Ethics in Mediation: Threats, Realities, and Modalities

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Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report

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I. BEGINNINGS

Joe Smith is an experienced mediator and well-respected attorney in his county.[1] He usually mediates divorce settlements, priding himself on a nearly eighty percent settlement rate.[2] Smith was recently hired to mediate a settlement between a couple that was heading for an ugly court battle. The attorney for the husband, a younger attorney who clearly looked up to Smith, confided in Smith that he had advised the husband to conceal from the wife the existence of a mutual fund account that was performing extremely well. The attorney joked with Smith about how he was "putting one over on" the wife, and that the mutual fund had been transferred into the name of a paralegal in order to avoid detection by the wife or her attorney.

Smith was concerned about whether the husband was mediating in good faith and counseled the husband and his attorney on the importance of open dialogue and of behaving with integrity toward the wife. Eventually, however, Smith, unable to persuade the husband or his attorney to be open about the mutual fund, withdrew from the mediation, citing to the wife an unspecified conflict of interest.[3] With a second mediator, a settlement was eventually reached without the existence of the mutual fund ever coming to light. Some months later, the wife's attorney, by chance, overheard the husband's attorney talking about the settlement and did some investigative

* This Comment would not have been written without the insights provided by Professor Mark Morris of the North Carolina Central University School of Law. The Author is indebted to him and to Mr. Frank Laney, Chief Mediator for the 4th Circuit Court of Appeals, for their help and generosity. Any and all errors are the Author's alone.

1. This is an entirely hypothetical fact situation, although some general details were taken from N.C. DISPUTE RESOL. COMM'N, ADVISORY OP. 10-16 (2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf; OR. STATE BAR BD. OF GOVERNORS, FORMAL OP. NO. 2005-167 (2005); and FLA. MEDIATOR QUALIFICATIONS ADVISORY PANEL, ADVISORY OP. 95-005 (1995).

2. The settlement rate for mediated divorce and custody actions ranges between sixty and eighty percent. Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 919 (1997).

3. Withdrawal is what the ethics opinions cited *supra* note 1 would tell Smith to do.

work, uncovering the mutual fund and the plot to keep it secret. The wife filed an action with the court to have the settlement set aside, a complaint against the husband's attorney for fraud, and a separate complaint against Smith under Rule 8.3 of the state's Code of Professional Responsibility (the Code).[4] This Comment will explore the mediation rules and Codes of the various states.

Without mediation—and other forms of alternative dispute resolution—the civil justice system in this country would surely collapse under its own weight.[5] Legal scholars from Chief Justice Warren Burger down have noted that the adversarial process should not be the only way to resolve disputes, and indeed, it is not suitable for many people.[6] Recognizing this, many states have made attempts at alternate dispute resolution (ADR) necessary to continuation of lawsuits.[7]

The demand, therefore, for trained ADR professionals is high. The American Arbitration Association lists approximately 8,000 arbitrators and mediators in its network;[8] there are over 1,200 certified Superior Court me-

4. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority."). This rule is referred to in several amusing ways by practicing attorneys, one of the best being the "duty to squeal." Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 741 (1997).

5. For the period July 1, 2009–June 30, 2010, a total of 5,319 of the 8,691 cases filed in North Carolina Superior Court were sent to mediation—of which, 2,772 (43%) settled. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 10 (2010). Since 2007, the U.S. Department of Justice has saved 2,869 months (or over 239 years) of litigation time by using some form of alternate dispute resolution. *Alternative Dispute. Resolution at the Department of Justice*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/odr/doj-statistics.htm (last updated Dec. 2010). In 2010 alone the Department saved more than $11 million in litigation and discovery expenses. *Id.*

6. Burger noted that:

> [W]e must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.

Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

7. For example, *all* civil actions filed in North Carolina Superior Court must be mediated before a court date will be calendared. N.C. GEN STAT. § 7A-38.1(a) (2009).

