimony is only to be under cross-examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf. *See Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia,* 20 F.R.D. 181, 182-83 (S.D.N.Y. 1957):

> [It] could scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial. Wigmore recognizes "the absolute necessity of such a conference for legitimate purposes" as part of intelligent and thorough preparation for trial. *3 Wigmore on Evidence,* (3d Edition) § 788.
>
> In such a preliminary conference counsel will usually, in more or less general terms, ask the witness the same questions as he expects to put to him on the stand. He will also, particularly in a case involving complicated transactions and numerous documents, review with the witness the pertinent documents, both for the purpose of refreshing the witness' recollection and to familiarize him with those which are expected to be offered in evidence. This sort of preparation is essential to the proper presentation of a case and to avoid surprise.[5]

---

[3] The United States Supreme Court has referred to EC 7-26 and DR 7-102 as embodying "the important ethical distinction between discussing testimony and seeking improperly to influence it," Geders v. United States, 425 U.S. 80, 90 n.3 (1976), but the Court did not elaborate on the distinction.

[3] The United States Court of Appeals for the Fourth Circuit has articulated the line of impermissibility (in the context of the sequestration of a defendant during a short recess in the course of a trial) about as clearly as it can be done:

> The danger . . . is that counsel's advice may significantly shape or alter the giving of further testimony . . . that will be untrue or a tailored distortion or evasion of the truth.

United States v. Allen, 542 F.2d 630, 633 (4th Cir. 1976), *cert. denied,* 430 U.S. 908 (1977).

[4] *Cf.* Rule 602 of the Federal Rules of Evidence: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

[5] The court in Hamdi went on to say:

> There is no doubt that these practices are often abused. The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and put-

It matters not at all that the preparation of such testimony takes the form of "practice" examination or cross-examination. What does matter is that whatever the mode of witness preparation chosen, the lawyer does not engage in suppressing, distorting or falsifying the testimony that the witness will give.

Inquiry No. 79-8-27
December 18, 1979

Opinion No. 80

DR 7-104(A)(1)—Communication by Lawyer Representing A Client With Government Officials

We are asked for our opinion on the application of DR 7-104(A)(1) to communications with government officials.[1] DR 7-104 bears the general catchline "Communicating With One of Adverse Interest." DR 7-104(A)(1) provides:

> "(A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The questions implied by the inquiry, though not specifically posed, appear to be three: first, whether DR 7-104(A)(1) has any application at all to communications directed to government officials; second, if so, what officials are to be deemed governmental "parties" with whom the rule restricts communications; and third, in what circumstances the restrictions come into play.

These questions raise sensitive issues implicating not only the need to protect uncounselled parties from possible overreaching by attorneys for adverse parties, but also the protection of the rights of the public to petition government officials and agencies. Having weighed all of the considerations which seem to us of principal concern, we have concluded that:

(1) DR 7-104(A)(1) was intended to and, as presently written, does apply to communications between lawyers for private parties and government officials;[2]

(2) The officials who are deemed to be governmental "parties with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the subject matter question, whether it be the initiation or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function; and

(3) DR 7-104(A)(1) applies only in circumstances where the word "party" is applicable in a relatively formal sense—that is, where the government agency or official is involved as a named party in litigation, a party in interest in negotiations (and so a prospective party in litigation if negotiations fail), a party to a contract under negotiation, or a party involved in substantive decisions concerning the issuance of licenses, the award of government grants, or rulemaking proceedings. The rule has no application even in such circumstances unless counsel has specifically been given responsibility for representing the governmental party in the matter and the private party's counsel has effectively been notified of that fact.

I.

A number of decisions from other jurisdictions have addressed the first question—whether the rule has any application at all to communications with government officials—albeit in a more cursory than thoughtful fashion. In all instances but one, the opinions have recognized on direct communications with government officials.[3]

The "legislative history" of the rule is less illuminating than the "case history." A footnote to the catchline of DR 7-104 quotes from Rule 12 of the Rules of the California State Bar, which states that "a member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel," and then goes on to state: "This rule shall not apply to communications with a public officer, board, committee or body." Cal. Business & Professions Code § 6076 (1962). It seems clear from this reference that the framers considered the possibility that the ABA's rule, like the California rule, should have no application in a governmental context. It is not equally clear, however, what choice the framers made in this regard. There are, at least theoretically, two possible views of their intentions: the first is that they intended that DR 7-104(A)(1) should not apply to any communications with governmental officers or bodies, but thought the matter so obvious that it was unnecessary to have the text of the rule say so explicitly; and the second is that they intended that there should not be in the ABA Code the exception found in California's Code, and so wrote a disciplinary rule without any such exception, and called attention to the California provision in order to point out an alternative path which they had thought it better not to follow. Although the matter is not altogether free from doubt, we think the second of these possibilities is substantially the more likely one.

DR 7-104 as a whole is clearly based on former ABA Canon 9, and the decisions thereunder,[4] and none of these sources contains the slightest hint of a governmental ex-

---

(Continued from previous page.)

ting words in the mouth of the witness or ideas in his mind. The line must depend in large measure, as do so many other matters of practice, on the ethics of counsel. *Id.* at 1833.

Although this passage might be read broadly to mean that any suggestion by the attorney of language or ideas to the witness is improper, we think it is more correctly read in the narrower sense of a lawyer's suggesting false testimony. Thus, immediately after the passage in question, the court quoted *3 Wigmore On Evidence* (3d ed.) § 788:

> This right may be abused, and often is; but to prevent the abuse by any definite rule seems impracticable.
>
> It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

Hamdi & Ibrahim Mango Co. v. Fire Assn. of Philadelphia, *supra*, 20 F.R.D. at 183.

[1] Because this inquiry was broad in scope, posing no particular question but seeking general guidance in a matter that inevitably is of special concern to a wide segment of this Bar, we deemed the matter to be one requiring an opinion of broad scope. Consequently, in accordance with our rules as approved by the Board of Governors, a draft opinion was published so as to elicit comments from the Bar and from interested members of the public before final action was taken concerning this inquiry. We have received at least twenty formal responses to our request for comments, and those responses, along with extensive discussions within the committee and a recent, thoughtful article by Professor John Leubsdorf, have prompted reconsideration and revision of our tentative draft opinion. See Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. R. 683 (1979).

[2] While we acknowledge that DR 7-104(A)(1), as it presently exists, requires consent of government counsel in advance of communications with government officials who are deemed with parties under the circumstances we have described, we believe that proposals should be developed to modify the present rule so as to eliminate any need for such consent and to require instead only that notice of intent to communicate with government officials be given counsel in advance of such communications. See discussion, *infra*.

[3] *See* A.B.A. Informal Opinion 1377 (June 2, 1977); New York State Bar Association Opinion 160 (October 9, 1970); State Bar of New Mexico Advisory Opinion, 9 State Bar of New Mexico Bulletin 391 (1971); Florida State Bar Association Opinion 68-20 (June 7, 1968) (digested at 44 Florida Bar Journal 404 (1970)); Oklahoma Bar Association Opinion 212 (September 15, 1961), 32 Oklahoma Bar Journal 1572 (1961); North Carolina Bar Association Opinion 455 (April 17, 1964), 11 N.C. Bar 14 (May 14, 1964); Alaska Bar Association Opinion 71-1 (April 14, 1971) digested at O. Maru, 1975 Supp., Digest of Bar Association Ethics Opinions 40 (1977) (recognizing applicability of ethical restrictions on direct communications with government officials). *See also*, State Bar of Texas Opinion 233 (June 1959), 18 Baylor Law Review 313-314 (1960) (Committee equally divided on applicability of ethical restrictions to direct communications with government officials).

[4] See footnotes 75, 76 and 77, to DR 7-104(A)(1) and (2), as well as footnote 30 which is appended to EC 7-18, the ethical consideration that illuminates this disciplinary rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; …

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

"Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so. " The opinion can be found at http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2

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

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

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

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

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

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

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

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

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

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

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

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

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

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

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

OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

September 2010

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

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

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 843 (9/10/10)

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

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

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

QUESTION

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

OPINION

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

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

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

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

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

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

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

CONCLUSION

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

(76-09)

In re Robertelli

Supreme Court of New Jersey

February 1, 2021, Argued; September 21, 2021, Decided

D-126 September Term 2019, 084373

Reporter
248 N.J. 293 *; 258 A.3d 1059 **; 2021 N.J. LEXIS 886 ***

In the Matter of John J. Robertelli, an Attorney at Law

Subsequent History: Dismissed by In re Robertelli, 2021 N.J. LEXIS 888 (N.J., Sept. 21, 2021)

Prior History: On an order to show cause why respondent should not be disbarred or otherwise disciplined.

Robertelli v. New Jersey Office of Atty. Ethics, 2015 N.J. Super. Unpub. LEXIS 213 (App.Div., Feb. 3, 2015)

Case Summary

Overview

HOLDINGS: [1]-Disciplinary charges against an attorney whose paralegal had connected with an opposing party in a personal injury suit on social media were dismissed because the evidence fell short of establishing that the attorney engaged in conduct involving dishonesty, fraud, deceit or misrepresentation or engaged in conduct prejudicial to the administration of justice; [2]-The Court held that when represented social media users fix their privacy settings to restrict information to friends, lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel.

Outcome

Disciplinary charges against attorney dismissed.

Syllabus

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the

Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

In the Matter of John J. Robertelli **(D-126-19) (084373)**

February 1, 2021 -- Decided September 21, 2021

ALBIN, J., writing for a unanimous Court.

The issue in this attorney disciplinary case is whether Respondent John Robertelli violated Rule of Professional Conduct (RPC) 4.2, which prohibits a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. That ethical prohibition applies to any form of communication with a represented party by the adversary lawyer or that lawyer's surrogate, whether in person, by telephone or email, or through social media. The Office of Attorney Ethics (OAE) brought disciplinary charges against Robertelli, asserting that he violated RPC 4.2 when his paralegal sent a Facebook message to, and was granted "friend" status by, Dennis Hernandez, who had filed an action against Robertelli's client. The charged violation occurred more than a decade ago, when the workings of a newly established social media platform -- Facebook.com -- were not widely known.

In November 2007, Robertelli represented the Borough of Oakland and an Oakland police sergeant in a personal-injury lawsuit filed by Hernandez. In preparing a defense, Robertelli requested that Valentina Cordoba, a paralegal, conduct internet research into Hernandez's academic and employment background, and any criminal history. As part of that research, Cordoba gained access to Hernandez's private Facebook page when Hernandez designated her as a "friend." At that time, Hernandez did not know that Cordoba was working for the law firm representing the parties he was suing.

Cordoba downloaded postings from Hernandez's Facebook page that included a video showing Hernandez wrestling. The defense believed that the wrestling episode may have occurred after Hernandez's accident. Robertelli forwarded to Hernandez's attorney, Michael Epstein, the Facebook postings downloaded by Cordoba. In a letter to Robertelli, Epstein accused him of violating RPC 4.2.

In May 2010, Hernandez filed a grievance with the District Ethics Committee. The Secretary of the Committee, with the concurrence of a non-lawyer public member, concluded that Hernandez's "grievance, even if proven, would not constitute unethical conduct," and therefore declined to docket the grievance for full review.

In July 2010, Epstein wrote to ask the OAE Director to investigate the "unethical conduct" of Robertelli. The OAE conducted an investigation and filed a complaint against Robertelli alleging that he violated several RPCs. At an April 2018 hearing before a Special Master, the testimony highlighted that Facebook in 2008 was unknown terrain to many attorneys.

Cordoba testified that she had a Facebook page, which did not identify her as a paralegal at Robertelli's firm. She monitored Hernandez's Facebook page, which at first was open to the public, and she reported to Robertelli about the public postings. But Hernandez's Facebook page later turned private, and she told Robertelli she no longer had access without sending a "friend" request. Cordoba claimed that Robertelli eventually gave her the green light to send Hernandez "a general message" and to proceed to monitor Hernandez's Facebook page. She believed, however, that despite her efforts to explain Facebook to Robertelli, he did not grasp the significance of a "friend" request. Cordoba, via Facebook, then forwarded Hernandez a message stating that he looked like one of her favorite hockey players, and Hernandez sent her a "friend" request.

Hernandez testified that his Facebook page was private -- and never public -- during the lawsuit and that Cordoba sent him a "friend" request, which he accepted. Because Hernandez deleted his Facebook page during the lawsuit and before he filed his ethics grievance, his Facebook records were not produced at the hearing to credit either Cordoba's or Hernandez's version of events.

Robertelli testified that in 2008 he had been practicing law for approximately eighteen years and did not know much about Facebook. He did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend." He believed that the information posted on the internet, including Facebook, was "for the world to see." He denied directing Cordoba to "friend" Hernandez or to contact or send a message to him. He recalled advising Cordoba to monitor whether Hernandez was placing information about the lawsuit on the internet. He said he had no understanding that Cordoba was communicating directly or indirectly with Hernandez.

The Special Master concluded that the OAE failed to prove by clear and convincing evidence that Robertelli violated the RPCs. The Special Master determined that Robertelli, "an attorney with an unblemished record and a reputation for integrity and professionalism," reasonably believed that his paralegal was merely exploring "publicly available information for material useful to his client" while his young

paralegal, experienced in social networking, "was unaware of potentially applicable ethical strictures." In concluding that Robertelli "proceeded at all times in good faith," the Special Master dismissed in their entirety the charges in the disciplinary complaint.

Following a de novo review of the record, six members of the Disciplinary Review Board (DRB) determined that Robertelli violated the RPCs.

HELD: *After conducting a de novo review of the record and affording deference to the credibility findings of the Special Master, the Court concludes that the OAE has failed to establish by clear and convincing evidence that Robertelli violated the RPCs. The disciplinary charges must therefore be dismissed.

*Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance. The Court refers this issue and any related issues to the Advisory Committee on Professional Ethics for further study and for consideration of amendments to the RPCs.

1. As of early 2008, Robertelli did not know how Facebook functioned, did not know about its privacy settings, and did not know the language of Facebook, such as "friending." And no jurisdiction had issued a reported ethics opinion giving guidance on the issue before the Court -- whether sending a "friend" request to a represented client without the consent of the client's attorney constitutes a communication on the subject of the representation in violation of RPC 4.2. The absence of ethical guidance at that time evidently reflected that Facebook had yet to become the familiar social media platform that it is today in the legal community. Further, the Court gives due regard to the Special Master's credibility findings based on his careful observation of the witness testimony unfolding before his eyes. In the end, based on an independent review of the record, the Court finds that the OAE has not met its burden of proving the disciplinary charges against Robertelli by clear and convincing evidence. (pp. 26-32)

2. Robertelli may have had a good faith misunderstanding about the nature of Facebook in 2008, but there should be no lack of clarity today about the professional strictures guiding attorneys in the use of Facebook and other similar social media platforms. When represented Facebook users fix their privacy settings to restrict information to "friends," lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel. Both sending a "friend" request and enticing or cajoling the represented client to send one are prohibited forms of conduct under RPC 4.2, as other jurisdictions have determined under their own rules of court. (pp. 32-35)

3. Lawyers should now know where the ethical lines are drawn. Lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven. And the Court reminds the bar that attorneys are responsible for the conduct of the non-lawyers in their employ or under their direct supervision. Under RPC 5.3, attorneys must make reasonable efforts to ensure that their surrogates -- including investigators or paralegals -- do not communicate with a represented client, without the consent of the client's attorney, to gain access to a private Facebook page or private information on a similar social media platform. (pp. 35-36)

4. The Court refers to the Advisory Committee

on Professional Ethics, for further consideration, the issues raised in this opinion. After its review, the Committee shall advise the Court whether it recommends any additional social media guidelines or amendments to the RPCs consistent with this opinion. (p. 36)

The disciplinary charges against Respondent are DISMISSED.

