From Michael Clayton to Michael Cohen: Ethical Considerations for "Fixers"

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YOU CAN'T MAKE THESE THINGS UP: ETHICAL DILEMMAS EXPOSED BY ALLEGED CONDUCT OF MICHAEL COHEN AND MICHAEL AVENATTI*

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INTRODUCTION:

Most of us have been bemused by the headlines for the past year, including the following:

- **Michael Cohen: When does Advocacy become unethical?**

  Gary Alt: Michael Cohen: When does advocacy become unethical?, https://stories.avvo.com/news/michael-cohen-advocacy-unethical.html (last visited Sept. 11, 2018).

- **Public Citizen files ethics complaints against Trump Lawyer Michael Cohen**

  Fredreka Schouten: Public Citizen files ethics complaints against Trump lawyer Michael Cohen,https://www.usatoday.com/story/news/politics/2018/05/10/public-citizen-against-donald-trump-lawyer-michael-cohen/599750002/ (last visited July 25, 2018).

- **Cohen Threatened the Onion in 2013 over Satirical Trump Article**

  Morgan Gstalter: Cohen threatened The Onion in 2013 over satirical Trump article, http://thehill.com/homenews/media/388740-cohen-threatened-the-onion-in-2013-over-satirical-trump-article (last visited Sept. 11, 2018).

- **Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence**

  Michael Rothfeld and Joe Palazzolo: Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence, https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678 (last visited July 27, 2018).

- **Taking to Twitter, Trump says the FBI Raid Targeting his Lawyer violated Attorney-Client Privilege**

John Wagner and Devlin Barrett: Taking to Twitter, Trump says the FBI raid targeting his lawyer violated attorney-client privilege, https://www.washingtonpost.com/news/post-politics/wp/2018/04/10/taking-to-twitter-trump-says-the-fbi-raid-targeting-his-lawyer-violated-attorney-client-privilege/ (last visited Sept. 11, 2018).

- **In Tense Exchange, Legal Scholar Alan Dershowitz accuses Michael Avenatti of Ethics Lapse**

  Josiah Ryan: In tense exchange, legal scholar Alan Dershowitz accuses Michael Avenatti of ethics lapse, https://www.cnn.com/2018/07/28/politics/dershowitz-accuses-avenatti-of-ethics-lapse-cnntv/index.html (last visited July 30, 2018).

While engrossed in these fascinating articles, the bottom line is that we, as attorneys, are bound by the same rules that cover the actions of Michael Cohen and Michael Avenatti. Michael Cohen is licensed to practice law in New York. Michael Avenatti is licensed to practice law in California, but for purposes of this article, we will particularly focus on the New York State Rules of Professional Conduct, 22 NYCRR 1200.0 *et seq.*

THE CAST OF CHARACTERS:

Michael Avenatti

Michael Avenatti has a law office in California. He is best known of late for representing Stormy Daniels, whose real name is Stephanie Clifford (hereafter referred to as "Daniels"). In 2007, Mr. Avenatti formed the law firm Eagan Avenatti, LLP (formerly known as Eagan O'Malley & Avenatti, LLP) with offices in Newport Beach, Los Angeles and San Francisco, California.

In 2017, a Florida man named Gerald Tobin alleged Avenatti failed to pay him $28,700 for private investigatory work. As a result, Mr. Avenatti's firm was abruptly forced into bankruptcy. In 2018, Mr. Avenatti's law firm was subjected to a $10 million judgment in U.S. bankruptcy court. Mr. Avenatti has also defaulted on a $440,000 judgment in back taxes, penalties, and interest that he was personally obligated to pay under another bankruptcy settlement. In June 2018, the former partner filed a motion in U.S. bankruptcy court asking for a lien on any and all legal fees Mr. Avenatti's firm might collect, up to $10 million, from clients in 54 cases including his representation of Stormy Daniels.

Michael Cohen

Michael Cohen began practicing personal injury law in New York in 1992, working for Melvyn Estrin in Manhattan. As of 2003, Cohen was an attorney in private practice and CEO of MLA Cruises, Inc., and of the Atlantic Casino.

In 2003, when Cohen was a candidate for New York City Council, he provided a biography to the New York City Campaign Finance Board for inclusion in its voters' guide, listing him as co-owner of Taxi Funding Corp. and a fleet of New York City taxicabs numbering over 200. As of 2017, Cohen was estimated to own at least 34 taxi medallions through 17 limited liability companies (LLCs).

Until April 2017, "taxi king" Evgeny Freidman managed the medallions still held by Mr. Cohen; this arrangement ended after the city's Taxi and Limousine Commission decided not to renew Freidman's licenses. Between April and June 2017, the New York State Department of Taxation and Finance filed seven tax warrants against Cohen and his wife for $37,434 in unpaid taxi taxes due to the MTA.

In 2006, Mr. Cohen was a lawyer at the law firm Phillips Nizer LLP. He worked at the firm for about a year before taking a job at The Trump Organization.

While at the company, Mr. Cohen became a close confidant to Donald Trump, maintaining an office near Mr. Trump at Trump Tower. Mr. Cohen aided Mr. Trump in his struggle with the condominium board at the Trump World Tower, which led to Mr. Trump successfully obtaining control of the board.

In 2008, Mr. Cohen was named COO of the MMA promotion Affliction Entertainment.

Approximately three weeks before the 2016 election, Mr. Cohen set up a limited liability corporation, called Essential Consultants, LLC.

THE ARTICLES:

In February 2018, the Wall Street Journal reported that:

- The month before, Michael Cohen had sent a written statement in Daniels's name to the Wall Street Journal, denying that she had a "sexual and/or romantic affair" with President Trump or "received hush money" from Trump; and
- Issued his own statement, in his capacity as Trump's lawyer, that President Trump "vehemently denies" any affair with her.

On February 13, 2018, Michael Cohen told the press that he paid the Stormy Daniels settlement out of his own pocket. He stated that he had not been reimbursed by the Trump campaign either directly or indirectly. Maggie Haberman: Michael D. Cohen, Trump's Longtime Lawyer, Says He Paid Stormy Daniels Out of His Own Pocket, https://www.nytimes.com/2018/02/13/us/politics/stormy-daniels-michael-cohen-trump.html (last visited July 27, 2018).

In March, 2018, New York magazine reported that Daniels alleged that the October 2016 nondisclosure agreement, signed in exchange for $130,000.00 was void, because Michael Cohen had discussed the payment publicly and because he had used "intimidation and coercive tactics" to force her to sign a false statement denying the relationship with now President Trump. Margaret Hartmann: As Trump's Attorney, Michael Cohen's Loyalty Matters More Than His Lawyering, http://nymag.com/daily/intelligencer/2018/03/trump-values-michael-cohens-loyalty-more-than-his-lawyering.html (last visited July 27, 2018).

On April 16, 2018, Michael Cohen disclosed that he had been consulted by Sean Hannity. This disclosure was made after Judge Kimba Wood ruled that the attorney-client privilege did not prohibit Cohen from revealing the identity of his third client. Up until that point Cohen had maintained that his third client wished to remain anonymous. Paul Farhi: Sean Hannity had a lot to say about Michael Cohen lately. But he left a few things out., https://www.washingtonpost.com/lifestyle/style/sean-hannity-had-a-lot-to-say-about-michael-cohen-lately-but-he-left-a-few-things-out/ (last visited July 25, 2018).