8. *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, AM. ARBITRATION ASS'N, http://www.adr.org/sp.asp?id=22036 (last visited Oct. 31, 2011).

diators in North Carolina.[9] Most states allow both attorney and nonattorney mediators, requiring only that certified mediators have professional qualifications and complete mediation training.[10]

Problems arise when the attorneys for the parties in the mediation behave in ways that would, in a litigation setting, lead to professional sanctions. How the states should handle this situation is the subject of quite heated debate.

One side of the debate holds that attorney–mediators are *attorneys* first. They are still bound by the same Code that they abide by as attorneys, and these responsibilities cannot be put on hold. Those who adhere to this side believe that the Code protects the integrity of the profession, because violations harm the profession as a whole. As another part of their argument, the *attorney*–mediator would note that reporting attorney misbehavior under Rule 8.3 is (generally) mandatory;[11] if a mediator, such as Smith, does not report infractions that he has knowledge of, he opens himself up to sanctions.[12]

The other side of the debate holds that attorney–mediators are, at that moment, *mediators*, not attorneys. The mediator is not at the mediation as a referee, but as a facilitator who is working to get the best resolution for the parties. Forcing mediators to wear two hats is unfair, they argue, to both the mediator and the participants. Forcing attorney–mediators to be on the alert for every infraction the parties may have committed in order to protect themselves from liability is not conducive to a good process or result. It also means that attorney–mediators have additional responsibilities that nonattorney–mediators do not, leading to discrepancies in how these two groups of identically trained mediators operate.

This Comment surveys the conflict at the state level and proposes a solution.[13] In the first section, there will be a short discussion of mediation

9. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 4 (2010).

10. *See generally State Requirements for Mediators*, MEDIATION TRAINING INST. INT'L, http://www.mediationworks.com/medcert3/staterequirements.htm (last visited Oct. 31, 2011). *But see* Poly Software Int'l v. Su, 880 F. Supp. 1487, 1493 (D. Utah 1995) (defining "mediator" as "an attorney who agrees to assist parties in settling a legal dispute").

11. In some states, reporting is not mandatory. *See infra* Part III.C.2.

12. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2010) ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . .").

13. My focus here is primarily on mediation in civil litigation (civil mediation). Mediation occurs in many other settings (criminal law, family law, worker's compensation, employment disputes, to name but a few), and the issues discussed here are no less relevant in those areas than they are here. However, in the interests of brevity and clarity, I have chosen to discuss only the civil arena.

and the clash between the mediation rules and the Code. In the second section, the Comment will discuss the choices that are available to the states in designing mediation and professional conduct rules. This section will explore the interplay between the two sets of rules in more detail, paying close attention to what the rules allow and what they forbid. Finally, a concluding section will discuss the competing, important interests and a proposed path forward.

II. SOME BACKGROUND

A. An Introduction to Mediation

Mediation is defined by Black's Law Dictionary as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[14] Mediation can be defined broadly—as allowing for neutral evaluation of claims and reasonableness of settlement offers—or narrowly—as only allowing the neutral[15] to facilitate the parties' negotiations.[16] However mediation is defined, each state determines the qualifications, standards, and sanctions applicable to mediators.[17]

14. BLACK'S LAW DICTIONARY 453 (3d pocket ed. 2006).

15. "Neutral," for the purposes of this Comment, is used interchangeably with "mediator."

16. *See* Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 216 (2001). Note that nonattorney–mediators will almost necessarily be confined to a more narrow version of mediation, while attorney–mediators, because of their legal knowledge, may choose either style.