Counsel: Steven J. Zweig, Deputy Ethics Counsel, argued the cause on behalf of the Office of Attorney Ethics (Steven J. Zweig, on the briefs).

Michael S. Stein argued the cause on behalf of respondent (Pashman Stein Walder Hayden, attorneys; Michael S. Stein and Janie Byalik, on the briefs).

Judges: JUSTICE ALBIN delivered the opinion of the Court. CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in JUSTICE ALBIN's opinion.

Opinion by: ALBIN

Opinion

JUSTICE ALBIN delivered the opinion of the Court.

Our Rules of Professional Conduct (RPCs) generally prohibit a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. RPC 4.2. That ethical prohibition applies to any form of communication with a represented party by the adversary lawyer or that lawyer's surrogate, whether in person, by telephone or email, or through social media. Although it is fair game for the adversary lawyer to gather information from the public realm, such as information that a party exposes to the public online, it is not ethical for the lawyer -- through a communication -- to coax, cajole, or charm an adverse represented party into revealing what that person has chosen to keep private.

The issue in this attorney disciplinary case is the application of that seemingly clear ethical rule to a time, more than a decade ago, when the workings of a newly established social media platform -- Facebook.com -- were not widely known. In 2008, Facebook -- then in its infancy -- had recently expanded its online constituency from university and high school students to the general public. A Facebook user could post information on a profile page open to the general public or, by adjusting the privacy settings, post information in a private domain accessible only to the universe of the user's "friends."

Respondent John Robertelli represented a public entity and public employee in a personal-injury action brought by Dennis Hernandez. During the course of internet research, Robertelli's paralegal forwarded a flattering message to Hernandez, and Hernandez unwittingly granted her "friend" status, giving her access to his personal private information.

As a result, the Office of Attorney Ethics (OAE) brought disciplinary charges against attorney Robertelli for a violation of RPC 4.2 and other RPCs. The matter proceeded before a Special Master, who heard three days of testimony in 2018. Robertelli testified that he had little knowledge or understanding of Facebook at the time and never knowingly authorized his paralegal to communicate with Hernandez to secure information that was not publicly available. The Special Master found that the conflicting testimony between Robertelli and his paralegal about the exact nature of their conversations a decade earlier was the product of the natural dimming of memories due to the passage of time. The Special Master, in particular, found that Robertelli in 2008 did not have an understanding of Facebook's privacy settings or Facebook-speak, such as "friending." The Special Master held that the OAE did not prove by clear and convincing evidence that Robertelli violated the RPCs and dismissed the charges.

The Disciplinary Review Board split, with six members voting to sustain the charges against Robertelli (four in favor of an admonition and two in favor of a censure) and three members voting to dismiss the charges.

After conducting a de novo review of the record and affording deference to the credibility findings of the Special Master, we conclude that the OAE has failed to establish by clear and convincing evidence that Robertelli violated the RPCs. The disciplinary charges must therefore be dismissed.

We add the following. Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance. We refer this issue and any related issues to the Advisory Committee on Professional Ethics for further study and for consideration of amendments to our RPCs.

I.

A.

We rely on the record developed before the Special Master. We begin with the facts that are not in dispute.

In November 2007, Robertelli, a partner at the law firm of Rivkin Radler, LLP, represented the Borough of Oakland and an Oakland Police Department sergeant in a personal-injury lawsuit filed in Superior Court by Dennis Hernandez. Hernandez claimed that while he was doing push-ups in the police station's parking lot, the sergeant's vehicle struck him, causing permanent physical injuries and the loss of an athletic scholarship.

In preparing a defense, Robertelli requested that Valentina Cordoba, a paralegal in the firm, conduct internet research into Hernandez's academic and employment background, and any criminal history. As part of that research, Cordoba gained access to Hernandez's private Facebook page when Hernandez designated her as a "friend." At that time, Hernandez did not know that Cordoba was working for the law firm representing the parties he was suing. Cordoba downloaded postings from Hernandez's Facebook page that included a video showing Hernandez wrestling with his brother. The defense believed that the wrestling episode may have occurred after Hernandez's accident.

With that information in hand, Gabriel Adamo, an associate at Rivkin Radler, deposed Hernandez. Afterwards, Robertelli forwarded to Hernandez's attorney, Michael Epstein, the Facebook postings downloaded by Cordoba. In a letter to Robertelli, Epstein accused him of violating RPC 4.2 by communicating with his client, through Facebook, without his consent about the subject of the representation. Hernandez would later testify that the wrestling video downloaded by Cordoba predated his accident and had been posted by a "friend."

The Superior Court judge assigned to the case barred the use of the Facebook postings because the information was disclosed after the end date for the completion of discovery but made no finding of an ethical violation, as urged by Epstein.

In May 2010, Hernandez filed a grievance with the District II-B Ethics Committee, alleging that Robertelli and Adamo violated the RPCs by having their paralegal directly contact him through Facebook without the consent of his counsel. The Secretary of the District Ethics Committee, with the concurrence of a non-lawyer public member, concluded that Hernandez's "grievance, even if proven, would not constitute unethical conduct," and therefore declined to docket the grievance for full review by the Committee. *See R.* 1:20-3(e)(3).

By letter, on July 30, 2010, Epstein asked the OAE Director to investigate the "unethical conduct" of both Robertelli and Adamo. Epstein claimed that, during a lawsuit and without his consent, the two attorneys "directly contacted" his client through their paralegal who -- without disclosing her position -- requested that the client "friend" her, allowing her to access his private Facebook page.

The OAE conducted an investigation and, in November 2011, filed a complaint against Robertelli and Adamo, alleging violations of RPC 4.2 (communicating with a person represented by counsel); RPC 5.1(b) and (c) (failure to supervise a subordinate lawyer -- charged only against Robertelli); RPC 5.3(a), (b), and (c) (failure to supervise a non-lawyer assistant); RPC 8.4(a) (violation of the RPCs by inducement or through the acts of another); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

In January 2012, Robertelli and Adamo answered the complaint, asserting that they acted in good faith and committed no unethical conduct. Robertelli admitted that he asked Cordoba "to perform a broad and general internet search regarding Hernandez" in defending the personal-injury action. But he explained that he did not "understand how Facebook worked" at the time and believed that "Cordoba was accessing information that was publicly available" by clicking "the 'friend' button." Robertelli apologized for any error committed through inadvertence and denied engaging in any knowing or purposeful misconduct.

Robertelli and Adamo then requested that the OAE withdraw its complaint in light of the District Ethics Committee's decision not to file charges. When the OAE refused to do so, Robertelli and Adamo filed an action in Superior Court seeking a declaration that the OAE Director lacked authority to review the District Ethics Committee's decision. *See Robertelli v. OAE*, 224 N.J. 470, 475, 134 A.3d 963 (2016). The trial court dismissed the action because the New Jersey Supreme Court has exclusive jurisdiction over attorney disciplinary matters, and the Appellate Division affirmed. *Id.* at 476.

We held that, although the OAE Director does not have appellate authority to override a District Ethics Committee decision declining to docket a grievance, the Director does have the independent power, under our court rules, to investigate and bring disciplinary charges against an attorney -- and to prosecute those charges. *Id.* at 486-91. We added that "[w]e anticipate that the Director will use that power sparingly to address novel and serious allegations of unethical conduct." *Id.* at 490. We also noted that "[t]his matter presents a novel ethical issue" and that "[n]o reported case law in our State addresses the question." *Id.* at 487.

B.

In March 2017, this Court appointed Michael Kingman to serve as the Special Master in this case. During three consecutive days in April 2018, the Special Master heard testimony about the circumstances surrounding Cordoba's gaining access to Hernandez's Facebook page, about Robertelli's knowledge of Facebook, and about his conversations with and supervision of Cordoba a decade earlier. The passage of time challenged the memories of the witnesses, and the Special Master attempted to make sense of the conflicting accounts.

A short primer on Facebook, its growth in the world of social media, and the public and private information made available by its users will be helpful in elucidating the issues before us.[1]

---

[1] "Social media" is defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." *Social Media, Merriam-Webster*, https://www.merriam-webster.com/dictionary/social%20media

1.

Facebook is a social media platform on the internet that permits users to post and share information, including messages, articles, and other writings; photographs; and video recordings. Users can share information either with the general public or, by setting privacy restrictions, with a more limited audience, such as Facebook "friends." A Facebook "friend" is not a friend in the colloquial sense. Any person granted access to the more privately guarded information by the user is deemed a "friend" in the language of Facebook. A person becomes a Facebook "friend" either by sending the user a "friend" request that the user accepts by the click of a button, or by receiving a "friend" request from the user that the person accepts by the click of a button. Information restricted to Facebook "friends" is not available to the general public.

Facebook was launched in 2004 to a limited scope of users -- college and university students and later high school students.[2] Not until the latter part of 2006 was Facebook membership opened to the general public.[3] In July 2007, Facebook had 30 million users worldwide;[4] in August 2008, 100 million users[5] and as of June 2021, 2.9 billion users.[6]

In 2008, only fifteen percent of lawyers who responded to the American Bar Association's Legal Technology Survey reported personally maintaining a presence on social media.[7] In contrast, by 2020, seventy-seven percent of lawyers reported using social media for professional purposes.[8]

The testimony at the hearing before the Special Master highlighted that Facebook in 2008 was unknown terrain to many attorneys. In line with that assessment, Cordoba stated that "Facebook was in its infancy" in 2008, that Robertelli did not understand Facebook's "terminology" or the privacy settings for a Facebook page, and that his overall comprehension on the subject was "maybe a two" out of ten.

Robertelli testified that in 2008 he did not have a social media account and had a "[m]inimum" understanding of Facebook. His associate, Gabriel Adamo, similarly stated that he did not know "what it meant to be a friend on Facebook" and thought Facebook was another venue for information generally available on the internet. Even Hernandez's counsel, Michael Epstein, admitted that he was "relatively unfamiliar with Facebook at that time" and did not recall having a Facebook profile.

With that background in mind, we turn to the critical testimony in this disciplinary matter.

2.

Cordoba testified that while she did general internet research on the Hernandez personal-injury case for Robertelli in 2008, she had a

---

(last visited Aug. 4, 2021).

[2] Alexis C. Madrigal, *Before It Conquered the World, Facebook Conquered Harvard*, The Atlantic (Feb. 4, 2019), https://www.theatlantic.com/technology/archive/2019/02/and-then-there-was-thefacebookcom/582004.

[3] *Our History, Facebook*, https://about.facebook.com/company-info (last visited Aug. 4, 2021).

[4] Sarah Phillips, *A Brief History of Facebook, The Guardian* (July 25, 2007), https://www.theguardian.com/technology/2007/jul/25/media.newmedia.

[5] Associated Press, *Number of Active Users at Facebook over the Years, yahoo!news* (May 1, 2013), https://news.yahoo.com/number-active-users-facebook-over-230449748.html.

[6] Press Release, *Facebook, Facebook Reports Second Quarter 2021 Results* (July 28, 2021), https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Second-Quarter-2021-Results.

[7] Reginald Davis, *Getting Personal, A.B.A. J.* (Aug. 2, 2009), https://www.abajournal.com/magazine/article/getting_personal.

[8] Allison C. Shields Johs, *2020 Websites & Marketing, A.B.A.* (Nov. 9, 2020), https://www.americanbar.org/groups/law_practice/publications/techreport/2020/webmarketing.

Facebook page -- the same one she had before she graduated from college in 2004. The page did not identify her as a paralegal at Rivkin Radler. As a Facebook user, she monitored Hernandez's Facebook page, which at first was open to the public and then turned private. She reported to Robertelli about the public postings. But when Hernandez's Facebook page turned private, she told Robertelli she no longer had access without sending Hernandez a "friend" request. She recalled Robertelli telling her to hold off sending the request until he checked with the insurance adjuster. But she was uncertain whether Robertelli understood the mechanics of Facebook, the privacy settings for a Facebook page, or the meaning of a "friend" request. Cordoba claimed that, after Robertelli checked with the adjuster, he gave her the green light to send Hernandez "a general message" and to proceed to monitor Hernandez's Facebook page. She believed, however, despite her efforts to explain Facebook to Robertelli, he did not grasp the significance of a "friend" request.

Cordoba, via Facebook, then forwarded Hernandez a message stating that he looked like one of her favorite hockey players. Hernandez responded with some flirtatious messages -- to which Cordoba did not reply -- and sent her a "friend" request, which she accepted. Cordoba then gained access to Hernandez's private Facebook page as one of his six-hundred-plus "friends."

Hernandez gave a different account from Cordoba's. Hernandez testified that his Facebook page was private -- and never public -- during the lawsuit. Hernandez stated that Cordoba sent him a "friend" request, which he accepted. Afterwards, according to Hernandez, he messaged Cordoba, asking her who she was, and she replied that he looked like her favorite hockey player. Because Hernandez deleted his Facebook page during the lawsuit and before he filed his ethics grievance, his Facebook records were not produced at the hearing to credit either Cordoba's or Hernandez's version of events.

Robertelli testified that in 2008 he had been practicing law for approximately eighteen years and was the attorney responsible for the defense in the Hernandez case. According to Robertelli, at the time that he asked Cordoba to conduct internet research, he did not know much about Facebook. He did not know that a Facebook page had different privacy settings or what it meant to be a Facebook "friend." He believed that the information Hernandez posted, or others posted, on the internet, including Facebook, was "for the world to see." He denied directing Cordoba to "friend" Hernandez or to contact or send a message to him. He recalled advising Cordoba to monitor whether Hernandez was placing information about the lawsuit on the internet. He also remembered that, during a brief conversation, Cordoba told him that Hernandez's Facebook "information is now in a different area that [she could] access by the click of a button." Cordoba described the website as "the equivalent of . . . posting something on a bulletin board"; she did not say that Hernandez's Facebook privacy settings were changed from public to private or that she had to send him a "friend" request. Robertelli admitted that he told Cordoba at first to wait until he spoke with Dawn Mulligan, head of claims and risk management of the Bergen County Municipal Joint Insurance Fund,[9] and then afterward to "[c]lick on the button and continue to monitor the site." But, he said, he had no understanding that Cordoba was communicating directly or indirectly with Hernandez.

Only after Robertelli released the information downloaded from Hernandez's Facebook page in discovery and Epstein charged him with violating the RPCs did Robertelli learn that Cordoba had directly contacted Hernandez. By then, Cordoba had joined another law firm in the same building as Rivkin Radler. In the building cafeteria, Robertelli encountered Cordoba, and the two conversed about the Hernandez case. At that point, for the first

[9] The Joint Insurance Fund retained Robertelli to represent the Borough of Oakland.

time, Cordoba told Robertelli that she had sent a message to Hernandez.

C.

After hearing three days of testimony and reviewing numerous exhibits, the Special Master issued a forty-eight-page report in which he concluded that the OAE failed to prove by clear and convincing evidence that Robertelli violated the RPCs as alleged in the complaint.[10] The Special Master made the following findings by clear and convincing evidence:

1. "[Robertelli] was ignorant as to the nature and extent of information available on the internet, and proceeded under the misimpression that" what Hernandez posted was available "for viewing by the world."

2. "[Robertelli] had no knowledge or understanding of social networking privacy settings or 'friend' requests."

3. Cordoba, a young paralegal, knowledgeable about Facebook from her days as a student, did not educate Robertelli about the new information-sharing technology because -- through no fault of her own -- "she did not understand that to be part of her job."

4. Cordoba engaged in what she viewed as normal research practice, accessed information, and reported the results to Robertelli.

5. Robertelli viewed the material supplied by Cordoba as if it had been taken off a "bulletin board" on which it had been posted.

6. Robertelli believed that "people sometimes published information about themselves on the internet for the world at large to see, and that looking at that information was part of the due diligence required in handling a lawsuit."