In March 2018 and late May 2018, numerous articles appeared on the Internet concerning Mr. Cohen's alleged threats to various parties, ostensibly made in his capacity as Trump's "fixer", including the following:

a. In 2013, after the Onion's satirical post regarding Trump, Cohen sought to "fix" the matter by informing the Onion's staff that their "commentary goes way beyond defamation and, if not immediately removed, I will take all actions necessary to ensure your actions do not go without consequence. Guide yourself accordingly." Morgan Gstalter: Cohen threatened The Onion in 2013 over satirical Trump article, http://thehill.com/homenews/media/388740-cohen-

threatened-the-onion-in-2013-over-satirical-trump-article (last visited Sept. 11, 2018).

b. In 2015, Cohen threatened the Daily Beast and its reporter over the phone. With respect to the reporter individually, Cohen said "I'm warning you, tread very [expletive] lightly because what I'm going to do to you is going to be [expletive] disgusting. Do you understand me? Don't think you can hide behind your pen because it's not going to happen." Later in the conversation, Cohen went on to attack the Daily Beast as well, saying "it's going to be my absolute pleasure to serve you with a $500 million lawsuit, like I told - I did to Univision." (referencing Trump's 2015 lawsuit against Univision for dropping the Miss Universe pageant). Christianna Silva: Michael Cohen threatened a journalist and said spousal rape isn't real in 2015, https://news.vice.com/en_us/article/xwmab7/michael-cohen-threatened-a-journalist-and-said-spousal-rape-isnt-real-in-2015/ (last visited Sept. 11, 2018).

c. In 2016, after a Harvard student pranked Trump during the campaign, Cohen called the student threatening expulsion from Harvard, as well as a lawsuit. Tim Mak: Listen: How Michael Cohen Protects Trump By Making Legal Threats, https://www.npr.org/2018/05/31/615843930/listen-how-michael-cohen-protects-trump-by-making-legal-threats (last visited Sept. 11, 2018).

d. Daniels's attorney, Avenatti, stated in an MSNBC interview that his client had been threatened with physical harm, though he did not name Cohen. Stormy Daniels' attorney says his client was threatened physically,

https://www.msnbc.com/morning-joe/watch/stormy-daniels-attorney-says-his-client-was-threatened-physically-1187514947648/ (last visited Sept. 11, 2018).

This article will explore the ethical issues raised by some of these headlines, and provide you with

ETHICAL DILEMMA ONE: WHAT CAN AND SHOULD AN ATTORNEY SAY AND WHAT SHOULD AN ATTORNEY AVOID SAYING IN THE CONTEXT OF REPRESENTING A CLIENT?

guidance.

A. The first ethical issue arises in the context of Michael Cohen's representation that Daniels had denied having an affair with President Trump and denied receiving "hush money," as well as his own representation that President Trump "vehemently" denied any affair. What ethics rules govern these types of disclosures?

First, if any part of either statement is untrue or the attorney believes the client's representation to be untrue, it implicates N.Y. Rules of Professional Conduct, Rules 8.4, 4.1, 3.1, and 4.4.

Rule 8.4 (c) provides that a lawyer or law firm shall not: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 4.1, Truthfulness in Statements to Others, states: **"[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. The comment to Rule 4.1 elaborates on what may constitute a misrepresentation:

> "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, *see* Rule 8.4." NY ST RPC Rule 4.1 cmt. 1, misrepresentation (McKinney)

Rule 4.1 applies in the limited context of representing a client. Rule 8.4 (and each of its subsections) addresses a lawyer's conduct at any time, whether or not the lawyer is concurrently representing a client. See *In Re Eagan,* 142 A.D.3d 182 (2d Dept. 2016) (attorney suspended for two years after not filing personal tax returns for ten years); *In re Jones* 118 A.D.3d 41 (2d Dept. 2014) (attorney failed to pay back loan made to attorney by a client, and the attorney's testimony conflicted with his prior written representations to the grievance committee regarding moving funds in his escrow account).

In addition, knowingly asserting a material false statement may constitute frivolous conduct in the context of litigation. **Rule 3.1. Non-Meritorious Claims and Contentions, prohibits frivolous conduct and provides that** (**b) A lawyer's conduct is "frivolous" for purposes of this Rule if: […] (3) the lawyer knowingly asserts material factual statements that are false (in the context of bringing or defending a proceeding). Similar to Rule 4.1 and** in contrast with Rule 8.4, Rule 3.1 is limited to addressing a lawyer's conduct in the context of bringing or defending a proceeding.

In our scenario, it is unclear whether Mr. Cohen's representations were made in the context of bringing or defending a proceeding. It was not until March 6, 2018, that Ms. Daniels

brought a lawsuit alleging that the "hush agreement" was of no force and effect. She noted in ¶ 27 of her Complaint, that "at no time did Mr. Cohen claim Ms. Clifford did not have an intimate relationship with Mr. Trump. Indeed, were he to make such a statement, it would be patently false". *Clifford v. Trump, et al.*, Case No. BC696568 (Sup. Ct. Cal.), Complaint at ¶ 27, http://documents.latimes.com/stormy-daniels-donald-trump-complaint/ (last visited Sept. 12, 2018).

Rule 3.4(a)(4) Fairness to Opposing Party and Counsel, provides that: A lawyer shall not […] knowingly use perjured testimony or false evidence." Rule 3.4(a)(5) precludes an attorney from participating in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." While the wording of Rule 3.4 is consistent with the inference that the Rule is applicable while a proceeding is pending, the context of Rule 3.4 overall indicates that it applies where opposing parties exist. It is further applicable to "any conduct that falls within [the Rule's] general terms that is a crime, an intentional tort or prohibited by rule or a ruling of a tribunal." NY ST RPC Rule 3.4 cmt. 1 (McKinney). In some cases, such conduct could occur where legal proceedings were foreseeable. NY ST RPC Rule 3.4 cmt. 2 (McKinney). Related Rule 3.3 deals specifically with candor/truthfulness "before a tribunal", which may include virtually any adjudicatory body, such as an arbitrator or an administrative agency operating in an adjudicatory capacity. The comments indicate that "[i]t also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition." NY ST RPC Rule 3.3 cmt. 1 (McKinney).

Lawyers have obligations to prevent the use of false information or frivolous lawsuits when considering whether to withdraw from representation of a client as well. Rule 1.16 (a) provides that a lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

> 1) **Bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring another person.** NY ST RPC Rule 1.16(a) (McKinney).

If the lawyer is already representing the client, then the lawyer "shall withdraw from" representing the client when:

> 4) **the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.** NY ST RPC Rule 1.16(a) (McKinney).

This does not mean that it is unethical for attorneys to engage in conduct meant to flush out whether testimony is truthful. For example, it has been held that it is acceptable for an attorney to employ an investigator for the purpose of befriending a key prosecution witness in order to ascertain truthfulness of testimony. N.Y.St.Bar.Assn.Comm.Prof.Eth. Op. 75-402. In the age of "friending" in the social media context, the issue addressed by Op. 75-402 becomes complicated by the ability to hide behind the wall of social media. While an attorney may join a social media network for the purpose of obtaining publicly available information regarding a witness, the attorney (or attorney's agent) may not "friend" or communicate with an

unrepresented opposing party without being truthful about his or her identity. N.Y.St.Bar.Assn.Comm.Prof.Eth. Op. 2010-02.

B.	The second ethical issue presented by Michael Cohen's alleged statements is whether it was unethical for him to disclose Sean Hannity's identity.

Most attorneys believe that the identities of their clients are confidential, and there are many occasions where a client may not want his or her identity or the fact of representation known. And, as we all know, attorneys are obligated to maintain the confidences of their clients under most situations.

There are a number of ethics rules dealing with the obligation to maintain the confidences of clients. Rule 1.6: **Confidentiality of Information,** governs the disclosure of information protected by the professional duty of confidentiality. "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." NY ST RPC Rule 1.6 (McKinney). Other rules also deal with confidential information: See "Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program." NY ST RPC

Rule 1.6 cmt. 1 (McKinney). As of August 24, 2018, New York Judiciary Law Section 498(2) has been amended to protect communications between lawyer referral services and prospective clients "on the same basis as the privilege provided by law for communications between attorney and client." N.Y. Judiciary Law § 498 (McKinney).

However, given Judge Wood's finding and the weight of authority in general, Cohen's obligation to maintain his client's identity in confidence at his client's request was overridden by a court order to the contrary.