17. *See* ALA. CODE OF ETHICS FOR MEDIATORS II (Alabama); ALASKA R. CIV. P. 100 (Alaska); ARIZ. REV. STAT. § 12-2238 (LexisNexis, Westlaw through 2011 3d Legis. Sess.) (Arizona); ARK. CODE ANN. § 16-7-206 (Westlaw through 2011 Legis. Sess.) (Arkansas); CAL. CIV. PROC. CODE § 1775.12 (Deering, Westlaw through 2011–2012 1st Extra. Sess.) (California); COLO. REV. STAT. § 13-22-307 (Westlaw through 2011 1st Reg. Sess.) (Colorado); CONN. GEN. STAT. § 52-235d (Westlaw through 2011 Jan. Reg. Sess.) (Connecticut); DEL. CH. CT. R. 95 (Delaware) (mediation for "business and technology disputes"); D.C. CODE § 16-4207 (Westlaw through Sep. 2011) (District of Colombia); FLA. STAT. § 44.405 (Westlaw through 2011 1st Reg. Sess.) (Florida); GA. ALT. DISP. RESOL. R. VII (Georgia); GUIDELINES FOR HAW. MEDIATORS V, *available at* http://www.courts.state.hi.us/services/alternative_dispute/selecting/guidelines/confidentiality_&_information_exchange.html (Hawaii); IDAHO CODE ANN. § 9-808 (Westlaw through 2011 Chs. 1–335) (Idaho); 710 ILL. COMP. STAT. 35/8 (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) (Illinois); IND. R. OF ALT. DISP. RESOL. 2.5, *available at* http://www.in.gov/judiciary/rules/adr/#_Toc244667873 (Indiana); IOWA CODE § 679C.108 (Westlaw through 2011 Reg. Sess.) (Iowa); KAN. STAT. ANN. §§ 5-

Parties to mediation and their attorneys will have certain expectations of both the mediator and the mediation process. They expect that the mediation will be conducted according to the conventions of the state, that the mediator will make some evaluation of the chances of success of the claims, and that the mediator will keep their discussions confidential.[18] Confidentiality is perhaps the most important factor in the success of mediation as a form of dispute resolution. Parties expect that what they say will go no further and so are more willing to admit fault or regret than they would be if their statements could be repeated in court.[19]

511 to -512 (Westlaw through 2011 Reg. Sess.) (Kansas); KY. MODEL CT. MEDIATION 12 (Kentucky); LA. REV. STAT. ANN. § 9:4112 (Westlaw through 2011 1st Extra. Sess.) (Louisiana); ME. R. CIV. P. 16B (2009) (Maine); MD. CT. R. 17-109 (2009) (Maryland); MASS. R. SUP. JUD. CT. 1:18 at R. 8, *available at* http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc118.html (Massachusetts); MICH. COMP. LAWS § 205.747 (Westlaw through 2011 Reg. Sess.) (Michigan); MINN. GEN. R. PRAC. 114.10 (Minnesota); MISS. MEDIATION R. FOR CIV. LITIG. VII, *available at* http://courts.ms.gov/rules/msrulesofcourt/court_annexed_mediation.pdf (Mississippi); MO. SUP. CT. R. 17.06 (Missouri); MONT. CODE ANN. § 26-1-813 (Westlaw through 2011 legislation) (Montana); NEB. REV. STAT. § 25-2937 (Westlaw through 2011 1st Reg. Sess.) (Nebraska); NEV. MEDIATION R. 11 (Nevada); N.H. SUPER. CT. R. 170 (New Hampshire); N.J. STAT. ANN § 2A:23C-8 (West, Westlaw through L. 2011 c. 136) (New Jersey); N.M. STAT. ANN. §44-7B-5 (Westlaw through 2011 1st Reg. Sess.) (New Mexico); N.Y. C.P.R.L. § 7504 (MCKINNEY 2011) (New York); N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS III (North Carolina); N.D. R. CT. IV (North Dakota); OHIO REV. CODE ANN. § 2710.07 (West, Westlaw through portion of 2011–2012 Sess.) (Ohio); OKLA. STAT. tit. 12, § 1805 (Westlaw through 2011 1st Reg. Sess.) (Oklahoma); OR. REV. STAT. § 36.220 (Westlaw through 2011 Reg. Sess.) (Oregon); 42 PA. CONS. STAT. § 5949 (Westlaw through 2011 Act 81) (Pennsylvania); R.I. GEN. LAWS § 9-19-44 (Westlaw through 2011 Jan. Sess.) (Rhode Island); S.C. ALT. DISP. RESOL. R. 8 (2009) (South Carolina); S.D. CODIFIED LAWS § 19-13A-8 (Westlaw through 2011 Reg. Sess.) (South Dakota); TENN. SUP. CT. R. 31 (2009) (Tennessee); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053 (West, Westlaw through 1st Called Sess. 2011) (Texas); UTAH CODE ANN. §78B-6-208 (West, Westlaw through 2011 2nd Special Sess.) (Utah); VT. STAT. ANN. tit. 12, §5720 (Westlaw through 2011 1st Sess.) (Vermont); VA. CODE ANN. §8.01-581.22 (Westlaw through 2011 Reg. Sess.) (Virginia); WASH. REV. CODE § 7.07.070 (Westlaw through 2011 legislation) (Washington); W. VA. TRIAL CT. R. 25.12 (West Virginia); WIS. STAT. § 904.085 (Westlaw through 2011 Act 44, except for Acts 32 and 37), *amended by* Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference) (Wisconsin); WYO. STAT. ANN. §1-43-102 (Westlaw through 2011 Gen. Sess.) (Wyoming).