7. Robertelli had "a few brief conversations" with Cordoba instructing her "to 'monitor' the Hernandez postings."

Given the novelty of Facebook, the Special Master also could not find by clear and convincing evidence that "[Robertelli] knew or should have known what . . . 'friending' meant," and concluded that the Facebook nomenclature "was in effect a foreign language to [Robertelli], as it would have been to most lawyers" at the time.

The Special Master made credibility findings as well. He expressed "serious doubts about the accuracy of much of the testimony at the hearing, particularly that of Cordoba," primarily because of the passage of time. He noted that Cordoba's "uncertain recollection" needed to be refreshed at various times and concluded that "[h]er interpretation today of a few brief conversations with [Robertelli]" could "hardly be relied upon to meet" the clear-and-convincing-evidence standard.[11] Indeed, he emphasized that no "definitive conclusions" could be reasonably drawn "from fragments of a conversation partially recalled from ten years earlier."

The Special Master observed that Robertelli's instruction to Cordoba to put on hold the research until he checked with the insurance adjuster logically suggested that Robertelli needed to secure the insurer's financial commitment to cover such work. The Special Master also indicated that the failure of Hernandez's counsel -- the grievant -- to preserve his client's "Facebook settings and contents" hobbled the factfinding process. For example, the information, if not deleted, would have revealed whether Hernandez's Facebook page, at first, was open to the public and whether Hernandez or Cordoba initiated the "friend" request.

In the end, the Special Master determined, by clear and convincing evidence, that Robertelli,

[10] The OAE dismissed the charges against Adamo, Robertelli's associate, at the conclusion of its case.

[11] The Special Master gave Cordoba her due, stating that "she tried to be [truthful]" in her testimony during which "she was afflicted with laryngitis and a severe cold." We do not believe that the Special Master was suggesting that Cordoba was not credible because she was under the weather.

"an attorney with an unblemished record and a reputation for integrity and professionalism," reasonably believed that his paralegal was merely exploring "publicly available information for material useful to his client" while his young paralegal, experienced in social networking, "was unaware of potentially applicable ethical strictures." In concluding that Robertelli "proceeded at all times in good faith," the Special Master dismissed in their entirety the charges in the disciplinary complaint.

Last, the Special Master recommended that this Court adopt a rule "that attorneys may not directly or indirectly friend someone represented by counsel without the knowledge and consent of such counsel."

D.

Following a de novo review of the record, six members of the Disciplinary Review Board (DRB) determined that Robertelli violated three RPCs. They concluded that the "facts" supported the findings that (1) Robertelli directed Cordoba to "communicate[] with a party represented by counsel, about the litigation, in violation of *RPC* 4.2"; (2) Robertelli failed to make reasonable efforts to ensure that a nonlawyer under his supervision acted in accordance with his own professional obligations and additionally "'ratified' the misconduct by attempting to use the fruits of Cordoba's surveillance in the underlying litigation," in violation of RPC 5.3(a), (b), and (c); and (3) Cordoba's "misrepresentation by silence or omission" to gain access to Hernandez's Facebook page is imputed to Robertelli, constituting a violation of RPC 8.4(c).[12]

Four of those six DRB members -- the plurality -- voted to impose an admonition, and the other two members, writing a separate opinion, voted to impose a censure. Three other DRB members, in two separate opinions, voted to dismiss all the disciplinary charges. The four opinions issued reflect the different story lines accepted by the DRB members.

1.

The plurality rejected what it viewed as the Special Master's finding that Cordoba was "less credible because she was sick during her testimony" or because she needed to have her memory refreshed with statements she made earlier. The plurality stated that "[t]his is the rare instance where we do not accept a credibility determination made by a trier of fact."

The plurality independently determined that "Cordoba's version" of her conversation with Robertelli concerning the Facebook research "is likely more credible than [his]." The plurality did not accept Robertelli's reasons for telling Cordoba to "hold off" doing further research. According to the plurality, it was "a stretch to believe that, as [Robertelli] recalls, Cordoba never used the words 'public' or 'private' to explain the change" in Hernandez's Facebook settings or that "the privacy component [was] so esoteric that an attorney cannot fathom what it means in the context of a nascent technology."

In short, in assessing credibility, the plurality rejected Robertelli's account and maintained that "[i]gnorance cannot be used as a shield."

2.

The two other members in favor of imposing discipline voted for a censure. In a dissenting opinion, they stated that "[Robertelli] failed to supervise his assistant *when he knew, without question*, that she was, at his instruction, trying to make contact with an adverse represented person." (emphasis added). They clearly did not find Robertelli credible in coming to their conclusion.

3.

Two DRB members, who voted to dismiss the disciplinary complaint, were unwilling to "second guess" the conclusions of the Special Master "who had the opportunity to observe the testimony and evaluate the credibility of the witnesses." Those two members gave

[12] The DRB dismissed the RPC 5.1(b) and (c) and RPC 8.4(a) and (d) charges.

great weight to three "undisputed" facts on which the Special Master rested his decision: Cordoba "did not explain to [Robertelli] the various privacy settings on Facebook or explain to him how the settings on that account changed at some point from public to quasi-private"; Robertelli was "technologically unsophisticated," "never had a Facebook page," and primarily "communicated with his staff in person or by telephone"; and "Cordoba and [Robertelli] testified that [Robertelli] never directed Cordoba to contact Hernandez or send any kind of message to him." Those DRB members highlighted (1) "the conflicting testimony [and] the changed recollection of witnesses" over the course of the investigation, (2) "Hernandez's deletion of his Facebook page," and (3) "the flimsy, almost non-existent evidence that [Robertelli] had meaningful knowledge of the workings of an embryonic Facebook in 2008." In their view, the OAE failed to prove an RPC violation by clear and convincing evidence.

4.

Another DRB member who voted to dismiss the complaint took the position that Cordoba's communication to Hernandez "did not relate to the subject of the lawsuit" and, on that basis alone, concluded that Robertelli did not violate RPC 4.2. That member questioned whether the information on Hernandez's Facebook page -- shared with "600 other people with no confidential relationship to [him] or his counsel" -- was private. From that vantage point, the DRB member did not consider that a "potentially damaging video, placed in the public domain by a ['friend' of Hernandez], implicated an attorney-client communication." He concluded that "the majority decision would allow *RPC* 4.2 and *RPC* 8.4(c) to function as a defensive weapon inhibiting the truth-seeking process."

E.

Robertelli filed a petition for review challenging the DRB majority's finding that he violated the RPCs and the DRB plurality's decision to impose an admonition. The OAE filed a cross-petition challenging the DRB plurality's imposition of an admonition.[13] We elected to review this matter on our own motion and issued an order to show cause "why [Robertelli] should not be disbarred or otherwise disciplined." *See R.* 1:20-16(b) ("The Court may, on its own motion, decide to review any determination of the Board where disbarment has not been recommended.").

II.

A.

Robertelli urges this Court to accept the credibility findings made by the Special Master and to dismiss the disciplinary charges that have cast a cloud over his professional reputation for over a decade. He claims that the DRB, in addition to improvidently casting aside the Special Master's credibility findings, did not give sufficient weight to Facebook's recent emergence on the social media scene in 2008, to Robertelli's unfamiliarity with the nature of Facebook and its terminology, and to the lack of ethical guidance on the issue before us. What may seem obvious to many today, Robertelli implores, should not be imputed to his limited understanding of social media in 2008.

B.

The OAE asks this Court to follow the DRB's decision to impose discipline on Robertelli for violating RPCs 4.2, 5.3, and 8.4(c) -- and, despite the DRB's dismissal of the RPC 8.4(d) charge, to find that Robertelli engaged in conduct prejudicial to the administration of justice by attempting to gain a litigation advantage through the use of the improperly obtained wrestling video. The OAE chides Robertelli for his lack of remorse and for blaming Hernandez for accepting Cordoba's "friend" request. The OAE reasons that Hernandez had no duty to investigate the identity of Cordoba but that Robertelli had an ethical obligation to supervise his paralegal, regardless of the novelty of Facebook, and not

[13] The OAE also cross-petitioned for review of the DRB's dismissal of the RPC 8.4(d) charge.

to communicate with a represented party. The OAE recommends the imposition of a reprimand.

III.

The ethical charges filed against Robertelli have drawn varied responses from the disciplinary authorities: the District Ethics Committee declined to docket the charges; the Special Master dismissed the charges after hearing three days of testimony; and the DRB issued four opinions, one in favor of imposing an admonition, another in favor of imposing a censure, and two in favor of dismissing the charges. As the final body to review this more-than-decade-long case, we start at a familiar place -- our standard of review.

In reviewing an attorney disciplinary determination de novo, as required by *Rule* 1:20-16(c), we must independently examine the record to determine whether an ethical violation is supported by clear and convincing evidence. *In re Pena*, 162 N.J. 15, 17, 738 A.2d 363 (1999). The DRB is governed by the same standard of review. *See R.* 1:20-15(e)(3).

The record in this case was developed during three days of testimony before a special master who heard from multiple witnesses, particularly those who played key roles in the events that led to the OAE's filing of charges against Robertelli. Similar to our de novo review of a judicial disciplinary proceeding, here we must give "due" though "not controlling" deference to the Special Master's conclusions based on his "assessment of the demeanor and credibility of witnesses." *See In re Subryan*, 187 N.J. 139, 145, 900 A.2d 809 (2006) (quoting *In re Disciplinary Procedures of Phillips*, 117 N.J. 567, 579-80, 569 A.2d 807 (1990)); *see also In re Alcantara*, 144 N.J. 257, 264, 676 A.2d 1030 (1995) (agreeing with the District Ethics Committee's determination that witnesses were credible and noting "[t]he [District Ethics Committee] observed the witnesses' demeanor"); *In re Norton*, 128 N.J. 520, 535, 608 A.2d 328 (1992) ("We agree generally with the [District Ethics Committee's] analysis of the events, which is based primarily on its assessment of the witnesses' credibility."). However, when the credibility findings are not fairly supported by the record, we owe no deference and may reject those findings. *See Subryan*, 187 N.J. at 145.

The plurality and dissenting DRB opinions acknowledged the deference owed to the credibility findings of the Special Master but differed on whether deference should be afforded to those findings in this case.

Although we are the final triers of fact in a disciplinary matter, a special master's credibility findings are generally entitled to some level of deference. That is so because, as an appellate court, we are left to survey the landscape of a cold record. We recognize that a special master has "the opportunity to make first-hand credibility judgments about the witnesses who appear[ed] on the stand," *see New Jersey Div. of Youth and Family Services v. E.P.*, 196 N.J. 88, 104, 952 A.2d 436 (2008), and "to assess their believability" based on human factors indiscernible in a transcript: the level of certainty or uncertainty expressed in a vocal response, the degree of eye contact, whether an answer to a question is strained or easily forthcoming, and so many other indicia available only by actual observation of the witness, *see Jastram v. Kruse*, 197 N.J. 216, 230, 962 A.2d 503 (2008).

At every point in this disciplinary process -- before the Special Master, the DRB, and this Court -- the OAE has had the burden of proving by clear and convincing evidence that Robertelli committed a violation of the RPCs charged in the complaint. *See In re Helmer*, 237 N.J. 70, 88, 202 A.3d 1261 (2019); *R.* 1:20-6(c)(2)(B), (C). To satisfy the clear-and-convincing standard, the evidence must produce in our minds "a firm belief or conviction" that the charges are true. *Helmer*, 237 N.J. at 88 (quoting *In re Seaman*, 133 N.J. 67, 74, 627 A.2d 106 (1993)). In other words, the evidence must be "so clear, direct and weighty and convincing as to enable [us] to

come to a clear conviction, without hesitancy, of the precise facts in issue." *Id.* at 88-89 (quoting *Seaman*, 133 N.J. at 74). The "high standard" of proof in an attorney disciplinary action reflects the "serious consequences" that follow from a finding that an attorney violated the RPCs. *In re Sears*, 71 N.J. 175, 197-98, 364 A.2d 777 (1976).

We now apply those precepts to the case before us.

IV.

A.

Our thorough review of the record, giving due though not controlling deference to the credibility findings of the Special Master, leads us to the conclusion that the OAE has not sustained its burden of proving by clear and convincing evidence that Robertelli violated the RPCs.

1.

Certain facts are basically undisputed. Facebook is ubiquitous today, but it was not in 2008. Then, Facebook had recently emerged from college campuses onto a world stage, transforming itself from a youth medium to a communication/information medium for people of all ages. That swift transition explains the early generational divide in the understanding of that new social media platform. In 2008, Cordoba had recently graduated from college, where she had a Facebook page; on the other hand, Robertelli, then forty-six years old, had installed a computer on his office desk just two years earlier.

Robertelli was not tech savvy. He communicated mostly in person or by telephone. He had, at best, a primitive understanding of social media that led him to believe that Facebook was just another extension of the internet. Like many attorneys, he viewed the internet as akin to a public bulletin board or a public library, where information exposed to the world could be foraged, collected, and used to advance the interests of a client in litigation. And indeed, even in the realm of social media, such as Facebook, jurisdictions appear to universally hold that "[a] lawyer may view the public portion of a person's social media profile or view public posts even if such person is represented by another lawyer." N.Y. Bar Ass'n, Com. & Fed. Litig. Section, *Social Media Ethics Guidelines*, No. 4.A (2019); *see also, e.g.*, N.C. Formal Ethics Op. 2018-5 (2019) ("Lawyers may view the public portion of a person's social network presence."); Me. Ethics Op. 217 (2017) ("Merely accessing public portions of social media does not constitute a 'communication' with a represented party for the purposes of [the equivalent of RPC 4.2].").

At least, as of early 2008, Robertelli did not know how Facebook functioned, did not know about its privacy settings, and did not know the language of Facebook, such as "friending." No one disputed at the Special Master hearing that Facebook was a novelty to the bar in 2008. As of 2008, no jurisdiction had issued a reported ethics opinion giving guidance on the issue before this Court -- whether sending a "friend" request to a represented client without the consent of the client's attorney constitutes a communication on the subject of the representation in violation of RPC 4.2. The absence of ethical guidance at that time evidently reflected that Facebook had yet to become the familiar social media platform that it is today in the legal community. Many lawyers in 2008, like Robertelli, had a "[m]inimum" understanding of Facebook.

Robertelli's paralegal had retained her Facebook page from college and knew the language of that new social media platform. One of her job duties at Rivkin Radler was to conduct internet research, such as background checks surveying a person's criminal, educational, and employment history, as she did in the case of Hernandez. It was at that point, when Cordoba used her personal Facebook page to research Hernandez's background, that recollections clashed at the Special Master hearing about what occurred a decade earlier.

We now turn to the disputed facts.

2.

At the hearing, Cordoba testified that, at first, Hernandez's Facebook page was open to the public; Hernandez testified that his Facebook page was always private. Cordoba stated that she forwarded Hernandez the you-look-like-my-favorite-hockey-player message, and then Hernandez sent the "friend" request; Hernandez stated that Cordoba sent him the "friend" request, and then forwarded the message. Hernandez deleted his Facebook page before the filing of the grievance, destroying an objective means of determining who had the better memory.

According to Cordoba, when Hernandez's Facebook page turned private, she consulted with Robertelli and told him her only means of access was to send a "friend" request. But Cordoba conceded that even though she attempted to give a "simple" explanation of Facebook's privacy settings, she did not believe Robertelli understood the significance of a "friend" request. The Special Master reasoned that Robertelli instructed Cordoba to hold off proceeding further until he checked with the insurance adjuster because Dawn Mulligan of the Joint Insurance Fund had to authorize payment for investigatory services. That makes sense. It is unlikely that Robertelli sought ethical advice from the insurance adjuster.