As Judge Kimba Wood found, the Second Circuit has ruled that generally, disclosure of a client's identity is not covered by an attorney-client privilege. *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993) ("We have determined that in the absence of special circumstances client identity and fee arrangements do not fall within the attorney-client privilege because they are not the kinds of disclosures that would not have been made absent the privilege and their disclosure does not incapacitate the attorney from rendering legal advice. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247 (2d Cir. 1944) (en banc), *cert. denied*, 475 U.S. 1108, 106 S. Ct. 1515, 89 L. Ed. 2d 914 (1986); *accord In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *Colton v. United States*, 306 F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); *United States v. Pape*, 144 F.2d 778, 782-83 (2d Cir. 1944), *cert. denied*, 323 U.S. 752, 65 S. Ct. 86, 89 L. Ed. 602 (1944). Appellant believes "special circumstances exist in the case at hand because revealing the sought-after client information necessarily would reveal the purpose for which the client consulted him."). *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993).

This conclusion flows from almost half a century old case law in the Second Circuit, interpreting the scope of privileged information. *See Colton v. United States, supra*, 306 F.2d

633, 637 (2d Cir. 1962). The *Colton* court held that, "although the word 'communications' must be broadly interpreted in this context, *see* 8 Wigmore, Evidence § 2306 (McNaughton rev. 1961), the authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus, the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. *United States v. Pape*, 144 F.2d 778 (2d Cir. YEAR), *cert. denied*, 323 U.S. 752, 65 S.Ct. 86, 89 L.Ed. 602 (1944); *Behrens v. Hironimus*, 170 F.2d 627 (4th Cir. 1958); *Goddard v. United States*, 131 F.2d 220 (5th Cir. 1942); *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 270 N.Y.S. 362 (Sup.Ct.1934), *aff'd mem*. 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dept. 1934); 8 Wigmore, Evidence § 2313 (McNaughton rev. 1961); McCormick, Evidence § 94 (1954)".

The *Vingelli* court noted an "exception to the notion that client identity and fee arrangements must be revealed, called the substantial disclosure exception. *See Colton*, 306 F.2d at 637. That exception states that where the substance of a confidential communication has already been revealed, but not its source, identifying the client constitutes a prejudicial disclosure of a confidential communication. *Id*." Where special circumstances did not implicate either of the recognized exceptions, no reason to depart from the general rule requiring disclosure existed. The court also noted that other circuits have ruled that client identity or fee information is protected by the privilege under certain circumstances. *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993). See also *Matter of Jacqueline F.*, 47 N.Y.2d 215 (1979) (attorney could be compelled to disclose client's address because of deliberate attempt by client to avoid court's mandate).

One of the earliest cases defining a special circumstances exception was *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977), in which the Ninth Circuit stated an exception to the general rule of client identity disclosure when there is a strong probability that such disclosure would implicate the client in the very activity for which legal advice was sought. Currently most circuits considering the issue have found special circumstances warranting a privilege when the disclosure of the information would be tantamount to revealing a confidential communication. *See, e.g., Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988); *In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423, 1431 (5th Cir. 1991); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1491 (10th Cir. 1990); *see also* Seymour Glanzer and Paul R. Taskier, Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege To Protect a Client's Identity, 75 J.Crim.L. & Criminology 1070 (1984) (discussing exceptions to the general rule permitting disclosure of client identity).

The Ninth Circuit's formulation in *Hodge & Zweig* that a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought was later limited by the Ninth Circuit. *See In re Osterhoudt*, 722 F.2d 591, 593-94 (9th Cir. 1983). *Osterhoudt* 's gloss on *Hodge & Zweig* limited the protection of a client's identity to those circumstances where its disclosure would in substance be a disclosure of the confidential communication between the attorney and client. This view has become known as the confidential communication exception, recognized in *In re Shargel*, 742 F.2d at 62-63, and with which the other circuits cited above agree.

The rule governing the unprivileged nature of client identification implicitly accepts the fact that a client might retain or consult an attorney for numerous reasons. Thus, the fact that disclosure of an attorney’s client's identity might suggest the possibility of wrongdoing on his or

her part does not affect analysis of whether disclosure would reveal a confidential communication.

Therefore, in the Michael Cohen scenario, the exception does not apply and Judge Wood correctly required the disclosure of Hannity's identity.

The next ethics issue concerns statements Michael Cohen allegedly made to intimidate others.

C. The next ethics issue concerns threatening statements Michael Cohen allegedly made to intimidate others.

Threats may implicate Rule 4 et seq. While it has been widely reported that he made "threats", it is necessary to probe what is meant by the term "threats". For example, in a lawsuit against her former attorney K Davidson, for breach of his ethical obligations under California law, the only incident of intimidation by Cohen that Daniels referenced is that he initiated an arbitration proceeding against her to enforce the nondisclosure agreement.

Rule 4.4 Provides that: (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such person. N.Y.County 607 (1972).

Threatening criminal prosecution is one side of the spectrum; other less severe conduct may be permissible.

New York Rule 3.4(e), provides that a "lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter**.**" The rationale for the prior Disciplinary Rule (the identically worded DR 7-105) appeared in Ethical Consideration 7-21:

> "The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system." NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125.

The current Comments to New York Rule 3.4 do not contain this rationale.

While this Rule does not prohibit a lawyer from reporting a crime committed by an adverse party for the purposes of having it prosecuted, it does prohibit threatening to commence or commencing prosecution solely as a means to secure a settlement. *See In re Glavin*, 107 A.D.2d 1006 (3d Dept. 1985); NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125. An opinion by the New York State Bar Association's Committee on Professional Ethics, NYSBA Formal Opinion 772 (2003), under the prior Disciplinary Rules, gives a very literal reading to this provision. There, the Committee affirmed that, as the language suggests, the prohibition only applies if the "sole purpose" behind the threat or commencement of prosecution is to secure a civil settlement. If some other purpose is evident, a violation will not be found. NY Eth. Op. 772 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 23099784.

Oddly enough, it is permissible for the lawyer representing the party subject to criminal charges to raise the issue and seek as part of any civil settlement that criminal charges not be filed. It is similarly permissible for the other party's attorney to negotiate over such a restriction once this door has been opened by the potential criminal defendant or his counsel. NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125.

Although a potential criminal defendant in New York may ethically request the other party to agree to forebear criminal prosecution as a condition of settlement, New York City Formal Opinion 1995-13 makes clear that such agreements may not in fact be enforceable by either party. As the Committee in that decision noted:

> "Should the aggrieved party choose to report the defendant's conduct after the defendant has performed pursuant to the settlement, the defendant will not be able either to prevent a prosecution or to obtain damages. In the event of non-performance of settlement conditions by the potential defendant, on the other hand, the potential plaintiff may not be permitted by the courts to recover on the settlement because it contains a non-reporting agreement."

Id. Therefore, a lawyer negotiating a settlement containing a non-reporting agreement should disclose to the client that the settlement may ultimately be unenforceable by either party due to the presence of such a provision. At least two other jurisdictions which have provisions similar to that found in New York have reached a similar conclusion. D.C. Bar Formal Opinion 339; Wisconsin Opinion E-87-5 (1987).