18. Pursuant to the Federal Rules of Evidence, "conduct or statements made in compromise negotiations" are inadmissible as evidence to prove "liability for, invalidity of, or amount of a claim . . . or to impeach through a prior inconsistent statement or contradiction[.]" FED R. EVID. 408(a).

19. One place where apologies have been found to be extremely useful tools in reducing litigation is in medical-malpractice suits. A study by Johns Hopkins found that apologies reduced malpractice settlement amounts by thirty percent. Rachel Zimmerman, *Doc-*

B. Attorney Ethics Rules

While confidentiality is important, parties to mediation also expect that the mediator will behave according to the standards of his profession. If mediators are presumed to adhere to mediation ethical standards, then in most states, they would be expected to keep everything said and done in mediation confidential.[20] However, if the mediator is an attorney, then the question becomes: is he or she expected to adhere to the attorney ethics standards also?[21] The American Bar Association has attempted to solve

tors' New Tool to Fight Lawsuits: Saying I'm Sorry, WALL ST. J., May 18, 2004, at A1; *see also* Jeffrey M. Senger, *Frequently Asked Questions About ADR,* 48 U.S. ATTY'S BULLETIN 9, 11 (2000).

20. "Everything" is slightly misleading. However, it is much simpler than "everything except child and elder abuse, threats or actual violence, and in some states, statements covered by open meetings legislation."