Robertelli testified that, in explaining to him the change in Hernandez's Facebook page, Cordoba told him that Hernandez's Facebook information was in a different area of the internet, on the equivalent of a bulletin board but accessible by the "click of a button." In Robertelli's account, Cordoba never used the term "friend." He told her to click the button and to continue to monitor the site.

The Special Master observed the witnesses firsthand. He found that the passage of time had dulled their memories. The refreshing of Cordoba's memory was not done with contemporaneous notes but with memos of Cordoba's interviews conducted years after her brief conversations with Robertelli. We reject the suggestion by the DRB plurality, based on its focus on an isolated line in the Special Master's forty-eight-page report, that the Special Master found Cordoba's testimony unreliable because she had laryngitis at the hearing. The Special Master did not find Cordoba purposefully untruthful but rather found her struggling with an uncertain memory. The Special Master observed Robertelli on the stand -- an attorney who had a spotless "reputation for integrity and professionalism" -- and concluded that Robertelli "reasonably . . . believed" that Cordoba was searching for "publicly available information for material useful to his client."

We give due regard to the Special Master's credibility findings based on his careful observation of the witness testimony unfolding before his eyes. In the end, based on our independent review of the record, the evidence is not "so clear, direct and weighty and convincing as to enable [us] to come to a clear conviction, without hesitancy, of the precise facts in issue," and therefore the OAE has not met its burden of producing in our minds "a firm belief or conviction" that Robertelli violated RPCs 4.2; 5.3; or 8.4(c) or (d). *See Helmer*, 237 N.J. at 88-89 (quoting *Seaman*, 133 N.J. at 74).

We additionally note that the evidence fell far short of establishing that Robertelli "engage[d] in conduct involving dishonesty, fraud, deceit or misrepresentation," RPC 8.4(c), or "engage[d] in conduct that is prejudicial to the administration of justice," RPC 8.4(d). When asserted as an independent basis for discipline, RPC 8.4(d) applies only "to particularly egregious conduct." *Helmer*, 237 N.J. at 83 (quoting *In re Hinds*, 90 N.J. 604, 632, 449 A.2d 483 (1982)). Although the better course might have been for Robertelli to accede that the information downloaded from Hernandez's Facebook page was inadmissible after he learned about the manner in which it was obtained, we cannot fault him for litigating a matter that this Court stated "presents a

novel ethical issue." *See Robertelli*, 224 N.J. at 487.

We find that the disciplinary charges against Robertelli have not been proven by clear and convincing evidence.

We now briefly review those charges and issue a few directives to remove all doubt, going forward, about a lawyer's professional obligations in the use of social media.

B.

RPC 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows . . . to be represented by another lawyer in the matter . . . unless the lawyer has the consent of the other lawyer." The purpose of RPC 4.2 is to deter lawyer overreaching and unfair gamesmanship -- "protecting a represented party from being taken advantage of by adverse counsel." Michels, *N.J. Attorney Ethics* 802 (2021) (quoting *Curley v. Cumberland Farms*, 134 F.R.D. 77, 82 (D.N.J. 1991), *aff'd*, 27 F.3d 556 (3d Cir. 1994)); *see also Model Rules of Pro. Conduct* r. 4.2 cmt. 1 (Am. Bar Ass'n 1983).

Robertelli may have had a good faith misunderstanding about the nature of Facebook in 2008, as the Special Master found; but there should be no lack of clarity today about the professional strictures guiding attorneys in the use of Facebook and other similar social media platforms.

When represented Facebook users fix their privacy settings to restrict information to "friends," lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel. To be sure, a lawyer litigating a case who -- by whatever means, including through a surrogate -- sends a "friend" request to a represented client does so for one purpose only: to secure information about the subject of the representation, certainly not to strike up a new friendship. Enticing or cajoling the represented client through a message that is intended to elicit a "friend" request that opens the door to the represented client's private Facebook page is no different. Both are prohibited forms of conduct under RPC 4.2. When the communication is ethically proscribed, it makes no difference in what medium the message is communicated. The same rule applies to communications in-person or by letter, email, or telephone, or through social media, such as Facebook.

That is the universal view adopted by jurisdictions that have addressed the issue. *See, e.g.*, N.Y. Bar Ass'n, Com. & Fed. Litig. Section, No. 4.C ("A lawyer shall not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel."); N.C. Formal Ethics Op. 2018-5 ("[R]equesting access to the restricted portions of a represented person's social network presence is prohibited [by the equivalent of RPC 4.2] unless the lawyer obtains consent from the person's lawyer."); Me. Ethics Op. 217 ("[A]n attorney may not directly or indirectly access or use private portions of a represented party's social media, because the efforts to access and use the private information . . . are prohibited 'communications' with a represented party . . ."); D.C. Ethics Op. 371 (2016) ("[R]equesting access to information protected by privacy settings, such as making a 'friend' request to a represented person, does constitute a communication that is covered by the [equivalent of RPC 4.2]."); Or. Formal Ethics Op. 2013-189 (Rev. 2016) (stating that lawyers may not request access to the social media of a represented party without the consent of the party's counsel); Colo. Formal Ethics Op. 127 (2015) ("[A] lawyer may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel."); W. Va. Ethics Op. 2015-02, at 10-11 (2015) ("[A]ttorneys may not contact a represented person through social media . . .

nor may attorneys send a 'friend request' to represented persons.").

What attorneys know or reasonably should know about Facebook and other social media today is not a standard that we can impute to Robertelli in 2008 when Facebook was in its infancy. *See In re Seelig*, 180 N.J. 234, 257, 850 A.2d 477 (2004) ("When the totality of circumstances reveals that the attorney acted in good faith and the issue raised is novel, we should apply our ruling prospectively in the interests of fairness."). Although we find that Robertelli did not violate RPC 4.2 or the other RPCs cited in the complaint, given the novelty of Facebook in 2008 and for the reasons already stated, lawyers should now know where the ethical lines are drawn. Lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven.

We remind the bar that attorneys are responsible for the conduct of the non-lawyers in their employ or under their direct supervision. RPC 5.3 requires that every attorney "make reasonable efforts to ensure that the" conduct of those non-lawyers "is compatible with [the attorney's own] professional obligations" under the RPCs. RPC 5.3(a), (b). For example, an attorney will be held accountable for the conduct of a non-lawyer if the attorney "orders or ratifies the conduct" that would constitute an ethical violation if committed by the attorney or "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." RPC 5.3(c)(1), (2). In short, attorneys must make reasonable efforts to ensure that their surrogates -- including investigators or paralegals -- do not communicate with a represented client, without the consent of the client's attorney, to gain access to a private Facebook page or private information on a similar social media platform.

V.

In sum, we hold that the disciplinary charges set forth in the complaint against Robertelli have not been proven by clear and convincing evidence and must be dismissed. We refer to the Advisory Committee on Professional Ethics, for further consideration, the issues raised in this opinion. After its review, the Committee shall advise this Court whether it recommends any additional social media guidelines or amendments to the RPCs consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in JUSTICE ALBIN's opinion.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 01-422 **June 24, 2001**

Electronic Recordings by Lawyers Without the Knowledge of All Participants

A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.

1. Introduction

In Formal Opinion 337,[1] this Committee stated that with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation.[2] The position taken in Opinion 337 has been criticized by a number of state and local ethics committees, and at least one commentator has questioned whether it survives adoption of the Model Rules of Professional Conduct.[3] The Committee has reexamined the issue and now rejects the broad proscription stated in Opinion 337. We also describe certain circumstances in which nonconsensual taping of conversations may violate the Model Rules.

The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, dis-

---

1. Formal Opinion 337 (August 10, 1974), in FORMAL AND INFORMAL ETHICS OPINIONS (ABA 1985), at 94.

2. In Informal Opinion 1320 (May 2, 1975) (Reconsideration of Formal Opinion 337), *id.* at 193, the Committee declined to reconsider its view and additionally opined that a lawyer may not ethically direct an investigator to tape record a conversation without the knowledge of the other party.

3. C. WOLFRAM, MODERN LEGAL ETHICS (1986) §12.4.4.

criminatory practices, and trademark infringement.[4] We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.

2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the Code of Professional Responsibility, which incorporated the principle that a lawyer "should avoid even the appearance of impropriety."[5] That admonition was omitted as a basis for professional discipline nine years later in the ABA's adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that "conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties."[6] The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c),[7] and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules.

Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed.[8] Courts and committees in a number of states have adopted the position of the opinion.[9] The State Bar of Michigan Standing

4. The subject is discussed thoughtfully in David B. Isbell & Lucantonio 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 (Summer 1995). The ethics of supervising investigators who use "pretext" techniques to gather information, often accompanied by secret electronic recording of conversations with their subjects, also is discussed in Apple Corps. Ltd. v. International Collectors Society, 15 F.Supp.2d 456, 475-76 (D. N.J. 1998).

5. Prior to Opinion 337, the Committee had interpreted Canon 22 of the ABA Canons of Professional Ethics, which stated that a lawyer's conduct "should be characterized by candor and fairness," to proscribe surreptitious taping of a court proceeding of conversations with clients, and of conversations with other lawyers. *See* Informal Decision C-480 (Attorney's Use of Recording Device for Court Proceedings) (December 26, 1961), *in* 1 INFORMAL ETHICS OPINIONS, at 81 (ABA 1975); Informal Opinion 1008 (Lawyer Tape Recording Telephone Conversation of Client Without Client's Knowledge) (October 25, 1967), *in* 2 INFORMAL ETHICS OPINIONS, at 180 (ABA 1975); Informal Opinion 1009 (Lawyer Tape Recording Telephone Conversation with Lawyer for Other Party) (October 25, 1967), *id.* at 182.

6. FORMAL AND INFORMAL ETHICS OPINIONS (1985), at 96.

7. Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

8. Ethics opinions on the subject prior to 1990 are discussed in Mark Koehn, Note, *Attorneys, Participant Monitoring and Ethics: Should Attorneys Be Able to Surreptitiously Record their Conversations?*, 4 GEO. J. LEGAL ETHICS 403 (1990).

9. *See* Matter of Anonymous Member of So. Carolina Bar, 404 S.E.2d 513, 513 (S.C. 1991); People v. Selby, 606 P.2d 45, 47 (Colo. 1979); Supreme Court of Texas Professional Ethics Committee Op. 392 (Feb. 1978).

Committee on Professional and Judicial Ethics initially agreed with Opinion 337,[10] but later found that the ethics of nonconsensual recording should be considered on a case-by-case basis.[11] The New York State Bar adopted a *per se* rule condemning nonconsensual recordings,[12] while the New York City Bar recognized exceptions to that position in the case of prosecutors and defense counsel in criminal investigations.[13] The New York County Bar more recently opined that recording of a conversation without the consent of the other party is not, in and of itself, unethical.[14]

In Virginia, a series of opinions condemned nonconsensual recordings by or at the direction of lawyers,[15] but the latest opinion on the subject found such conduct not to be unethical when done for the purpose of a criminal or housing discrimination investigation. The Virginia Standing Committee on Legal Ethics noted there may be other factual situations in which the same result would be reached.[16] Oklahoma, Utah, and Maine have rejected the broad prohibition of Opinion 337, saying that nonconsensual recordings by lawyers are not unethical unless accompanied by other deceptive conduct.[17] The District of Columbia also found a *per se* rule inappropriate,[18] and Kansas has found surreptitious recording by lawyers to be "unprofessional," but not unethical.[19]

Criticism of Opinion 337 has occurred in three areas. First, the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majori-

---

10. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Informal Op. CI-200 (interpreting the Code of Professional Responsibility).

11. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998).

12. New York State Bar Ass'n Committee on Professional Ethics Op. 328 (1974).

13. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Op. 80-95 (1981).

14. New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (Secret Recording Of Telephone Conversations) (July 28, 1993).

15. Gunter v. Virginia State Bar, 385 S.E. 2d 597, 622 (Va. 1989); Virginia Legal Ethics Op. 1324 (Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings From Client) (Feb. 27, 1990); Virginia Legal Ethics Op. 1448 (Advising Client/Potential Civil Plaintiff to Record Oral Conversation With Unrepresented Potential Civil Defendant) (January 6, 1992); Virginia. Legal Ethics Op. 1635 (Attorney's Tape Recording Telephone Conversation When Not Acting in Attorney Capacity) (February 7, 1995).

16. Virginia Legal Ethics Opinion 1738 (Attorney Participation In Electronic Recording Without Consent Of Party Being Recorded) (April 13, 2000).

17. Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Op. 168 (March 9, 1999); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass'n Op. 307 (March 5, 1994).

18. D.C. Bar's Legal Ethics Committee Op. 229 (Surreptitious Tape Recording By Attorney) (June 16, 1992).

19. Kansas Bar Ass'n Ethics Op. 96-9 (Secret Tape Recordings of Other Persons by Attorneys and Clients) (August 11, 1997).

ty of states permit recording by consent of only one party to the conversation.[20] Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques.[21] Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play,"[22] it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.[23]

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. The State Bar of Arizona, for example, listed four exceptions to the ethical prohibition for such things as documenting criminal utterances (threats, obscene calls, etc.); documenting conversations with potential witnesses to protect against later perjury; documenting conversations for self-protection of the lawyer; and recording when "specifically authorized by statute, court rule or court order."[24] Other ethics committees have excepted recordings by criminal defense lawyers, reasoning that the commonly accepted "law enforcement exception" otherwise would give prosecutors an unfair advantage.[25] Exceptions also have been recognized for "testers" in investigations of housing discrimination and trademark infringement.[26] And the Ohio Supreme Court, although finding nonconsensual recordings by lawyers generally impermissible, has noted an exception for "extraordinary circumstances" as well as for investigations by prosecutors and criminal defense lawyers.[27]

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain

---

20. *See infra* note 30 and accompanying text.

21. *E.g.,* Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983); Miano v. AC & R Advertising Inc., 148 F.R.D. 68, 88-89, *aff'd*, 834 F.Supp. 632 (S.D. N.Y. 1993).

22. Maine Op. 168, *supra* note 17.

23. As discussed in Part 5, *infra*, the client-lawyer relationship may create a justifiable expectation that the lawyer will not record a client's conversation without the knowledge of the client.

24. Arizona Op. No. 75-13 (June 11, 1975).

25. *See, e.g.,* Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986); Kentucky Bar Ass'n Op. E-279 (Jan. 1984).

26. Virginia Legal Ethics Op. 1738, *supra* note 16.

27. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers "should avoid even the appearance of impropriety." Furthermore, unlike the Canons or the Code, the Model Rules deal directly with "respect for rights of third persons" in Rule 4.4. That rule proscribes only "means that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person."

If a lawyer records a conversation with no substantial purpose other than to embarrass or burden a third person, the lawyer has violated Model Rule 4.4. But there seems no reason to treat recording of conversations any differently in this respect from other methods of gathering evidence.[28] The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do *not* violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules as adopted.

3. Nonconsensual Recording In Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation.[29] Some states, however, prohibit recordings without the consent of all parties, usually with an exception for law enforcement activities and occasionally with other exceptions.[30] Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly.[31] A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. Further, because the state statute creates a right not to have one's conversations recorded without consent, nonconsensual recordings of conversations for the purpose of obtaining evidence would violate Model Rule 4.4's proscription

---

28. Similarly, if a lawyer falsely states that a conversation is not being recorded, the lawyer likely has violated Model Rule 4.1's prohibition against knowingly making false material statements of fact to third persons, but again there seems no reason to treat the subject of nonconsensual recording differently from any other conduct when it is not accompanied by misrepresentations to third persons.

29. 18 U.S.C. § 2511(2)(d).