A similar prohibition against threats of criminal prosecution to gain advantage in a civil matter does not exist under the Model Rules of Professional Conduct, as applicable in most other states. ABA Formal Op. 92-363 (1992); ABA Formal Op. 94-383 (1994); MD Jud. Eth. Comm. Op. 03-16 (2003). Thus, in states adhering to the Model Rules, a lawyer is not prohibited from threatening criminal action to gain advantage in a civil suit provided the criminal matter is related to the civil claim, the lawyer has a well-founded belief that the civil and criminal claims are warranted by the facts, and the lawyer does not attempt to suggest any improper influence over the criminal process. ABA Formal Op. 92-363; see also DE Jud. Eth. Adv. Comm. Op. JEAC 1995-2 (1995) (imposing additional requirement that the threatening attorney actually intends to go forward with the criminal charges in the event the civil dispute is not

resolved).With respect to avoiding criminal implications, care must be taken that the party agreeing to forebear reporting not agree to, nor the defendant soliciting that forbearance seek, an agreement that obligates the victim to destroy evidence, fail to cooperate with law enforcement authorities if such cooperation is requested, or suppress or alter evidence that the lawyer or client is under a legal obligation to produce. Entering into such agreements may themselves be criminal acts under New York law. *See, e.g.*, N.Y. Penal Law §§ 215.40 (Tampering with Physical Evidence); 177.05/175.10 (Falsifying Business Records); 205.50 (Hindering Prosecution) 215.50 (Criminal Contempt) and 215.00 (Bribing a Witness). In addition, lawyers for both parties entering into a settlement agreement which contains an agreement not to report a crime must be sure that the agreement does not run afoul of N.Y. Penal Code § 215.45 (Compounding a Crime). As the New York City Committee on Professional and Judicial Ethics observed:

> "[T]he legality of every agreement not to report a crime is controlled by N.Y. Penal Law § 215.45, Compounding a Crime, which forbids offering or accepting "any benefit" upon an understanding that, in return, criminal conduct will not be reported. The statute provides an affirmative defense that excludes from criminal liability a person who offers or accepts a benefit upon a reasonable belief that the benefit was no more than the amount due as restitution or indemnification for the harm caused by the crime. This law places strict limits upon anyone who wishes to negotiate a civil settlement that includes an agreement not to report criminal conduct. First, one must have a reasonable belief that facts in the case support a criminal charge. Second, any civil claim that is settled must arise from the same facts that give rise to the criminal charge. Third, any benefit conferred may be no more than the amount reasonably believed to constitute restitution or indemnification for the crime."

NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125 (citations omitted). Likewise, proof of a threat to present criminal charges unless specified action is performed constitutes a prima facie case of criminal coercion, N.Y. Penal Law §135.60, and if

property is actually obtained, it constitutes a prima facie case of extortion, N.Y. Penal Law § 155.05. In both cases, an affirmative defense similar to that available to a charge of Compounding a Crime exists. *See* N.Y. Penal Law §§ 135.75 and 155.12(a). Thus, it is important that a party agreeing to forego filing charges not attempt to secure more than proper restitution in exchange for doing so.

With respect to threatening disciplinary charges, ABA Formal Op. 94-383 (1994) concluded that a lawyer may not threaten to file a disciplinary complaint or report against opposing counsel solely to obtain an advantage in a civil case. Although this type of action is not per se prohibited by the Model Rules of Professional Conduct, when the opposing counsel's misconduct raises a serious question about his honesty, trustworthiness or fitness as a lawyer, the lawyer has an absolute obligation to report the opposing counsel under Model Rule 8.3(a). ABA Formal Op. 94-383 (1994). New York's Rules of Professional Conduct contain a similar provision in New York Rule 8.3(a). Under both the Model Rules and New York Rules, the reporting obligation only extends to information which is not confidential information. The ABA Committee has concluded that threatening to report such a violation if settlement is not reached is impermissible because it suggests that if a settlement is reached, reporting (even if otherwise required) will not occur. The ABA Committee also found that a threat of disciplinary action against opposing counsel is unethical, even in cases where reporting is not required, if "the misconduct is unrelated to the civil claim, the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay, or burden opposing counsel or his client, or to prejudice the administration of justice." ABA Formal Op. 94-383 (1994), s*ee also* Nassau County Opinion 98-12 (1998) (reaching a similar conclusion).

NYSBA Formal Opinion 772 casts some doubt on a similar conclusion in New York. There, the Committee on Professional Ethics narrowly construed the identical predecessor of Rule 3.4 (DR 7-105) as applying only to the filing of "criminal charges." While it noted that other bodies (including the ABA and Nassau County) had reached a conclusion that the prohibition extended to other types of non-criminal disciplinary charges, it concluded that "the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(a)." NY Eth. Op. 772 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 23099784. The facts before the Committee did not involve attorney disciplinary charges, but rather dealt with the filing of professional disciplinary charges against an adversary-broker under the rules of the New York Stock Exchange. Whether a different result would have been reached if attorney disciplinary charges had been at issue is unclear. Given the fact that Opinion 772 explicitly disagreed with Nassau County Opinion 98-12, and the Nassau County matter did involve an attorney disciplinary complaint, it would appear that, at least in the eyes of the NYSBA Committee, DR 7-105 did not, and New York Rule 3.4 presumably does not, extend that far.

While New York City Formal Opinion 2015-5 also applied a literal reading to Rule 3.4, resulting in a narrow application, like ABA Formal Opinion 94-383, it concluded that other rules could be violated by the threat to file non-criminal charges in appropriate circumstances. NY Eth. Op. 2015-5 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.) 2015 WL 4197679.

Applying this analysis to the allegations made against Michael Cohen demonstrates that a great deal more information is necessary before it can be determined whether any unethical coercive techniques were used in any of the scenarios identified by media headlines. It is likely that an allegation that he threatened arbitration, such as the allegation made by Daniels in an

action against her former attorney, Keith Davidson, are not sufficient to demonstrate any unethical conduct.

ETHICAL DILEMMA TWO: WHEN DOES A LAWYER'S CONDUCT IN MAKING PAYMENTS ON BEHALF OF A CLIENT BECOME UNETHICAL

- In February, 2018, the media reported that Michael Cohen paid Daniels, $130,000 out of his own pocket to prevent her from talking to the press about an alleged encounter with President Trump.
- The Wall Street Journal reported that Cohen wired Daniels the funds on October 27, 2016. Cohen had not been able to reach Trump before making the transfer. When reporters asked President Trump about the payment in April 2018, he denied knowing about the payment.
- In response to a complaint filed with the Federal Election Commission by Common Cause, Cohen alleged that he made the $130,000 settlement payment to Stormy Daniels out of his own pocket to prevent her from talking to the press about her alleged relationship with now President Trump. Common Cause claimed that this amounted to a campaign contribution beyond the $2700 maximum contribution permitted for individuals. The Federal Election Campaign Act, 52 U.S.C. §30101 et seq. regulates contributions to federal political campaigns but whether this constituted an illegal campaign contribution will not be addressed in this article. [1] If, on the other hand, the payment was a loan, it would not violate the campaign contribution laws but might violate the ethics rules.

[1] On August 21, 2018, Mr. Cohen waived indictment and pleaded guilty to eight (8) counts of a federal information. He will be sentenced in December, 2018. Among other matters, he admitted to unlawful and excessive campaign contributions in advancing payments to two unnamed women to assure that they did not publicize damaging allegations before the 2016 presidential election and therefore influence that election.

Rule 1.8 (e) limits an attorney's ability to advance funds on behalf of a client. **While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client** (with several exceptions). One of the exceptions is that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. NY ST RPC Rule 1.8(e).

The first question in working through our scenario, then, is whether the payment constituted financial assistance to now President Trump. Some have suggested that it does not, that President Trump did not need the money, and could have paid it himself.

A corollary question is whether paying a settlement constitutes a permissible advancing of costs or expenses of litigation. This depends on whether there was any litigation such that the settlement payment could arguably constitute an expense of litigation. This, in turn, requires an analysis of the facts, which are complicated by the related campaign.

According to the August 18, 2018 federal information filed against Mr. Cohen, in October 2016 an agent for an adult film actress informed an Editor that she was willing to make public statements and confirm on the record her alleged past affair with an individual unidentified in the Information. The Editor put him in touch with Michael Cohen, and put Cohen in touch with an attorney representing the Woman, and Cohen "negotiated a $130,000 agreement with Attorney -1 to himself purchase Woman-2's silence, and received a signed confidential settlement agreement and a separate side letter agreement from the Woman. *U.S. v. Michael Cohen*, Case No.: 1:18-cr-00602-WHP (Doc. 2).

It is important to understand the reason why Rule 1.8(e) (which is based on the American Bar Association Model Rules of Professional Conduct) exists. The ABA/BNA Lawyers Manual on Professional Conduct, sums up the underlying reason for Rule 1.8's prohibition on attorney

advances to clients: "the rules can also be said to protect lawyers from client requests for help, and also from the competition from other lawyers who might be willing to provide monetary assistance." Philip G. Schrag, The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), 28 Geo. J. Legal Ethics 39, 60 (2015).

The cases and opinions suggest varying approaches to loaning clients money. NYS Bar Association opinion 1044 (10/8/15) take a restrictive approach. It addresses the question whether an attorney can advance a client's taxi or other expenses to attend an independent medical examination and the expenses for other doctor's appointments. The opinion notes that Comment 9B to Rule 1.8 limits permitted financial assistance to court costs and expense directly related to the litigation and does not include living expenses. NY Eth. Op. 1044 (N.Y.St.Bar.Assn.Comm.Prof.Eth.) 2015. The reason behind this is that fronting living expenses would "encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigations." Expenses of litigation include items like fees of a private investigator, the lawyer's travel expenses to visit witnesses or attend depositions, long distance phone bills, costs of clandestine videos and other expenses that a lawyer or lawyer's agents incur while investigating the facts of the case. R. Simon, Simon's N.Y. Rules of Professional Conduct Annotated 484 (2014 ed). In answer to the questions addressed in the opinion, the lawyer may advance the client's taxi and other transportation costs to the independent medical examination and may even pay those expenses if the client is indigent, but whether the lawyer can pay expenses depends on whether they are expenses of the litigation. The opinion concludes that some medical expenses may be expenses of the litigation, but that the cost of routine medical care may not qualify. See also *Matter of Moran*, 42 A.D.3d

272 (4th Dept. 2007) (attorney was suspended for 18 months for conduct which included loaning money to clients through intermediaries.)

How other jurisdictions treat the issue depends on their variation of the rule. Missouri Formal Ethics Opinion 125 https://www.courts.mo.gov/file.jsp?id=32148 (2008) dealt with this issue in the context of whether a lawyer may indemnify his client for debts owed to the opposing party. The opinion stated:

> "…Any type of guarantee to cover a client's debts constitutes financial assistance If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party. See *In re Morse* (lawyer who loaned friend and client $1400 to pay rent, transportation given a reprimand); *State ex rel. Counsel for Discipline v. Kratina,* 746 N.W.2d 378 (2008) (lawyer suspended for 60 days for paying vehicle and transportation expenses, insurance premiums, and rent for an unemployed client and friend)." Missouri Formal Ethics Opinion 125 https://www.courts.mo.gov/file.jsp?id=32148 (2008).

Conversely, in *Attorney Grievance Com'n of Maryland v. Stolarz*, 379 Md. 387 (2004) a Maryland attorney signed an acknowledgement agreement faxed to him by a Virginia-based bank, in which the attorney agreed that the bank's $300.00 loan to his client would be paid out of settlement proceeds. The attorney was not a guarantor of the funds. Due to error by both attorney and client in disbursing settlement funds, the loan went unpaid. When the client refused to pay back the loan, the bank filed a grievance against the attorney, who paid back the loan plus interest from his own personal funds. In this instance the Maryland Court of Appeals considered the attorney's conduct a mitigating factor, dismissing the case with a non-disciplinary warning. *Attorney Grievance Com'n of Maryland v. Stolarz*, 379 Md. 387 (2004).

Even good intentions do not ameliorate the harshness of the rule. For example, a lawyer's wife's charitable loan resulted in a suspension of six months for her lawyer husband. *Toledo Bar Ass'n v. Pheils,* Ohio, 951 N.E.2d 758 (2011). The Florida Supreme Court meted out

a one-year suspension for the lawyer who had covered the appellate fees for a client whose case outcome might yield substantial legal fees for the lawyer. (*Florida Bar v. Patrick*, Fla., 67 So.3d 1009 (2011); *compare Mercantile Adjustment Bureau LLC v. Flood, 278 P.3d 348 (2012)* (trial lawyer's payment of appellate counsel fees for client's case did not violate Rule 1.8(e), citing access to justice policy).

California allows attorneys to outright make loans to their clients, provided the attorney has been retained, and the client's obligation to repay the loan is in writing. Philip G. Schrag, The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), 28 Geo. J. Legal Ethics 39, 56 (2015)

Mississippi and Lousiana allow attorneys to make loans to clients 60 days after being retained, for necessities related to the litigation such as payments to prevent foreclosure or repossession, as well as medical expenses. Loans under $1,500.00 must be reported to the bar association, and loans over $1,500.00 require bar association approval. *Id.;* Miss. Rules of Prof'l Conduct R. 1.8(e); LA. Rules of Prof'l Conduct R. 1.8(e).

In a jurisdiction like New York, which is not so lenient, there is a strong argument that advancing settlement funds on behalf of a client violates Rule 1.8. Further, the settlement payment may have violated Rules 1.2 and 1.4(a), requiring a lawyer to abide by a client's decisions in settling a matter, and to promptly communicate settlement offers to the client, respectively. After the payment was made, public statements from both Cohen and Trump regarding whether Trump knew about the payment and whether Cohen was reimbursed by Trump indicate that Rules 1.2 and 1.4(a) were not complied with.

ETHICAL DILEMMA THREE: IS IT ETHICAL FOR A LAWYER TO RECORD A CLIENT WITHOUT THE CLIENT'S KNOWLEDGE

In the April 2018 raid of Cohen's offices, the FBI seized a recorded a conversation between Cohen and Trump that revolved around payments to Karen McDougal, the Playboy model who said she had an affair with then-candidate Trump. Mr. Cohen recorded the conversation without Mr. Trump's knowledge. Mr. Cohen's legal team then released the tape in order to correct statements made by President Trump's legal team.

There are both legal prohibitions and ethical considerations involved in tape recording. Under federal law, surreptitious tape recording is permitted so long as one party being taped consents. *See* 18 U.S.C. § 2511(2)(d) (2001). A similar rule is followed in most states, including New York. *See* N.Y. Penal L. §§ 250.00 & 250.05.

Nonetheless, until the early 2000's, it had been considered unethical for an attorney to record any person, including adverse parties, without their consent, even if otherwise lawful. *See* ABA Formal Op. 337; *see also* NYC Eth. Op. 1995-10 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 607779, *modified* by NYC Eth. Op. 2003-02 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 2004 WL 837933 (holding taping is permissible where attorney has good faith basis for believing disclosure of taping would significantly impair pursuit of a generally accepted societal good); NYSBA Formal Opinions 328 (1974) and 696 (1993); *Bacote v. Riverbay Corp.*, 2017 U.S. Dist. LEXIS 35098 (S.D.N.Y. 2017); *Anderson v. Hale,* 202 F.R.D. 548 (N.D. Ill. 2001) (reported at 17 ABA/BNA Lawyers' Manual on Professional Conduct 283 (May 9, 2001)); *but see Meachum v. Outdoor World Corp*., 654 N.Y.S.2d 240 (Sup. Ct., Queens Co. 1996) (attorney's involvement in improper tape recording relevant to attorney's fitness to serve as class counsel).

The primary concern addressed by the rule prohibiting clandestine taping by attorneys is that an attorney's status as a member of the bar translates to an expectation of candor and honesty in dealing with others. Also implicated is Rule 8.4, prohibiting dishonesty, fraud, deceit or misrepresentation by an attorney including recording of a conversation without the other party's knowledge or consent. This is regardless of whether the person who is the target of taping is a party represented in the matter in issue. *Miano v. AC & R Advert., Inc.*, 148 F.R.D. 68, 73 (S.D.N.Y.), *amended* (Mar. 4, 1993), *adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993).

However, in ABA Formal Op. 01-422 (2001), the Committee on Professional Responsibility reversed ABA Formal Op. 337, and held that surreptitious recording of another does not necessarily violate ethics rules so long as doing so is legal in the jurisdiction involved and there is no false representation that the conversation is not being taped. ABA Formal Op. 01-422 (2001). New York County Opinion 696 (1993) similarly recognizes that secret recordings are permissible provided at least one party to the conversation consents. See also Order Amending Tennessee Rules of Professional Conduct (Tenn. 2003); Maine Board of Bar Overseers Professional Ethics Commission, Opinion 168 (1999) (no prohibition against lawyer tape recordings). The Association of the Bar of the City of New York, however, continues to take a harder line regarding surreptitious taping, holding that a lawyer may not, as a matter of routine practice, tape record conversations without disclosure. However, it does recognize that undisclosed taping may be permissible if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. New York City Opinion 2003-02 (2003).