30. According to a 1998 law review note surveying state statutes, twelve states at that time prohibited recording without consent of both parties to the conversation: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. Stacy L. Mills, Note, *He Wouldn't Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 and nn. 126, 127 (Spring 1998). Oregon law permits recording of telephone conversations, but not in-person conversations, with one party's consent. Or. Rev. Stat. § 165.540 (1999).

31. *See* Kimmel v. Goland, 51 Cal. 3d 202, 212 (Cal. 1990), holding that a lawyer is not immune from tort liability for transcribing conversations recorded by a client in violation of California's two-party consent statute.

against using "methods of obtaining evidence that violate the legal rights of [a third] person."[32]

A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

4. False Denial That a Conversation is Being Recorded

That a lawyer may record a conversation with another person without that person's knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded. To do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person. The distinction has been recognized by the Mississippi Supreme Court, which held in *Attorney M. v. Mississippi Bar*[33] that nonconsensual recording of conversations by lawyers generally is not a violation of ethical rules, but then held in *Mississippi Bar v. Attorney ST*[34] that a lawyer who falsely denied to a third person that he was recording their telephone conversation had violated the proscription of Rule 4.1 against false statements of material fact in the course of representing a client.

5. Undisclosed Recording of Conversations With Clients

When a lawyer contemplates recording a conversation with a client without the client's knowledge, ethical considerations arise that are not present with respect to non-clients.[35] Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client's knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.[36]

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion. But a tape recording that captures the client's exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer's notes or dictated memorandum of the conversa-

---

32. That conclusion does not, of course, apply to lawyers engaged in law enforcement whose activities are authorized by state or federal law.

33. 621 So. 2d 220, 223-24 (Miss. 1992).

34. 621 So. 2d 229, 232-33 (Miss. 1993).

35. "A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties." THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 2, topic 1, Introductory Note, at 125 (2000).

36. A lawyer may satisfy the need to inform a client that their conversations are or may be recorded by advising the client, at the outset of the representation or any later time, that the lawyer may follow this practice.

tion. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law,[37] the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes, and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it is inadvisable except in circumstances where the lawyer has no reason to believe the client might object, or where exceptional circumstances exist. Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

Conclusion

In summary, our conclusions are as follows:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.

2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

---

37. Though a client-lawyer conversation ordinarily will be privileged, there are numerous ways in which disclosure of the recording might nevertheless later be compelled by law, as in a situation where the client is held to have waived the privilege, or where a court finds the crime-fraud exception is applicable. Further, when a recording is made of an officer of a client corporation, the recording may become the property of an unfriendly successor in the case of a bankruptcy, receivership, or hostile takeover.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.

4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

New York City Bar Association Professional Ethics Committee

Formal Opinion 2003-02: Undisclosed Taping of Conversations by Lawyers

February 02, 2003

TOPIC: Undisclosed taping of conversations by lawyers.

DIGEST: A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. NY City 1980-95 and 1995-10 are modified by this opinion.

CODE: DRs 1-102(a)(4), 7-102(a)(5), 7-102(a)(7), 7-102(a)(8)

QUESTION:

May a lawyer tape record a conversation without informing all parties to the conversation that it is being recorded?

OPINION:

In June 2001, the American Bar Association ("ABA") reversed course with respect to whether it is permissible for lawyers to tape a conversation without disclosing that the conversation was being taped. For more than twenty-five years, it was the position of the ABA that undisclosed taping by any lawyers other than law enforcement officials was unethical. See ABA Formal Op. 337 (1974). In Formal Opinion 01-422, however, the ABA reversed its position, opining that undisclosed taping was not in and of itself unethical unless prohibited by the law of the relevant jurisdictions.

The Professional Responsibility Committee of this Association has recommended to this Committee that we follow the lead of the ABA – at least to the extent of modifying our prior opinions declaring all undisclosed taping by lawyers in civil and commercial contexts to be unethical. We have revisited the issue of undisclosed taping by lawyers and conclude that our prior opinions, like the ABA's 1974 opinion, swept too broadly. However, we regard the ABA's new position as an overcorrection.

This Committee remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice. At the same time, however, we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good. We further recognize that it would be difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional

discipline if he or she has a reasonable basis for believing such circumstances exist. NY City 1980-95 and 1995-10 are modified accordingly. [1]

DISCUSSION:

ABA Formal Opinion 01-422 offers a variety of reasons for abandoning a general prohibition against undisclosed taping. Some of the reasons offered are more persuasive than others. None, in the view of this Committee, provides persuasive support for the conclusion that undisclosed taping, as a routine practice, should be permissible for attorneys.

The ABA's Opinion leads with the suggestion that reversal of the prohibition against undisclosed taping is warranted by an intervening change in societal attitudes and practices with respect to undisclosed taping. Thus, according to the ABA:

> the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence required by such techniques. Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

ABA Formal Opinion 01-422 (footnotes omitted).

We are unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s. While it is certainly true that many states currently permit the recording of conversations without the consent of all parties and that courts routinely accept evidence acquired by such techniques, the same could have been said at the time the ABA issued its 1974 Opinion. Similarly, we are unaware of any reason to believe that undisclosed taping is significantly more prevalent today as an investigative technique than it was in the 1970s. To the contrary, as at least one court has noted, the ABA's 1974 opinion expressly cited the prevalence of surreptitious recording as the reason why a formal opinion on the subject was

---

[1] This opinion assumes that the taping occurs in a jurisdiction where taping without disclosure to all parties is legal and that the attorney has not represented that the conversation is not being recorded. Attorneys may not engage in illegal conduct, see DR 7-102(a)(7), (8), or knowingly make a false statement of fact. See DR 7-102(a)(5).

advisable. See Anderson v. Hale, 202 F.R.D. 548, 557 n.5 (N.D. Ill. 2001). [2]
This Committee likewise does not share the ABA's skepticism with respect to whether individuals today can justifiably assume that a conversation is not being recorded – particularly when the conversation is with an attorney. Anyone who has ever had occasion to call customer service for a telephone, bank or charge account – i.e., the overwhelmingly majority of U.S. residents – has repeatedly been greeted with a taped message advising callers that their conversations may be recorded for quality control or training purposes. Accordingly, we believe it is neither unlikely nor unjustifiable that many individuals assume that a commercial conversation will not be recorded unless they have been given notice of the possibility that it will be. Nor do we think it unjustifiable for individuals to assume – or advisable for the legal profession to discourage individuals from assuming – that the business practices of lawyers are any less courteous and honorable than those of the local bank or telephone company.

In any event, we regard the state of mind of the recording's target to be considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping. And however much the expectations of the target may be subject to debate, it cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped. Indeed, it is difficult to conceive of any other reason for failing to disclose that the conversation is being taped. It was in recognition of that fact that our first opinion on undisclosed taping characterized the practice as "smacking of trickery," NY City 1980-95, and joined ABA Formal Opinion 337 in concluding that undisclosed taping was, as a general matter, violative of DR 1-102(a)(4)'s proscription against engaging in conduct that "involv[ed] dishonesty, deceit, fraud or misrepresentation." [3]

Undisclosed taping smacks of trickery no less today than it did twenty years ago. In that respect, the passage of time has not altered the analysis. What has, however, emerged over the years is an increasing recognition of the variety of circumstances in which the practice of undisclosed taping can be said to further a generally accepted societal good and thus be regarded as consistent with "the standards of fair play and candor applicable to lawyers." NY City 1980-95. [4]

---

[2] Formal Opinion 337 begins with the following statement:

> Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.

[3] We reaffirmed our general disapproval of undisclosed taping in NY City 1995-10, which opined that a lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped.

[4] As we noted in our 1980 opinion:
Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources – articulated and unarticulated – which presumably reflects a consensus of the bar's or society's judgments. Without being unduly relativistic, it is nevertheless possible that conduct which is

We invoked that principle in our 1980 opinion to support an exception to the general rule against undisclosed taping for criminal defense lawyers who may need to secretly record conversations with certain witnesses. Since that time, other bar committees, boards and courts have adopted that exception, recognized a variety of others (such as the investigation of housing discrimination and other actionable business practices and the documentation of threats or other criminal utterances), and/or opined that the permissibility of undisclosed taping should be determined on a case-by-case basis.[5] In addition, some committees have gone so far as to opine that undisclosed taping is not, in and of itself, unethical.[6]

ABA Formal Opinion 01-422 cites the variety of approaches that have been taken as support for its conclusion that it is time simply to declare the general rule to be that undisclosed taping is, in and of itself, not ethically proscribed:

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

---

considered unfair or even deceitful in one context may not be so considered in another. (See, e.g.., the ABA's Proposed Model Rules of Professional Conduct, Rule 4.1, Comment concerning assertions made in settlement negotiations.)

[5] Mena v. Key Food Stores Co-Operative, Inc., Index No. 6266/01 (Sup. Ct. Kings County, NY) (March 31, 2003) (approving use of undisclosed taping for the purpose of Title VII investigation); Virginia Legal Ethics Opinion 1738 (April 13, 2000) (approving use of undisclosed taping for the purpose of a criminal or housing discrimination investigation and noting that there may be other factual situations in which the same result would be reached); Gidatex v. Campaniello Imports Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)(investigation of trademark infringement); State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998) (case-by-case approach); Apple Corps Ltd., MPL v. Int'l Collectors Soc., 15 F. Supp. 2d 456 (D.N.J. 1998)(investigation of compliance with terms of consent decree in copyright action);Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997) (use by prosecutors and criminal defense lawyers and in "extraordinary circumstances"); Minn. Law Prof. Resp. Bd. Eth. Op. 18 (1996) (use by prosecutors, government attorneys charged with civil law enforcement authority, and criminal defense attorneys); Hawaii Sup. Ct. Formal Op. 30 (Modification 1995) (case-by-case approach); Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986) (use by criminal defense lawyers); Kentucky Bar Ass'n Op. E-279 (Jan. 1984) (same); Arizona Op. No. 75-13 (June 11, 1975) (use to document criminal utterances, to document conversations with potential witnesses to protect against later perjury, to document conversations for self-protection of lawyer, and when "specifically authorized by statute, court rule or court order").

[6] Maine Professional Ethics Commission of the Bd. Of Overseers of the Bar Op. 168 (March 9, 1999); Kansas Bar Ass'n Ethics Op. 96-9 (August 11, 1997); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass'n Op. 307 (March 5, 1994); New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (July 28, 1993).

In fact, however, most of the opinions cited by the ABA are less at odds with one another than reflective of a cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical.

While that principle carries with it, as many ethical rules do, some risk of uncertainty in its application, attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling. In addition, even if a disciplinary body does not necessarily share an attorney's assessment of the need for undisclosed taping in a particular set of circumstances, there is little likelihood of, and no need for, the imposition of sanctions as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping. We accordingly regard there to be less conflict in the field, and less risk to attorneys in the field, than is suggested by the ABA's Opinion.

We also have yet to see any persuasive argument – either in the ABA's recent opinion or elsewhere – in support of permitting undisclosed taping as a matter of routine practice.

The committees that have opined that undisclosed taping is not in and of itself unethical have tended to stress either that the practice is legal in that jurisdiction,[7] that there are unquestionably times when there is a good reason to engage in undisclosed taping,[8] and/or that tape recording "is merely a technological convenience, providing a more accurate means of documenting rather than relying on one's memory, notes, shorthand, transcription, etc. for recall." Ok. Bar. Assoc. Op. 307 (1994).

If, however, the only reasons for taping are convenience and increased accuracy, there is no reason to refrain from disclosing that the conversation is being taped.[9] Nor is it correct that undisclosed taping has no effect other than providing an accurate record of what was said. As attorneys are well aware, individuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices. Undisclosed taping also confers upon the

---

[7] See, e.g., New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (July 28, 1993).

[8] See, e.g., Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Alaska Ethics Opinion No. 2003-1 (January 24, 2003).

[9] In this regard, the Ohio Board of Commissioners on Grievances and Discipline has aptly observed: Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. In addition, because undisclosed taping has those effects, it therefore also has the potential effect of undermining public confidence in the integrity of the legal profession, which in turn undermines the ability of the legal system to function effectively.

See, e.g., Anderson v. Hale, 202 F.R.D. at 556 (noting that open discussion is vital to the advancement of justice and that the public's willingness to speak openly with attorneys is directly affected by public perception of the integrity of attorneys); NY City 80-95 (undisclosed taping has the potential to "undermine those conditions which are essential to a free and open society").

The fact that a practice is legal does not necessarily render it ethical. Moreover, the fact that the practice at issue remains illegal in a significant number of jurisdictions[10] is a powerful indication that the practice is not one in which an attorney should readily engage. Similarly, the fact that there are times when a valid reason exists to engage in undisclosed taping does not mean that if should be permitted when there is no valid reason for it. No societal good is furthered by allowing attorneys to engage in a routine practice of secretly recording their conversations with others, and there is considerable potential for societal harm.

Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

In situations involving the investigation of ongoing criminal conduct or other significant misconduct that question will often be easy to answer in the affirmative. The same is true with respect to individuals who have made threats against the attorney or a client or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury (in either a civil or a criminal matter).

The answer is likely to be far less clear with respect to witnesses whom the attorney has no reason to believe will engage in wrongdoing, and the prudent attorney will, absent extraordinary circumstances, refrain from engaging in the undisclosed taping of such

---

[10] A law review note published in 1998 surveyed the legality of recording a conversation without the consent of all parties and reported that it was illegal in twelve states: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. See Stacy L. Mills, Note, He Wouldn't Listen to Me Before, But Now…: Interspousal Wiretapping and an Analysis of State Wiretapping Statutes, 37 Brandeis L.J. 415, 429 and nn. 127, 127 (Spring 1998). In addition, while Oregon permits telephone conversations to be recorded without the consent of all parties, it prohibits undisclosed taping of in-person conversations. Or. Rev. Stat. § 165.540 (1999).

witnesses. Similarly, while we are not prepared to state that it would never be ethically permissible to engage in the undisclosed taping of a client or a judicial officer, the circumstances in which doing so would be ethically permissible are likely to be few and far between.

Finally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping. Nor, at least with respect to individuals who are not potential witnesses, is undisclosed taping justified by a desire to guard against the possibility of a subsequent denial of what was said. Such practices constitute engaging in undisclosed taping as a routine matter and, for the reasons discussed above, are ethically impermissible.

Conclusion

NY City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.

Issued: June, 2003

PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

April 10, 2020

FORMAL OPINION 2020-300

ETHICAL OBLIGATIONS FOR LAWYERS WORKING REMOTELY

I. Introduction and Summary

When Pennsylvania Governor Tom Wolf ordered all "non-essential businesses," including law firms to close their offices during the COVID-19 pandemic, and also ordered all persons residing in the state to stay at home and leave only under limited circumstances, many attorneys and their staff were forced to work from home for the first time. In many cases, attorneys and their staff were not prepared to work remotely from a home office, and numerous questions arose concerning their ethical obligations.

Most questions related to the use of technology, including email, cell phones, text messages, remote access, cloud computing, video chatting and teleconferencing. This Committee is therefore providing this guidance to the Bar about their and their staff's obligations not only during this crisis but also as a means to assure that attorneys prepare for other situations when they need to perform law firm- and client-related activities from home and other remote locations.

Attorneys and staff working remotely must consider the security and confidentiality of their client data, including the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged.

In Formal Opinion 2011-200 (Cloud Computing/Software As A Service While Fulfilling The Duties of Confidentiality and Preservation of Client Property) and Formal Opinion 2010-100 (Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in Pennsylvania), this Committee provided guidance to attorneys about their ethical obligations when using software and other technology to access confidential and sensitive information from outside of their physical offices, including when they operated their firms as virtual law offices. This Opinion affirms the conclusions of Opinions 2011-200 and 2010-100, including:

- An attorney may ethically allow client confidential material to be stored in "the cloud" provided the attorney takes reasonable care to assure that (1) all materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.

- An attorney may maintain a virtual law office in Pennsylvania, including a virtual law office in which the attorney works from home, and associates work from their homes in various locations, including locations outside of Pennsylvania;

- An attorney practicing in a virtual office at which attorneys and clients do not generally meet face to face must take appropriate safeguards to: (1) confirm the identity of clients and others; and, (2) address those circumstances in which a client may have diminished capacity.

This Opinion also affirms and adopts the conclusions of the American Bar Association Standing Committee on Ethics and Professional Responsibility in Formal Opinion 477R (May 22, 2017) that:

> A lawyer generally may transmit information relating to the representation of a client over the [I]nternet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

The duty of technological competence requires attorneys to not only understand the risks and benefits of technology as it relates to the specifics of their practices, such as electronic discovery. This also requires attorneys to understand the general risks and benefits of technology, including the electronic transmission of confidential and sensitive data, and cybersecurity, and to take reasonable precautions to comply with this duty. In some cases, attorneys may have the requisite knowledge and skill to implement technological safeguards. In others, attorneys should consult with appropriate staff or other entities capable of providing the appropriate guidance.

At a minimum, when working remotely, attorneys and their staff have an obligation under the Rules of Professional Conduct to take reasonable precautions to assure that:

- All communications, including telephone calls, text messages, email, and video conferencing are conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information;
- Information transmitted through the Internet is done in a manner that ensures the confidentiality of client communications and other sensitive data;
- Their remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form;

- Proper procedures are used to secure and backup confidential data stored on electronic devices and in the cloud;
- Any remotely working staff are educated about and have the resources to make their work compliant with the Rules of Professional Conduct; and,
- Appropriate forms of data security are used.

In Section II, this Opinion highlights the Rules of Professional Conduct implicated when working at home or other locations outside of a traditional office. Section III highlights best practices and recommends the baseline at which attorneys and staff should operate to ensure confidentiality and meet their ethical obligations. This Opinion does not discuss specific products or make specific technological recommendations, however, because these products and services are updated frequently. Rather, Section III highlights considerations that will apply not only now but also in the future.

II. Discussion

A. Pennsylvania Rules of Professional Conduct

The issues in this Opinion implicate various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, other parties, and counsel, primarily focused on the need to assure confidentiality of client and sensitive information. Although no Pennsylvania Rule of Professional Conduct specifically addresses the ethical obligations of attorneys working remotely, the Committee's conclusions are based upon the existing Rules, including:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers")
- Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney, and persons or entities supervised by the attorney, to disciplinary sanctions. Comments to the Rules assist attorneys in understanding or arguing the intention of the Rules, but are not enforceable in disciplinary proceedings.

B. Competence

A lawyer's duty to provide competent representation includes the obligation to understand the risks and benefits of technology, which this Committee and numerous other similar committees believe includes the obligation to understand or to take reasonable measures to use appropriate technology to protect the confidentiality of communications in both physical and electronic form.

Rule 1.1 ("Competence") states in relevant part:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Further, Comment [8] to Rule 1.1 states

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

Consistent with this Rule, attorneys must evaluate, obtain, and utilize the technology necessary to assure that their communications remain confidential.

C. Confidentiality

An attorney working from home or another remote location is under the same obligations to maintain client confidentiality as is the attorney when working within a traditional physical office.

Rule 1.6 ("Confidentiality of Information") states in relevant part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> …
>
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comments [25] and [26] to Rule 1.6 state:

> [25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The

> unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].
>
> [26] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Comment [25] explains that an attorney's duty to understand the risks and benefits of technology includes the obligation to safeguard client information (1) against unauthorized access by third parties (2) against inadvertent or unauthorized disclosure by the lawyer or other persons subject to the lawyer's supervision. Comment [26] explains that an attorney must safeguard electronic communications, such as email, and may need to take additional measures to prevent information from being accessed by unauthorized persons. For example, this duty may require an attorney to use encrypted email, or to require the use of passwords to open attachments, or take other reasonable precautions to assure that the contents and attachments are seen only by authorized persons.

A lawyer's confidentiality obligations under Rule 1.6(d) are, of course, not limited to prudent employment of technology. Lawyers working from home may be required to bring paper files and other client-related documents into their homes or other remote locations. In these circumstances, they should make reasonable efforts to ensure that household residents or visitors who are not associated with the attorney's law practice do not have access to these items. This can be accomplished by maintaining the documents in a location where unauthorized persons are denied access, whether through the direction of a lawyer or otherwise.

D. Supervisory and Subordinate Lawyers

Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers") states:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance") states:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,

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

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Therefore, a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect requirements that any staff, consultants or other entities that have or may have access to confidential client information or data comply with the Rules of Professional Conduct with regard to data access from remote locations and that any discussions regarding client-related matters are done confidentially.

III. Best Practices When Performing Legal Work and Communications Remotely[1]

A. General Considerations

In Formal Opinion 2011-200, this Committee concluded that a lawyer's duty of competency extends "beyond protecting client information and confidentiality; it also includes a lawyer's ability to reliably access and provide information relevant to a client's case when needed. This is essential for attorneys regardless of whether data is stored onsite or offsite with a cloud service provider." When forced to work remotely, attorneys remain obligated to take reasonable precautions so that they are able to access client data and provide information to the client or to others, such as courts or opposing counsel.

While it is beyond the scope of this Opinion to make specific recommendations, the Rules and applicable Comments highlight that the need to maintain confidentiality is crucial to preservation of the attorney-client relationship, and that attorneys working remotely must take appropriate measures to protect confidential electronic communications. While the measures necessary to do so will vary, common considerations include:

[1] These various considerations and safeguards also apply to traditional law offices. The Committee is not suggesting that the failure to comply with the "best practices" described in Section III of this Opinion would necessarily constitute a violation of the Rules of Professional Conduct that would subject an attorney to discipline. Rather, compliance with these or similar recommendations would constitute the type of reasonable conduct envisioned by the Rules.

- Specifying how and where data created remotely will be stored and, if remotely, how the data will be backed up;
- Requiring the encryption or use of other security to assure that information sent by electronic mail are protected from unauthorized disclosure;
- Using firewalls, anti-virus and anti-malware software, and other similar products to prevent the loss or corruption of data;
- Limiting the information that may be handled remotely, as well as specifying which persons may use the information;
- Verifying the identity of individuals who access a firm's data from remote locations;
- Implementing a written work-from-home protocol to specify how to safeguard confidential business and personal information;
- Requiring the use of a Virtual Private Network or similar connection to access a firm's data;
- Requiring the use of two-factor authentication or similar safeguards;
- Supplying or requiring employees to use secure and encrypted laptops;
- Saving data permanently only on the office network, not personal devices, and if saved on personal devices, taking reasonable precautions to protect such information;
- Obtaining a written agreement from every employee that they will comply with the firm's data privacy, security, and confidentiality policies;
- Encrypting electronic records containing confidential data, including backups;
- Prohibiting the use of smart devices such as those offered by Amazon Alexa and Google voice assistants in locations where client-related conversations may occur;
- Requiring employees to have client-related conversations in locations where they cannot be overheard by other persons who are not authorized to hear this information; and,
- Taking other reasonable measures to assure that all confidential data are protected.

B. Confidential Communications Should be Private

1. Introduction

When working at home or from other remote locations, all communications with clients must be and remain confidential. This requirement applies to all forms of communications, including phone calls, email, chats, online conferencing and text messages.

Therefore, when speaking on a phone or having an online or similar conference, attorneys should dedicate a private area where they can communicate privately with clients, and take reasonable precautions to assure that others are not present and cannot listen to the conversation. For example, smart devices such as Amazon's Alexa and Google's voice assistants may listen to conversations and record them. Companies such as Google and Amazon maintain those recordings on servers and hire people to review the recordings. Although the identity of the

speakers is not disclosed to these reviewers, they might hear sufficient details to be able to connect a voice to a specific person.[2]

Similarly, when communicating using electronic mail, text messages, and other methods for transmitting confidential and sensitive data, attorneys must take reasonable precautions, which may include the use of encryption, to assure that unauthorized persons cannot intercept and read these communications.

2. What is Encryption?

Encryption is the method by which information is converted into a secret code that hides the information's true meaning. The science of encrypting and decrypting information is called cryptography. Unencrypted data is also known as plaintext, and encrypted data is called ciphertext. The formulas used to encode and decode messages are called encryption algorithms or ciphers.[3]

When an unauthorized person or entity accesses an encrypted message, phone call, document or computer file, the viewer will see a garbled result that cannot be understood without software to decrypt (remove) the encryption.

3. The Duty to Assure Confidentiality Depends Upon the Information Being Transmitted

This Opinion adopts the analysis of ABA Formal Opinion 477R concerning a lawyer's duty of confidentiality:

> At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.
>
> Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

[2] https://www.vox.com/recode/2020/2/21/21032140/alexa-amazon-google-home-siri-apple-microsoft-cortana-recording

[3] https://searchsecurity.techtarget.com/definition/encryption

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c)[4] includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In addition to the obligations under the Pennsylvania Rules of Professional Conduct, which are based upon the Model Rules, clients may also impose obligations upon attorneys to protect confidential or sensitive information. For example, some commercial clients, such as banks, routinely require that sensitive information be transmitted only with a password protocol or using an encryption method.

C. There Are Many Ways to Enhance Your Online Security

[4] Pennsylvania did not adopt Comment [18] in its entirety.

While this Opinion cannot provide guidance about specific products or services, its goal is to provide attorneys and law firms with guidance about how they can meet their obligation of competence while preserving client confidentiality. The following subsections of this Opinion outline some reasonable precautions that attorneys should consider using to meet their ethical obligations.

1. Avoid Using Public Internet/Free Wi-Fi

Attorneys should avoid using unsecured free Internet/Wi-Fi hotspots when performing client- or firm-related activities that involve access to or the transmission of confidential or sensitive data. Persons, commonly called hackers, can access every piece of unencrypted information you send out to the Internet, including email, credit card information and credentials used to access or login to businesses, including law firm networks. Hackers can also use an unsecured Wi-Fi connection to distribute malware. Once armed with the user's login information, the hacker may access data at any website the user accesses.

2. Use Virtual Private Networks (VPNs) to Enhance Security

A VPN, or Virtual Private Network, allows users to create a secure connection to another network over the Internet, shielding the user's activity from unauthorized persons or entities. VPNs can connect any device, including smartphones, PCs, laptops and tablets to another computer (called a server), encrypting information and shielding your online activity from all other persons or entities, including cybercriminals. Thus, the use of a VPN can help to protect computers and other devices from hackers.

3. Use Two-Factor or Multi-Factor Authentication

Two-Factor or Multi-Factor Authentication is a security method that requires users to prove their identity in more than one way before signing into a program or a website. For example, a user might require a login name and a password, and would then be sent a four- or six-digit code by text message to enter on the website. Entering this additional authentication helps to ensure only authorized persons are accessing the site. Although these forms of enhanced security may seem cumbersome, its use provides an additional layer of security beyond simple password security.

4. Use Strong Passwords to Protect Your Data and Devices

One of the most common ways that hackers break into computers, websites and other devices is by guessing passwords or using software that guesses passwords, which remain a critical method of gaining unauthorized access. Thus, the more complex the password, the less likely that an unauthorized user will access a phone, computer, website or network.

The best method to avoid having a password hacked is by using long and complex passwords. There are various schools of thought about what constitutes a strong or less-hackable password, but as a general rule, the longer and more complex the password, the less likely it will be cracked. In addition, mobile devices should also have a PIN, pass code or password. The devices

should lock/time out after a short period of time and require users to re-enter the PIN code or password.

5. Assure that Video Conferences are Secure

One method of communicating that has become more common is the use of videoconferencing (or video-teleconferencing) technology, which allows users to hold face-to-face meetings from different locations. For many law offices, the use of videoconferences has replaced traditional teleconferences, which did not have the video component.

As the popularity of videoconferencing has increased, so have the number of reported instances in which hackers hijack videoconferences. These incidents were of such concern that on March 30, 2020 the FBI issued a warning about teleconference hijacking during the COVID-19 pandemic[5] and recommended that users take the following steps "to mitigate teleconference hijacking threats:"

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

6. Backup Any Data Stored Remotely

Backups are as important at home as they are at the office, perhaps more so because office systems are almost always backed up in an automated fashion. Thus, attorneys and staff working remotely should either work remotely on the office's system (using services such as Windows Remote Desktop Connection, GoToMyPC or LogMeIn) or have a system in place that assures that there is a backup for all documents and other computer files created by attorneys and staff while working. Often, backup systems can include offsite locations. Alternatively, there are numerous providers that offer secure and easy-to-set-up cloud-based backup services.

7. Security is Essential for Remote Locations and Devices

Attorneys and staff must make reasonable efforts to assure that work product and confidential client information are confidential, regardless of where or how they are created. Microsoft has published its guidelines for a secure home office, which include:

[5] https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic. Although the FBI warning related to Zoom, one brand of videoconferencing technology, the recommendations apply to any such service.

- Use a firewall;
- Keep all software up to date;
- Use antivirus software and keep it current;
- Use anti-malware software and keep it current;
- Do not open suspicious attachments or click unusual links in messages, email, tweets, posts, online ads;
- Avoid visiting websites that offer potentially illicit content;
- Do not use USBs, flash drives or other external devices unless you own them, or they are provided by a trusted source. When appropriate, attorneys should take reasonable precautions such as calling or contacting the sending or supplying party directly to assure the data are not infected or otherwise corrupted. [6]

8. Users Should Verify That Websites Have Enhanced Security

Attorneys and staff should be aware of and, whenever possible, only access websites that have enhanced security. The web address in the web browser window for such sites will begin with "HTTPS" rather than "HTTP." A website with the HTTPS web address uses the SSL/TLS protocol to encrypt communications so that hackers cannot steal data. The use of SSL/TLS security also confirms that a website's server (the computer that stores the website) is who it says it is, preventing users from logging into a site that is impersonating the real site.

9. Lawyers Should Be Cognizant of Their Obligation to Act with Civility

In 2000, the Pennsylvania Supreme Court adopted the Code of Civility, which applies to all judges and lawyers in Pennsylvania.[7] The Code is intended to remind lawyers of their obligation to treat the courts and their adversaries with courtesy and respect. During crises, the importance of the Code of Civility, and the need to comply with it, are of paramount importance.

During the COVID-19 pandemic, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a statement, which this Opinion adopts, including:

> In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. Accordingly, we remind lawyers that the Guidelines for Civility in Litigation … require that lawyers grant reasonable requests for extensions and other accommodations.
>
> Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations. Consistent with California

[6] https://support.microsoft.com/en-us/help/4092060/windows-keep-your-computer-secure-at-home

[7] Title 204, Ch. 99 adopted Dec. 6, 2000, amended April 21, 2005, effective May 7, 2005.

> Rule of Professional Conduct 1.2(a), lawyers should also consult with their clients to seek authorization to extend such extensions or to stipulate to continuances in instances where the clients' authorization or consent may be required.
>
> While we expect further guidance from the court system will be forthcoming, lawyers must do their best to help mitigate stress and health risk to litigants, counsel and court personnel. Any sharp practices that increase risk or which seek to take advantage of the current health crisis must be avoided in every instance.

This Opinion agrees with the Los Angeles County Bar Association's statement and urges lawyers to comply with Pennsylvania's Code of Civility, and not take unfair advantage of any public health and safety crises.

IV. Conclusion

The COVID-19 pandemic has caused unprecedented disruption for attorneys and law firms, and has renewed the focus on what constitutes competent legal representation during a time when attorneys do not have access to their physical offices. In particular, working from home has become the new normal, forcing law offices to transform themselves into a remote workforce overnight. As a result, attorneys must be particularly cognizant of how they and their staff work remotely, how they access data, and how they prevent computer viruses and other cybersecurity risks.