A number of authorities recognizing a general ban on surreptitious recordings similarly recognize some limited exceptions to this rule. *See, e.g.*, New York City Opinions 1980-95

(1982) and 2003-02 (2003) (criminal defense counsel documentation of threats/criminal activity; or investigation of discrimination or questionable business practices); Virginia Bar Association Opinion 1738 (2000) (permissible for counsel to tape or direct taping in criminal or housing discrimination investigations, where one party consents, or where the lawyer is a victim of a criminal threat); Alaska Bar Association Opinion 95-5 (1995) (recordings made by criminal defense attorneys may be permissible); North Carolina Ethics Opinion 171 (1994) (permissible for counsel to tape opposing counsel).

In *Bermejo v. NYC Health and Hospitals Corp.*, 135 A.D.3d 116 (2nd Dept. 2015), an attorney for the injured plaintiff surreptitiously videotaped an independent medical examination. The attorney failed to disclose the taping until he sought to use it to impeach the doctor conducting the IME at trial. The attorney claimed he taped the exam, to prevent against the doctor claiming, as he had before, that the lawyer engaged in obstructionist tactics during the exam. He claimed that the "societal good" justified the taping, to expose what he believed would be incorrect allegations of misconduct. However, the Second Department found that the secret video "cannot be regarded as an 'appropriate tool' or an activity that attorneys should feel free to engage in "all the time," focusing in particular on the lawyer's failure to provide notice to defense counsel of the taping or to obtain approval from the court.

In *Alexander Interactive, Inc. v. Adorama, Inc.*, 2014 WL 2968528 (S.D. N.Y. 2014), the plaintiff's lawyer claimed that she had taped everything with an expert during an onsite visit by defense counsel to plaintiff's office. After Defendant's counsel raised the issue with the magistrate, plaintiff's counsel said she was "bluffing", but the magistrate found that if counsel had actually surreptitiously taped the expert, this would violate Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See also City Bar Op. 2003-2.

The Court distinguished her conduct from much narrower examples of where undisclosed taping might be acceptable, including the investigation of ongoing criminal activity or significant misconduct or conversations with persons who had previously made threats against the attorney or a client. City Bar Op. 2003–02.

To the extent a lawyer may now directly engage in lawful surreptitious taping, it is not inappropriate for a lawyer to advise a client with respect to their engaging in such activities.

In *Mena v. Key Food Stores Cooperative, Inc.*, 195 Misc. 2d 402 (Sup. Ct., Kings Co. 2003), the court refused to disqualify an attorney for assisting his client in the surreptitious recording of her employer in the context of an employment discrimination case. The court also refused to suppress the resulting evidence, noting that evidence is not rendered inadmissible simply because it is secured by unlawful or unethical means. *See also* NYSBA Formal Opinion 515 (1979) (recognizing that attorney may counsel a client on the surreptitious recording of another where the client requested that advice).

While it is generally improper for an attorney to use another, including a client, as an agent to secretly record a conversation, there is a carve-out for "accepted investigative techniques." *Gidatex, S.r.L. v. Campaniello Imports, Ltd*., 82 F.Supp.2d 119 (S.D.N.Y. Sept. 20, 1999). In *Gidatex*, a furniture manufacturer's counsel did not violate New York's rule against attorney misrepresentations by having private investigators secretly tape conversations with defendant distributor's salespeople, in an effort to gain evidence in a trademark infringement suit. The hiring of investigators to pose as consumers was found to be an acceptable investigative technique, because "Gidatex's investigators did not intrude upon Campaniello's attorney-client privilege or attempt to use superior legal knowledge to take advantage of Campaniello's

salespeople. Neither investigator was an attorney and neither attempted to interview party witnesses." *Id*. at 122.

A number of courts have recognized that when surreptitious recordings violate ethical standards they may be subject to disclosure even if the information contained therein otherwise would have been protected as privileged work product. *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, (1983) (secret tape recording of defendant not attorney work product and discoverable); *Byrd v. Reno*, 1998 WL 429767 (D.D.C. 1998), *appeal dismissed*, 180 F.3d 298 (D.C. Cir. 1999) (same); *Roberts v. Amercable Intl. Inc.*, 883 F. Supp. 499 (E.D. Ca. 1995) (same). *Ward v. Maritz, Inc.*, 156 F.R.D. 592 (D. N.J. 1994) (work product privilege violated where attorney suggests surreptitious recording); *Bogan v. Northwestern Mutual Life Ins. Co.*, 144 F.R.D. 51 (S.D.N.Y. 1992) (plaintiff's tape recorded conversations with certain witnesses without consent discoverable). Even if the lawyer did not personally conduct the recordings, or even suggest to his client that she do so, a client's recordings may be subject to disclosure if they were in any way relied upon by the lawyer. *Haigh v. Matshushita Elec. Corp. of America*, 676 F. Supp. 1332 (E.D. Va. 1987) (attorney's review and use of conversations secretly recorded by plaintiff, who acted on her own, subject to discovery since such review and use amounted to encouragement and support of plaintiff's actions); *see also Otto v. Box U.S.A. Group, Inc.*, 177 F.R.D. 698 (N.D. Ga. 1997) (plaintiff's taping of a conversation prior to hiring attorney not protected by work product privilege). As jurisdictions adopt the more recent ABA approach of Formal Opinion 01-422, this view that any work product privilege is waived is likely to change.

The question then becomes whether an attorney's surreptitious recording of his client would become discoverable, despite an argument that the communications are confidential. Since the privilege belongs to the client, not counsel, it is unlikely that counsel's behavior can

waive the privilege. In the scenario we are addressing, any privilege was allegedly waived when President Trump's legal team referenced the tape. Kevin Breuninger and Dan Mangan: Michael Cohen's secret tape was originally deemed 'privileged' – but Trump's team blabbed about it anyway, https://www.cnbc.com/2018/07/21/trump-team-waived-privilege-to-release-michael-cohens-tape-source.html (last visited Sept. 12, 2018).

Where tape recordings were turned over to an attorney by the client, they would not necessarily be deemed privileged where the law firm failed to establish that the tape recordings were disclosed to it is as confidential communications. *Matter of Application to Quash a Grand Jury Subpoena Duces Tecum*, 157 Misc. 2d 432 (N.Y. Cty. Crim. Term 1993). In *Lanza v. NYS Joint Legislative Committee on Government Operations*, 3 N.Y.2d 92 (1957), the Court permitted disclosure of a tape recording of a private consultation between attorney and client, holding that it was not compelled testimony and therefore not susceptible to an injunction and that the privilege did not inhibit disclosures by others who have overheard the communication). See also *Niceforo v. UBS Global Asset Management Americas, Inc.*, 20 F. Supp. 3d 428, 436 (S.D. N.Y. 2014) ("Niceforo was on notice of UBS's privacy policy. Her decision to record her communications with counsel in a notebook kept in her desk drawer, combined with her failure to seek the notebook's return for more than a year, destroys any claim that she intended to keep the communications confidential.") It therefore appears that the answer to the question of whether privilege would apply to a tape recording of communications between counsel and the client would depend upon 1) whether the communication was intended to be confidential; 2) whether it was the attorney or the client who tape-recorded the conversation and is seeking to disclose it; and 3) whether the person making the recording took reasonable precautions to keep the information confidential.

CONCLUSION:

These are but some of the ethical issues attorneys can learn from, based on the Michael Cohen and Michael Avenatti experiences. It is truly unfortunate that these type of issues continue to exist, such that real life situations provide such extensive fodder for this ethics discussion.

Formal Opinion 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction

TOPICS: Client Due Diligence, Confidentiality, Duty of Candor, Duty to Refrain from Counseling Fraudulent or Illegal Conduct**.**

DIGEST: The New York Rules of Professional Conduct (the "Rules") prohibit a lawyer from knowingly assisting a client's crime or fraud but do not explicitly address a lawyer's duty when the lawyer merely has doubts about the lawfulness of the client's conduct; nor do the Rules explicitly require a lawyer to investigate in such circumstances in order to ascertain whether the legal services would in fact assist a crime or fraud before assisting the client. Nevertheless, when a lawyer is asked to assist in a transaction that the lawyer suspects may involve a crime or fraud, a duty of inquiry in some circumstances is implicit in the Rules. First, in order to render competent representation as required by Rule 1.1, a lawyer has a duty to the client in some circumstances to undertake an inquiry into suspicious transactions to render reasonable and candid advice to the client about whether to undertake the proposed conduct and the consequences of doing so. Second, notwithstanding the absence of an explicit requirement, a duty to inquire into suspicious transactions under some circumstances is implicit in the duty to avoid knowingly assisting wrongful conduct. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client will engage or is engaging in a crime or fraud, the lawyer must not assist, or further assist, the wrongdoing. The lawyer may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

RULES: 1.1, 1.2, 1.6, 1.16, 2.1, 8.4

QUESTION: When an individual client asks a lawyer to provide legal assistance in a transaction, and the lawyer suspects that the legal services may assist the client's crime or fraud, to what extent must the lawyer investigate to allay or confirm the suspicions, and what other conduct must the lawyer undertake under the Rules?[1]

[1] This opinion addresses the straightforward situation in which a lawyer for an individual in a transactional representation suspects that the client's conduct may be criminal or fraudulent. It does not address a lawyer's duties with regard to a client's potentially illegal conduct in the context of litigation. Rule 3.3 (Conduct Before a Tribunal) may establish additional, or different, obligations in that context. This opinion is relevant to the representation of an entity as well as an individual but it does not address additional or different obligations that in-house counsel or outside counsel may have when representing an entity, including under Rule 1.13 (Organization as Client). Finally, this opinion does not address obligations that may be established by law other than the Rules, such as obligations that may have to be undertaken to satisfy a legal standard of care under professional negligence law.

OPINION:

I. Introduction

In the context of the following scenario, this opinion addresses lawyers' obligations under the Rules when the lawyer is retained to assist an individual client in a transaction that appears to the lawyer to be suspicious.

> A lawyer represents a client in the sale of a business in New York. The client advises the lawyer that the proceeds of the transaction will be used to purchase a different business. The client directs that after the first transaction closes, all payments be sent to a bank in a well-known secrecy jurisdiction. The client then asks the lawyer to proceed with the purchase. In preparing the documents and doing general due diligence, the lawyer realizes that the proposed purchase price is much more than the business is worth. The lawyer also learns inadvertently that the client has two passports, each from a secrecy jurisdiction different than the one in which the bank is located. The lawyer suspects, but does not know, that the transaction will involve a fraud or crime, such as money laundering or tax evasion, on the part of the client.[2]

As set forth below, a number of Rules and considerations bear on whether a transactional lawyer has a duty to investigate the client's conduct in this scenario and whether there are other steps that must be taken. These include the lawyer's duties of competence [Rule 1.1], of confidentiality [Rule 1.6], and to refrain from assisting a client in conduct that the lawyer knows is illegal or fraudulent [Rule 1.2(d)].

[2] Many U.S. lawyers and law firms conduct due diligence before accepting a new client, and they are well-advised to do so. *See* ABA Formal Op. 463 (2013) ("It would be prudent for lawyers to undertake Client Due Diligence ('CDD') in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity."). However, there is no uniform legal requirement that US lawyers undertake due diligence. This contrasts with the law in a number of non-US jurisdictions that have well-developed anti-money laundering and other due diligence requirements. *See generally* John A. Terrill, II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. Sch. L. Rev. 433, 440 (2014-2015) (discussing UK anti-money-laundering law requiring lawyers, among others, to undertake client due diligence, including identifying a beneficial owner who is not the customer and obtaining information on the purpose of the representation).

II. A Transactional Lawyer May Have a Duty to Inquire When Serious Questions are Raised Regarding Whether the Lawyer is Assisting the Client in a Crime or Fraud

a. The duty of competence may require the lawyer to conduct due diligence into the client's potentially fraudulent conduct

Rule 1.1(a) requires a lawyer to provide "competent representation to a client." In many contexts, the very purpose of the representation is to provide advice about the lawfulness of a client's proposed course of conduct or to assist the client in structuring a proposed transaction in a manner that conforms to the law. Rule 1.2(d) authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client," and in such cases, Rule 1.1 presupposes that the lawyer will provide competent advice about whether the proposed conduct would be unlawful or about how to achieve the client's objectives within the law.

Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective. Rule 1.2(d) forbids a lawyer from assisting the client in conduct that the lawyer *knows* to be illegal or fraudulent. But even if the lawyer does not have the requisite knowledge under Rule 1.2(d), furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under Rule 1.1(a). In general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance.

Further, Rules 1.4 and 2.1 require lawyers to render reasonable, candid advice. Unless the lawyer inquires in response to serious suspicions, the lawyer will not be in a position to advise the client about the attendant risks of civil or criminal liability. Thus, the duty of competence not only protects the client, but also in some situations requires the lawyer to take the steps necessary, including additional inquiry, to ensure that she is providing competent advice.

What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances. In many representations, there is no reason for the lawyer to doubt the lawfulness of the client's proposed actions. On the other hand, there may be representations where the circumstances raise suspicions or questions. For example, in the hypothetical above, the lawyer may have a duty to inquire of the client as to the reasons for a purchase of a business at a higher-than-market price and for running the funds through a bank in a secrecy jurisdiction to determine whether the transaction is being used to launder money, to avoid legitimate taxes, or for some other criminal or fraudulent purpose. Depending upon the answer, the lawyer may conclude that the transaction is legitimate, that she needs to make further inquiry, or that she must not provide further assistance in the transaction.

These conclusions are consistent with Comment [5] to Rule 1.1 which notes that "[c]ompetent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of the problem," and with other authorities. *See, e.g.*, N.Y. City 2015-3 (2015) (a lawyer who believes he is the victim of a scam by a purported prospective client has a duty of competence to

investigate further before proceeding with the matter); ABA Informal Op. 1470 (1981) ("Opinion 1470") ("[A] lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."); *cf.* N.Y. City 2018-2 (2018) ("The duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered.").

b. A lawyer who fails to investigate potentially fraudulent conduct may also violate Rule 1.2(d), depending on the circumstances

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer *knows* to be criminal or fraudulent. "Knowledge" under the Rules is defined as "actual knowledge of the fact in question . . . [which] may be inferred from the circumstances." Rule 1.0(k). However, consistent with the criminal law standard of "conscious avoidance," a lawyer may be deemed to have knowledge that the client is engaged in a criminal or fraudulent transaction if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. *See* N.Y. City 2018-2 (2018) ("Conscious avoidance of the fact in question may also constitute knowledge under the Rules, as under criminal law") (citing N.Y. City 99-02 (1999) ("Lawyers have an obligation not to shut their eyes to what was plainly to be seen … A lawyer cannot escape responsibility by avoiding inquiry.")).[3]

Opinion 1470 similarly recognized that when lawyers are aware that the client's proposed course of conduct is likely to be illegal, they "cannot escape responsibility by avoiding inquiry" but "must be satisfied, on the facts before [them] and readily available to [them], that [they] can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants"; if lawyers are not satisfied that the client's conduct is lawful, they have "a duty of further inquiry" before rendering assistance. Thus, while Rule 1.2(d) does not require lawyers to inquire when there is no ground for suspicion, they cannot ignore "red flags." *Cf.* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 Geo. J. Legal Ethics 187 (2011), citing *In re Blatt*, 63 324 A.2d 15, 17-19 (N.J. 1974) (holding that "a lawyer committed misconduct by helping a client effect a purchase after failing to investigate its suspicious nature"); *In re Dobson*, 427 S.E.2d 166, 166-68 (S.C. 1993) (sanctioning "an attorney for helping his client while remaining deliberately ignorant of his client's criminal conduct" and holding that the court would " not countenance the conscious