In addition, lawyers working remotely must consider the security and confidentiality of their procedures and systems. This obligation includes protecting computer systems and physical files, and ensuring that the confidentiality of client telephone and other conversations and communications remain protected.

Although the pandemic created an unprecedented situation, the guidance provided applies equally to attorneys or persons performing client legal work on behalf of attorneys when the work is performed at home or at other locations outside of outside of their physical offices, including when performed at virtual law offices.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498 **March 10, 2021**

Virtual Practice

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.[2]

II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.[3] A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

[3] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,[4] virtual practice commonly implicates the key ethics rules discussed below.

A. Commonly Implicated Model Rules of Professional Conduct

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."[5] Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.[6]

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[7] The following non-

[4] For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

[6] Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[8] As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.[9] At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[10] However, depending on the circumstances, lawyers may need to take special precautions.[11] Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."[12] As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.[13] Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."[14] Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

---

[8] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].
[9] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[10] *Id.*
[11] The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).
[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[13] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.,* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).
[14] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[15] The duty to supervise nonlawyers extends to those both within and outside of the law firm.[16]

B. Particular Virtual Practice Technologies and Considerations

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.[17] To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

---

[15] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

[16] As noted in Comment [3] to Model Rule 5.3:

> When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[17] For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer."[18] Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.[19]

3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.[20] Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,[21] to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that

---

[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018).

[19] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'").

[20] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[21] Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).[22]

5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.[23] Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.[24] This duty requires regular interaction and communication with, for example,

---

[22] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

[23] As ABA Formal Op. 477R noted:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

[24] The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.[25]

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.[26]

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,[27] and should ensure that all client-related information is secure, indexed, and readily retrievable.

7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.[28] The

---

- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

[25] *See* ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

[26] For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

[27] *See, e.g.*, Mo. Bar Informal Advisory Op. 20070008 & 20050068.

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.15; *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

United States v. Cincotta

United States Court of Appeals for the First Circuit
August 4, 1982, Decided
Nos. 81-1141; 81-1408; 81-1147; 81-1409; 81-1155; 81-1407

Reporter: 689 F.2d 238; 1982 U.S. App. LEXIS 16820

UNITED STATES OF AMERICA, APPELLEE, v. EDWARD A. CINCOTTA, DEFENDANT, APPELLANT; UNITED STATES OF AMERICA, APPELLEE, v. JOHN ZERO, DEFENDANT, APPELLANT; UNITED STATES OF AMERICA, APPELLEE, v. MYSTIC FUEL, INC., DEFENDANT, APPELLANT

Subsequent History: [1]** As amended August 6, 1982. Certiorari Denied, November 8, 1982, *459 U.S. 991, 103 S. Ct. 347, 74 L. Ed. 2d 387*.

Prior History: Appeals From The United States District Court For The District Of Massachusetts.

[Hon. W. Arthur Garrity, Jr., U.S. District Judge].

Disposition: The judgments of conviction are affirmed.

Case Summary

Procedural Posture
Defendants appealed the judgments of the United States District Court for the District of Massachusetts, which convicted them of conspiring to defraud the United States in violation of *18 U.S.C.S. § 371*, willfully causing false claims to be made against the United States in violation of *18 U.S.C.S. §§ 2* and *287*, and using false documents in a matter within the jurisdiction of a United States department in violation of *18 U.S.C.S. §§ 2* and *1001*.

Overview
After a jury trial, defendants were convicted of conspiring to defraud the United States in violation of *18 U.S.C.S. § 371*, willfully causing false claims to be made against the United States in violation of *18 U.S.C.S. §§ 2* and *287*, and using false documents in a matter within the jurisdiction of a United States department in violation of *18 U.S.C.S. §§ 2* and *1001*. Defendants appealed. The court affirmed the judgments of conviction because the evidence was sufficient to convict defendants of the crimes with which they were charged, the district court did not abuse its discretion in admitting into evidence the notebook of defendant corporation's truck driver for the period during the indictments, the use of the conscious avoidance jury instruction was not plain error, and the district court properly remedied a letter mailed by the government to prospective government witnesses.

Outcome
The court affirmed the judgments of conviction because the evidence was sufficient to convict defendants, the district court did not abuse its discretion in admitting into evidence the notebook of defendant corporation's truck driver for the period during the indictments, the use of the conscious avoidance jury instruction was not plain error, and the district court properly remedied a letter mailed by the government to government witnesses.

Counsel: Harvey R. Peters, with whom Paul T. Smith, and Jeffrey M. Smith, were on brief, for appellant Edward A. Cincotta.

Joseph J. Balliro, with whom Juliane Balliro, was on brief, for appellant John Zero.

Richard M. Passalacqua, with whom Franklin, Pearlstein & Passalacqua, was on brief, for appellant Mystic Fuel, Inc.

Bruce A. Singal, Assistant United States Attorney, with whom William F. Weld, United States Attorney, was on brief, for Appellee.

Judges: Coffin, Chief Judge, Phillips,* Senior Circuit Judge, Campbell, Circuit Judge.

Opinion by: COFFIN

Opinion

[*240] COFFIN, Chief Judge.

This criminal appeal challenges the trial court's disposition of five issues, pertaining to the sufficiency of the evidence against one individual defendant, the sufficiency of the evidence and indictment against the **[**2]** corporate defendant, and, involving both individual defendants, the adequacy of remedies for prosecutorial misconduct, the admissibility of a hearsay

* Of the Sixth Circuit, sitting by designation.

document, and the propriety of a jury instruction on the implications of a defendant's conscious avoidance of knowledge.

Factual Background

Appellant Mystic Fuel Corporation (Mystic) was engaged in the business of delivering heating oil to oil consumers. It did not own or rent oil storage tanks, but it did own several trucks for transporting oil. It used those trucks to earn money in two different ways: it entered delivery contracts whereby oil suppliers without trucks would pay Mystic a commission to deliver oil to the suppliers' customers; and it entered supply contracts whereby oil consumers would buy oil directly from Mystic, which Mystic would then acquire in its own name from suppliers.

Appellant Cincotta was a major stockholder in Mystic, and its Treasurer. He signed all the company's checks, bids, and contracts. Together with appellant Zero, he made all the major decisions of the company, as well as the rules governing its daily operation.

Appellant Zero was also a major stockholder in Mystic, and its dispatcher. **[**3]** He hired the truck drivers, and issued their daily orders on where to pick up and deliver oil. He also supervised Mystic's billing and accounting.

At trial, the government set forth evidence of a scheme through which Mystic would defraud the United States Department of Defense, inducing it to pay for oil that Mystic would sell in its own name to its own clients. The evidence suggested that during fiscal year 1978 (September 1, 1977, through August 31, 1978) Mystic had a delivery contract giving it a commission for delivering "number four oil" (a moderately heavy oil, generally used to heat small industrial buildings, schools, and medium-sized apartment buildings) from the Union Petroleum Corporation (Union) to Fort Devens in Ayer, Massachusetts. The evidence suggested further that on numerous occasions Mystic picked up a shipment of oil at Union, representing that the oil was for delivery to Fort Devens. Then, Mystic would sell the shipment to its own consumer clients. Finally, it would tell the Fort Devens authorities that it had in fact delivered the shipment to Fort Devens, inducing the Department of Defense to pay Union for the shipment. The net result was that Fort Devens **[**4]** paid for shipments it never received, and Mystic was able to sell oil that it had never paid for.

After a two-week trial, the jury deliberated for ten hours and then found all three defendants guilty of (1) conspiring to defraud the United States in violation of *18 U.S.C. § 371*, of (2) wilfully causing seven specific false claims to be made against the United States, in violation of *18 U.S.C. §§ 2*, *287*, and of (3) knowingly and wilfully making and using seven specific false documents in relation to a matter within the jurisdiction of a United States department, in violation of *18 U.S.C. §§ 2*, *1001*.

Sufficiency of the Evidence Against Cincotta

Appellant Cincotta contends that the trial judge erred in denying his motion for a judgment of acquittal at the close of the **[*241]** government's case. He argues that the evidence was not sufficient to permit the jury to conclude beyond a reasonable doubt that he personally violated the statutes under which he was convicted. Although he does not contest the sufficiency of the evidence establishing a conspiracy to present false claims, he does contest the sufficiency **[**5]** of the evidence that he was a part of the conspiracy.

Our review of the trial judge's decision on this point is quite limited. We are required to affirm that decision unless the evidence, viewed in the light most favorable to the government, could not have persuaded any rational trier of fact that Cincotta was guilty beyond a reasonable doubt. Moreover, ***HN1*** "participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States* , 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942) (citation omitted).

Given this standard of review, we cannot reverse the trial judge's decision. Although there was no "smoking gun" that directly demonstrated Cincotta's sponsorship of the fraudulent conspiracy, there was ample circumstantial evidence. The principal source of that evidence was Elaine Kelly, Cincotta's secretary at Mystic. Mrs. Kelly testified that all major decisions at Mystic were made by either Cincotta or Zero. She testified further that "John Zero and Eddie Cincotta talked over everything that was going on . . . Who eventually made **[**6]** the final decision I don't know. I would think it would be a mutual thing, or maybe one or the other had a better decision than the other." She also testified that Cincotta "made all the rules . . . for the truck drivers, during the course of the day." Although Zero normally gave the drivers their instructions regarding deliveries to Fort Devens, Cincotta gave them their instructions in Zero's absence. And although Zero and Cincotta mutually handled all company firing decisions, Cincotta alone signed the corporation's checks, contracts, and bids. Finally, the extent of Cincotta's interest in Mystic's activities is magnified by the fact that his mother and two uncles worked with him in the small company office.

In addition to Mrs. Kelly's testimony there was corroboration in regard to the Fort Devens fraud in the

testimony of other witnesses. Frederick Taubert, the Vice President of Marketing at Union Petroleum, testified that he dealt with either Zero or Cincotta on any issues involving the Fort Devens contract, and that he perceived Cincotta to be in charge of the whole operation of Mystic on a day-to-day basis. Patricia Phelan, the supply clerk and ordering officer at Fort **[**7]** Devens, testified that Zero and Cincotta usually came in together twice a week to have her sign the fuel tickets acknowledging delivery of fuel shipments to Fort Devens. She testified further that on those occasions when another Mystic employee brought in the fuel tickets for her signature, if the tickets did not show to what building the oil had allegedly been delivered she would call up Zero or Cincotta and they would give her a building number to fill in. And several truck drivers, including Anthony Carpenter and Brian Esterbrook, referred to the duo collectively, as "John or Eddie", "Zero or Cincotta", in describing the source of their delivery instructions.

In sum, there was sufficient evidence of Cincotta's pervasive involvement in Mystic's operations -- both generally and with regard to the Fort Devens deliveries in particular -- for a reasonable juror to infer that Cincotta knew of, profited from, and encouraged the conspiracy and each of the individual fraudulent acts that underlay the substantive counts for which he was convicted.

Sufficiency of the Evidence and Adequacy Of the Indictment Against Mystic Fuel

HN2 A corporation may be convicted for the criminal **[**8]** acts of its agents, under a theory of respondeat superior. But ***HN3*** criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn, requires that the agent be performing acts **[*242]** of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation. *United States v. DeMauro*, 581 F.2d 50, 54 n.3 (2d Cir. 1978); *United States v. Beusch*, 596 F.2d 871, 878 & n.7 (9th Cir. 1979). Thus, where intent is an element of a crime (as it is here), a corporation may not be held strictly accountable for acts that could not benefit the stockholders, such as acts of corporate officers that are performed in exchange for bribes paid to the officers personally.

Mystic argues that the trial court erred in denying its motion for acquittal. It contends that the government failed to produce evidence of Cincotta's and/or Zero's intent to benefit the corporation through their scheme to defraud the United States. This argument may be rejected out of hand. The mechanism by which the fraudulent scheme worked required money to **[**9]** pass through Mystic's treasury. When Fort Devens paid Union for the undelivered shipments, the shipments were not resold in Zero's name of Cincotta's name. Rather, they were sold to Mystic's customers in Mystic's name. Mystic -- not the individual defendants -- was making money by selling oil that it had not paid for.

Mystic also argues that, even if there was adequate proof against it at trial, the indictment was fatally defective because it failed to aver that the individual defendants intended to benefit the corporation through their scheme. It is well settled that ***HN4*** an indictment must charge all of the essential elements of the crime in question. *E.g.*, *United States v. Barbato*, 471 F.2d 918 (1st Cir. 1973). But, to be sufficient, "these elements need not always be set forth *in haec verba*. Indictments 'must be read to include facts which are necessarily implied by the specific allegations made.'" *Id.* at 921 (citation omitted). *See also United States v. McLennan*, 672 F.2d 239 (1st Cir. 1982). "It is a cardinal principle of our criminal law that ***HN5*** an indictment is sufficient which apprises a defendant of the crime with **[**10]** which he is charged so as to enable him to prepare his defense and to plead judgment of acquittal or conviction as a plea to a subsequent prosecution for the same offense." *Portnoy v. United States*, 316 F.2d 486, 488 (1st Cir.), *cert. denied*, *375 U.S. 815, 11 L. Ed. 2d 50, 84 S. Ct. 48 (1963)*.

We believe the indictment against Mystic was sufficient under that standard. The three crimes charged all require, as an essential element, criminal intent. The indictment specifically alleges that Mystic Fuel had the requisite intent on each count. [1] Mystic emphasizes that, as a corporation, it could only possess the requisite criminal intent if one of its agents intended to benefit the corporation by his wrongful act. It contends that the agents' intent to benefit it is therefore an essential element of the crime and must be alleged specifically. We reject such analysis, for

---

[1] Paragraph 13 of the indictment provides:

> "The defendants *MYSTIC FUEL, INC.*, EDWARD A. CINCOTTA and JOHN ZERO *willfully, knowingly* and unlawfully *entered into an agreement . . . to defraud* the United States by failing to deliver [oil] and . . . *to willfully* cause to be made and presented claims upon or against the United States Department of Defense . . ., *knowing said claims to be false*, fictitious and fraudulent . . . and . . . *to knowingly and willfully* make and cause to be made false, fictitious and fraudulent statements and representations, and use and cause to be used false writings and documents, *knowing the same to contain false*, fictitious and fraudulent statements ..... " (emphasis added).

it would stand the principles of *Barbato, supra*, and *Portnoy, supra*, on their respective heads. It would require an indictment to specifically allege any facts "which are necessarily implied by the specific allegations made". It would require **[**11]** the indictment against Cincotta and Zero to allege that they were awake at the time of their actions because that is the only way they could have possessed the requisite criminal intent. Such is clearly not the law. The allegations that Mystic knowingly and wilfully (1) conspired, (2) presented the specific false claims listed **[*243]** in the indictment, and (3) made the specific false statements listed in the indictment, were adequate to apprise the corporation of the crime with which it was charged, to enable the corporation to prepare its defense, and to allow the corporation to plead its judgement of conviction here in response to any subsequent prosecution for the same offense.

[12]** *Other Issues Raised by Appellants*

The other issues presented on appeal deserve more limited treatment. Zero and Cincotta both challenge the district court's decision to admit into evidence pages from a notebook kept by John Glencross, a Mystic truck driver during the period of the indictments. Glencross used the notebook to keep track of all his deliveries, since he was paid $25 for each load delivered. The exhibit was a key link in the government's case, since it indicated shipments that Glencross had picked up under the Fort Devens account but delivered to Mystic's commercial customers. The appellants admit that the pages were relevant, but argue that they should have been excluded as hearsay. They argue that the hearsay exception for "records of regularly conducted activity", *Fed.R.Evid. 803(6)*, was inapplicable because "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.*

The question of trustworthiness was argued extensively before the trial judge, who acknowledged that the effective cross-examination of Glencross, and some errors in the notebook brought out by that cross-examination, made the notebook **[**13]** "untrustworthy standing alone". Nonetheless, the court concluded that the notebook was "sufficiently reliable to put in evidence" because it was corroborated in many instances (and in all instances relating to deliveries associated with the defendants' convictions) by delivery tickets issued by Mystic and signed by its commercial customers. ***HN6*** "The determination of whether a foundation has been laid for application of [*Federal Rule of Evidence 803(6)*] and whether the circumstances indicate untrustworthiness, is within the discretion of the district court." *United States v. Patterson*, 644 F.2d 890 (1st Cir. 1981). We are not persuaded that the trial court abused its discretion in choosing to admit the records.