[3] The knowledge standard differs from the "should know" or "should have known" standard of several other Rules. *See* Rules 4.4(b), 5.1(d)(2)(ii), 5.3(b)(2)(ii). Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to "know" facts, or the significance of facts, that become evident only with the benefit of hindsight. As Justice Stevens observed in a different context, after a representation ends, "a particular fact may be as clear and certain as a piece of crystal or a small diamond," but lawyers "often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel." *Nix v. Whiteside*, 475 U.S. 157, 189, 106 S. Ct. 988, 1005 (1986) (Stevens J, concurring).

avoidance of one's ethical duties as an attorney").[4]

III. Limits on the Lawyer's Duty to Inquire

Ordinarily, a lawyer will begin an inquiry by seeking information from the client before turning to other sources. After concluding a reasonable inquiry, the lawyer may ordinarily credit the client when there are doubts. Whether a particular inquiry is adequate will vary with the circumstances.

To the extent that the lawyer must seek information from others, the Rules may impose conditions or limits. In general, the duty under Rule 1.4 to keep the client reasonably informed will require the lawyer to explain why there are doubts about the legality of the transaction and what steps the lawyer proposes to take to allay or confirm suspicions. If suspicions are sufficiently serious to give rise to a duty of inquiry under Rule 1.2(d), then the lawyer would render further assistance at her peril. A lawyer's fear that a client may seek to cover up his actions does not eliminate the duty of communication. Rule 1.4(a)(5). If the lawyer does suspect a cover-up and cannot persuade the client to be forthcoming, she may choose to terminate the representation. Rule 1.16(c)(2). Similarly, if the client will not authorize such an inquiry, the lawyer may have no realistic choice other than to cease assisting in the particular transaction, because to continue the representation may put her in jeopardy of violating Rule 1.2(d). And, needless to say, a client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, "red flag."

If the client green-lights an inquiry but refuses to pay for the time required to conduct it, the lawyer must decide whether to conduct the inquiry at her own expense or terminate the representation. The lawyer may discontinue the representation based on concerns as to the legality of the transaction. *See* Rule 1.2(f) (permitting a lawyer to refuse to participate in conduct that the lawyer believes to be unlawful, even if there is support for an argument that the conduct is legal); Rule 1.2, Cmt. [15].[5]

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[4] This opinion focuses on situations where a lawyer recognizes that a transaction is suspicious at the outset or at some later time before the transaction is completed. It does not address a lawyer's duty of inquiry, if any, after assisting in a potentially fraudulent or criminal transaction that is completed. We note, however, that Rule 8.4(h), which prohibits a lawyer from "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," has been found to require inquiry after assisting a completed transaction if the lawyer then suspects that the transaction was fraudulent or criminal. *See Matter of Reno*, 147 A.D.3d 8, 12 (1st Dep't 2016) (sanctioning lawyer under Rule 8.4(h) for assisting and not then remedying a fraudulent transaction, because the lawyer had strong reasons to suspect that his client was defrauding a vulnerable seller and "at a minimum, had a duty to confirm that his client tendered the agreed consideration . . . to ensure that the transaction was 'legitimate.'"). The implication of the *Reno* opinion is that, if the lawyer concluded upon inquiry that the transaction he assisted was fraudulent, the lawyer would have had some remedial obligation.

[5] Whether a lawyer should continue to work on the potentially illegal or fraudulent matter while conducting the inquiry depends on the circumstances. Even if the transaction is never

Further, any inquiry must be undertaken consistently with the confidentiality duty under Rule 1.6. Ordinarily, without client consent, the lawyer cannot conduct the inquiry in a manner that discloses client confidences to third parties. *See* NYCBA Formal Op. 2015-3.

IV. Remedial Obligations

If a lawyer gains knowledge during the course of representation that a client is engaged in unlawful conduct (or plans to be), the lawyer has a range of options. The lawyer's remedial steps should be dictated by such factors as the lawyer's knowledge of the facts at hand, the seriousness of the client's misconduct, and the extent of the lawyer's involvement in the client's misconduct. When the lawyer has actual knowledge of prospective wrongdoing, the lawyer may not assist in the wrongdoing and, further, must counsel the client against the illegal course of conduct under Rule 1.4(a)(5). This counseling obligation derives from the duty of competence under Rule 1.1. Despite the challenges involved in "persuading a client to take necessary preventive or corrective action" under Rule 1.4, such communications are appropriate not only to assist the client but to mitigate any risks the attorney is assuming by continuing to represent the client. Rule 1.2(d), Cmt. [10].

In our hypothetical situation, if the lawyer determines that the client may be engaged in tax fraud or tax evasion, the lawyer may choose to counsel the client to pay the appropriate taxes or take other corrective action. There may also be circumstances in which corrective action is not possible and the lawyer may have no alternative but to resign.[6] Rule 1.16(b)(1).

If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation. Comment [10] to Rule 1.2(d) states that the lawyer's obligations are "to avoid assisting the client" and to "remonstrate with the client" when the representation will result in violation of the Rules or other law. Withdrawal alone may be insufficient in some circumstances, for example, where the lawyer believes there is continued third-party reliance on an inaccurate opinion or representation. In that case, the lawyer may engage in "noisy withdrawal," which permits the attorney to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. Rule 1.2(d), Cmt [10]; *see* Rule 1.6(b)(3); Rule 4.1, Cmt. [3]. The lawyer must also decide whether and how to prevent any serious harm that will result from the client's conduct, including whether to reveal the client's confidential information to accomplish that end. In general, the potentially applicable exceptions to the ordinary confidentiality duty

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completed, a lawyer is subject to discipline for knowingly *attempting* to assist a client's illegal or fraudulent conduct. *See* Rule 8.4(a) (providing that a lawyer or law firm may not attempt to violate the Rules). But certain tasks may be peripheral to the transaction and unrelated to any potential wrongdoing. And preliminary work on the transaction may not constitute a knowing "attempt" to assist a client's illegal or fraudulent conduct if the lawyer is concurrently investigating with an eye toward ending assistance if suspicions are confirmed.

[6] If, for example, the lawyer learns that the transaction is being used to launder the proceeds of a crime, it is unlikely that counseling the client not to act unlawfully will be successful.

provide that the lawyer may disclose confidences to prevent criminal conduct or for other specified purposes, but not that the lawyer must do so. *See* Rule 1.6(b)(1), (2) & (3).[7]

Throughout the process described above, the prudent lawyer would be well advised to keep a record of the decision making process and the basis for the steps she has (or has not) taken.

V. Conclusion

When asked to represent a client in a transaction that a lawyer believes to be suspicious, the lawyer has an implicit duty under some circumstances to inquire into the client's conduct. If the lawyer believes that her client is entering into a transaction that is illegal or fraudulent, the lawyer ordinarily must attempt to inquire in order to provide competent representation to the client under Rule 1.1. Further, under Rule 1.2(d), which forbids knowingly assisting a client's illegal or fraudulent conduct, a lawyer has the requisite knowledge if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. Implicit in the rule, therefore, is the obligation to take reasonably available measures to ascertain whether the client's transaction is illegal or fraudulent. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client's conduct is illegal or fraudulent, the lawyer must not further assist the wrongdoing and may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

[7] This opinion does not address whether there are circumstances where a lawyer *must* undertake remedial measures to prevent or rectify wrongdoing in a transactional context and, if so, what measures must be undertaken. We assume that, in the transactional context, whether, and in what circumstances, such an obligation exists will largely be determined by substantive law rather than the Rules. *See* ABA Model Rules of Professional Conduct, Rule 4.1, Cmt. [3] (observing that: "In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid assisting a client's crime or fraud.").