Zero and Cincotta also challenge the trial court's jury instruction on when "conscious avoidance of knowledge" is adequate to demonstrate criminal intent. [2] They argue that there was no evidentiary predicate for the charge. We disagree. There was sufficient evidence that a reasonable juror could have concluded that Cincotta, in bringing delivery tickets to Fort Devens for signature, consciously chose not to know whether the deliveries had been made, when **[**14]** he had reason to believe that they had not been made. The appellants also argue that the charge was deficient because it did not include "balancing language" instructing the jurors that wilful blindness constitutes knowledge of a fact only where the individual is aware of a high probability that the fact exists and where the individual does not subjectively disbelieve the fact. *See United States v. Jewell*, 532 F.2d 697, 704 n.21 (9th Cir. 1976). Although such language may indeed **[*244]** provide useful clarification, the defendants did not ask for it to be included, and the failure to use it is not plain error. *See United States v. Ciampaglia*, 628 F.2d 632, 642-43 (1st Cir.), *cert. denied*, *449 U.S. 956, 66 L. Ed. 2d 221, 101 S. Ct. 365 (1980)*. Appellant Zero argues that the instruction raised an unconstitutional presumption of guilt against him when, in attempting to relate the conscious avoidance charge to the facts of the case, the court said, "There has been a great deal of evidence with respect to what was done by the defendant Mr. Zero, but a relatively small amount of evidence with respect to the defendant Mr. Cincotta.

Similar allegations of Mystic's intent and knowledge are found in the paragraphs of the indictment setting forth the substantive counts, namely paragraphs 17, 19, and 21.

[2] Appellant Cincotta contends that the instruction unfairly surprised him because it was not discussed until after the close of evidence, leaving him no opportunity to develop evidence "through cross-examination or otherwise" that he had not closed his eyes to facts which should have prompted him to investigate. We detect no such prejudice. ***HN7*** The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question. Thus, if someone refuses to investigate an issue that cries out for investigation, we may presume that he already "knows" the answer an investigation would reveal, whether or not he is "certain". *See generally* *United States v. Jewell*, 532 F.2d 697, 699-704 (9th Cir. 1976). Evidence of conscious avoidance is merely circumstantial evidence of knowledge; a defendant who seeks to refute such evidence follows the same course no matter how the evidence is labeled. In short, a defendant accused of a crime involving knowledge must be prepared to meet both direct and circumstantial evidence, of which "conscious avoidance" is a major subset.

[15]** " Although we can appreciate appellant's point, we believe the trial court nullified any potential prejudice when, only four sentences later, it continued:

> "Now, giving you that instruction I hope you know does not constitute any comment by the Court on the weight of the evidence. The Court is not suggesting that you find that Mr. Cincotta consciously avoided knowledge here of things that were going on, nor does the Court imply that what Mr. Zero did or did not do is a basis for his being either convicted or acquitted. That is what is meant when it says that you are the exclusive judges of the facts."

[16]** Finally, both appellants attack the trial judge's refusal to impose more severe sanctions against the government for mailing a letter and an eight-page document to prospective government witnesses. The trial court found that the letter and document were improper for two reasons: they discouraged the witnesses from speaking to defense counsel, thereby denying the defendants access to them, and they improperly coached the witnesses on how to present their testimony. Specifically, the mailing conveyed the implicit and explicit message that the witnesses were partisans enlisted by the prosecution to help it win its case, that the defense attorneys were adversaries who would assault their integrity, and that the witnesses should avoid embarrassing the prosecution if they could do so and still tell the truth. The trial court sought to remedy this misconduct by instructing the witnesses before trial on their proper roles. The court told the witnesses specifically that the government had acted improperly. It explained in great detail precisely why the government conduct was improper. It then set forth a correct description of the role of witnesses in a criminal trial and admonished **[**17]** the witnesses to keep that proper role in mind. [3] In the case of witnesses **[*245]** who had refused to speak with defense attorneys, the court specifically admonished them to reconsider their decision. [4]

---

[3] The district court's efforts in this regard were exemplary. Although anything less than a full transcript inadequately reveals the care and discernment with which it educated the witnesses, a few excerpts can convey the flavor.

All witnesses who had read the Points for Prospective Witnesses were told:

> "This letter of December 16th and its enclosed Points for Prospective Witnesses constituted improper coaching of witnesses for the government by government counsel . . . The [principal error] is that it implies that being called as a witness for the government allies you with the government in the trial of this case. You are not witnesses for the government. You are witnesses for the system[,] the court[,] the jury that will be hearing this case. [The pamphlet] equates credibility with just truthfulness, and it makes it appear that cross-examination of a witness by defense counsel must implicitly be attacking the truthfulness or the character of a witness, and that is just wrong..... [Cross-examination] is less often directed to challenging the truthfulness of a witness than it is the other elements of credibility . . . the witness' ability to observe things accurately and to recall things accurately..... [The pamphlet states,] 'If you are asked, "Did anything else happen at that time, or was anything else said?" you can be sure that you have omitted a fact which you mentioned to the U.S. Attorney or to the government agent previously.' [That statement erroneously] identifies everything that you have said to a government investigator or to a government lawyer as a fact, that is to say, a correct statement, whereas the whole process here of the trial is designed to ascertain what the facts really were [;] you may have been mistaken in something you have stated heretofore in the course of preliminary interviewing. . ..[Thepamphletstates,]'BewareofleadingquestionscontaininghalF-truths,andbewareofYesorNo,'theimplication again being that the point to cross-examination is to trick you or to confuse you ..... You are not to beware of the questions that lawyers on either side of the case ask, or, on occasion, the judge may ask a question. Your obligation is to the jury . . . to testify truthfully, candidly, but not as if you were allied or linked to either side of the case..... At the end, it is stated incorrectly . . . that 'The length of time other witnesses will take is largely beyond the control of the government, as it depends on the length of cross-examination.' This sentence, like so many other sentences, makes it appear that the government here is solicitous for you and your welfare and your convenience, but other persons connected with the case might not be so solicitous. That just isn't so."

[4] The witnesses who had refused to meet with defense counsel before trial were told:

> "There ha[s] been an improper discouraging of access to defense counsel by government agents in this case You witnesses back in September received a letter from the prosecuting attorney [which stated in part]: 'Remember, anything you say to them,' that is, the defense lawyers or investigators, 'can be used to damage your credibility when you testify at trial.' Well, that doesn't present a fair picture of the role of witnesses.

[19]** The appellants contend that this was an inadequate corrective response. They suggest that the trial court should have dismissed the indictments, prohibited the witnesses from testifying, or at the very least instructed the jury that the witnesses had been improperly coached. We conclude that the court below responded in a thoroughly satisfactory manner. On the question of denial of access to government witnesses, the appellants have not shown any particularized prejudice from the combination of misconduct and trial court remedy. *See* *United States v. Morrison* , 449 U.S. 361, 66 L. Ed. 2d 564, 101 S. Ct. 665 (1981). After the court's curative charge, only three witnesses -- all employees of Union Petroleum -- refused to meet with the defense; all three continued their refusal after consulting with Union's corporate counsel, and it is far more likely that they were responding to the company's fear of civil liability to the government for undelivered oil than to any residual influence of the government's letter. On the question of improper coaching, we are not persuaded that these defendants were deprived of a fair trial or suffered any impairment of their rights **[**20]** to cross-examination. The only prejudice that the prosecutorial misconduct could have caused was the instillment of a general attitude of fear and hostility in the witnesses. The trial court's lecture was more than sufficient to correct any improper attitudes before the witnesses took the stand. The court also offered to read the complete mailing to the jury and to allow the defendants to cross-examine the witnesses about the mailings. It adequately defused whatever risk of prejudice had been created by the prosecutorial misconduct.

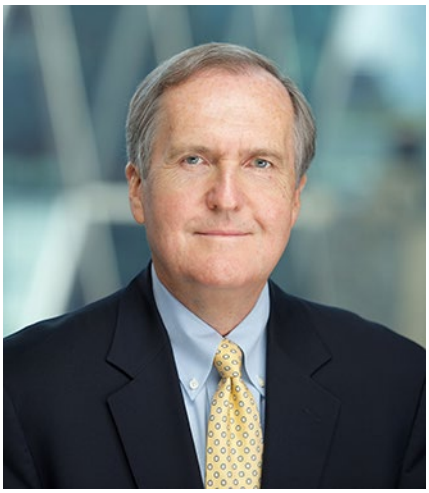
The judgments of conviction are affirmed.

. . . There is an implication in those and other statements, in my determination, that witnesses in the case should be identified with the government ..... 'A criminal trial, like its civil counterpart, is a quest for truth.' . . . 'An accused and his counsel have rights of access to potential witnesses that are no less than their accessibility to the potential prosecutors.' . . . I ask, previous to the trial of this case, . . . that you reconsider [your refusal] in light of the principles that I have read to you..... You are not required to discuss the case in advance, but the whole trend and spirit of the criminal law in the last several years is to facilitate that."

John M. Fietkiewicz

Heckel Inn Master of the Bench

Senior Counsel | Arnold & Porter



After three decades as a federal prosecutor in the District of New Jersey, Mr. Fietkiewicz joined Arnold & Porter in 2018. Since that time, he has counseled a wide array of corporate and individual clients in dealing with criminal and civil investigations and litigation. He has defended clients in criminal prosecutions and government investigations, conducted internal investigations, counseled on corporate compliance, and litigated complex civil claims.

During his career in government and private practice, Mr. Fietkiewicz has personally handled and supervised a variety of white collar matters from the investigative stage through trial and appeal. These cases have involved bank, corporate, health care, securities, and tax fraud; official corruption; antitrust; money laundering; defense contracting; and cybercrime.

As part of the US Attorney's executive team from 2010 until 2018, Mr. Fietkiewicz oversaw the full array of criminal and civil cases handled by the approximately 150 attorneys in the Office. Notably, as Counsel to the US Attorney, he created, implemented, and managed an office-wide criminal trial program through which he supervised all criminal trials and provided advice to all trial teams on legal and evidentiary issues, trial strategy and tactics, witness preparation, witness examinations, and jury arguments. In his many years as a supervisor and Senior Litigation Counsel, Mr. Fietkiewicz trained AUSAs on federal law and practice and in their handling of investigations and prosecutions.

Earlier in his career, Mr. Fietkiewicz was a Law Clerk to the Honorable Gerard L. Goettel, US District Judge, Southern District of New York, and a civil litigator at a large New York law firm.

He is a frequent lecturer and panelist on numerous topics concerning white collar prosecutions, trial practice, evidence, professional responsibility, and federal criminal practice.

Mr. Fietkiewicz received his JD, cum laude, from the Fordham University School of Law, where he was Editor-in-Chief of the Fordham Law Review.

Samuel P. Moulthrop

Heckel Inn Master of the Bench
Of Counsel | Riker Danzig Scherer Hyland & Perretti LLP

Samuel P. Moulthrop is Of Counsel in Riker Danzig's White Collar Criminal Defense and Investigations Group and in the firm's Environmental Litigation Group. He focuses on litigation, investigations, and white collar criminal defense.

Before joining the firm, Mr. Moulthrop served in the U.S. Attorney's Office for the District of New Jersey. In that office, he served as Assistant U.S. Attorney, Chief of the Criminal Division, in which he supervised federal criminal investigations and trials in the District of New Jersey; Chief of the Appeals Division, in which he supervised and handled appeals for the U.S. Attorney's Office before the U.S. Court of Appeals for the Third Circuit; Deputy Chief of the Fraud and Public Protection Division, in which he supervised and litigated white collar criminal prosecutions, including bank, insurance, and securities fraud cases and environmental cases; and Chief of the Environmental Section, in which he supervised and handled civil and criminal environmental litigation conducted by the federal government in the District of New Jersey.

He has extensive experience assisting clients with government enforcement and compliance issues involving potential criminal charges. He regularly manages complex federal and state court litigation on behalf of Fortune 500 corporations, and their officers and directors. Mr. Moulthrop and his team of attorneys have represented both companies and individuals in connection with criminal investigations involving allegations of alleged violations of securities laws, Arms Export Control Act, environmental statutes, and tax laws. They have also handled cases involving fraud and political corruption allegations.

In addition, he regularly represents medical professionals and health care providers in connection with health care investigations and legal proceedings.

Jeffrey D. Smith

Heckel Inn Master of the Bench

Partner | DeCotiis, FitzPatrick, Cole & Giblin, LLP

Jeffrey Smith is a partner at DeCotiis. He is a member of the Executive Committee and Co-Chair of the Litigation Department. He joined the firm as a partner in 1998. He is also a member of the White Collar Litigation and Corporate Investigations practice group.

Mr. Smith concentrates his practice in White Collar and Corporate Investigations and Complex Litigation. He has wide trial and appellate experience with emphasis on the defense of federal and state criminal and regulatory cases and related civil litigation. Mr. Smith has defended corporate and individual clients in a broad cross-section of industries in investigations conducted by the U.S. Department of Justice, the Securities and Exchange Commission, the Commodity Futures Trading Commission and state Attorneys General. Mr. Smith also represents clients in complex civil litigation involving allegations of fraud, breach of contract, breaches of fiduciary duty, racketeering, violations of the federal False Claims Act and redevelopment litigation.

Prior to joining the firm in 1998, Mr. Smith was an Assistant United States Attorney for the United States Attorney's Office for the District of New Jersey from 1988 until 1998. He served in a number of roles, including the Civil Division and the Special Prosecutions Division, where he focused on the prosecution of public corruption cases. Mr. Smith was twice the recipient of the Justice Department's Director's Award for Superior Performance as an Assistant United States Attorney, in 1996 and 1997.

Justice Walter F. Timpone (Ret.)

Heckel Inn Master of the Bench

Senior Counsel | Calcagni & Kanefsy

Justice Walter F. Timpone (Ret.) is Senior Counsel with Calcagni & Kanefsky. A former New Jersey Supreme Court Justice, Federal prosecutor, and private practice litigator, Justice Timpone is the consummate attorney. He brings his extensive experience to bear on internal and government investigations, corporate compliance and governance, complex regulatory concerns, crisis management, white collar criminal defense, and arbitration and mediation.

Before joining Calcagni & Kanefsky, Justice Timpone served on the Supreme Court of New Jersey. He was nominated to the State's highest court by New Jersey Governor Christopher J. Christie and sworn in as an Associate Justice in 2016. He served until his retirement from the Court in 2020. During his time on the Supreme Court, Justice Timpone wrote 30 majority opinions, several in high profile, often-cited cases.

Before serving on the Supreme Court of New Jersey, Justice Timpone was a litigation partner at a preeminent national law firm. There he successfully negotiated Deferred Prosecution Agreements for public and private healthcare organizations. During private practice, he also served as Associate General Executive Board Attorney for an international labor union and Acting General Counsel for a major New Jersey hospital.

Justice Timpone served as an Assistant United States Attorney for the District of New Jersey for eleven years. While with the U.S. Attorney's Office, he was elevated to Chief of Special Prosecutions, leading the Office's investigations and prosecutions of corruption and fraud against the public.