21. Each state also retains its own Code. *See* ALA. RULES OF PROF'L CONDUCT R. 8.3 (Alabama); ALASKA RULES OF PROF'L CONDUCT R. 8.3 (Alaska); ARIZ. RULES OF PROF'L CONDUCT R. 8.3 (Arizona); ARK. RULES OF PROF'L CONDUCT R. 8.3 (Arkansas); CAL. RULES OF PROF'L CONDUCT R. 1-100 (California); COLO. RULES OF PROF'L CONDUCT R. 8.3 (Colorado); CONN. RULES OF PROF'L CONDUCT R. 8.3 (Connecticut); DEL. RULES OF PROF'L. CONDUCT R. 8.3 (Delaware); D.C. RULES OF PROF'L CONDUCT R. 8.3 (District of Colombia); FLA. BAR REG. R. 4-8.3 (Florida); GA. RULES OF PROF'L CONDUCT R. 8.3 (Georgia); HAW. RULES OF PROF'L CONDUCT R. 8.3 (Hawaii); IDAHO RULES OF PROF'L CONDUCT R. 8.3 (Idaho); ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 8.3 (Illinois); IND. RULES OF PROF'L CONDUCT R. 8.3 (Indiana); IOWA RULES OF PROF'L CONDUCT R. 32:8.3 (Iowa); KAN. RULES OF PROF'L CONDUCT R. 8.3 (Kansas); KY. SUP. CT. R. 8.3 (Kentucky); LA. STATE BAR ASS'N. ART. XVI § 8.3 (Louisiana); ME. RULES OF PROF'L CONDUCT R. 8.3 (Maine); MD. LAWYER'S RULES OF. PROF'L CONDUCT R. 8.3 (Maryland); MASS. R. SUP. JUD. CT. 3.07 at R. 8.3, *available at* http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc307/rule8-3.html (Massachusetts); MICH. RULES OF PROF'L CONDUCT R. 8.3 (Michigan); MINN. RULES OF PROF'L CONDUCT R. 8.3 (Minnesota); MISS. RULES OF PROF'L CONDUCT R. 8.3 (Mississippi); MO. SUP. CT. R. 4-8.3 (Missouri); MONT RULES OF PROF'L CONDUCT R. 8.3 (Montana); NEB. CT. RULES OF PROF'L CONDUCT § 3-508.3 (Nebraska); NEV. RULES OF PROF'L CONDUCT R. 8.3 (Nevada); N.H. RULES OF PROF'L CONDUCT R. 8.3 (New Hampshire); N.J. RULES OF PROF'L CONDUCT R. 8.3 (New Jersey); N.M. RULES OF PROF'L CONDUCT R. 16-803 (New Mexico); N.Y. RULES OF PROF'L CONDUCT R. 8.3 (New York); N.C. RULES OF PROF'L CONDUCT R. 8.3 (North Carolina); N.D. RULES OF PROF'L CONDUCT R. 8.3 (North Dakota); OHIO RULES OF PROF'L CONDUCT R. 8.3 (Ohio); 5 OKLA. STATE CH. 1, APP. 3-A R. 8.3 (Oklahoma); OR. RULES OF PROF'L CONDUCT R. 8.3 (Oregon); PA. RULES OF PROF'L CONDUCT R. 8.3 (Pennsylvania); R.I. SUP. CT V at R. 8.3 (Rhode Island); S.C. RULES OF PROF'L CONDUCT R. 8.3 (South Carolina); S.D. CODIFIED LAWS § 16-18-APPX-8.3 (Westlaw through 2011 Reg. Sess.) (South Dakota); TENN. SUP. CT. R. 8 at R. 8.3 (Tennessee); TEX. RULES PROF'L CONDUCT R. 8.03 (Texas); UTAH RULES OF PROF'L CONDUCT R. 8.3 (Utah); VT. RULES OF PROF'L CONDUCT R. 8.3 (Vermont); VA. SUP. CT. R. pt. 6, § II, para. 8.3 (Virginia); WASH. RULES OF PROF'L CONDUCT R. 8.3 (Washington); W. Va. RULES OF PROF'L CONDUCT R. 8.3 (West Virginia); WIS. SUP. CT. R 20:8.3 (Wisconsin); WYO. RULES OF PROF'L CONDUCT R. 8.3 (Wyoming).

this issue by providing, in the words of one author, "an 'exit door' from the lawyers' ethical rules. The 'key' to this 'door' is advising the ADR disputants that the lawyer/neutral is not acting as an attorney for any or all of the disputants with the attendant attorney-client ethical rules, but is instead acting as a neutral."[22] To be sure, this so-called exit door may not be perfect because the lawyer *qua* neutral may still be subject to some other provisions of the Model Rules.

While this exit strategy sounds great in theory, it works only when all parties to the mediation behave according to the highest ethical standards. In cases such as the hypothetical described *supra*, where a party actively tries to defraud the other party, the attorney–mediator's "exit" begins to look like complicity. Attorney–mediators are, if not formally then at least perceptually, bound by both the mediator ethics rules *and* the Code.

As one might expect, there is very little case law in this area. The American Bar Association did not adopt a modern version of Rule 8.3 until 1969, and the first major case involving the Rule was not until 1988.[23] That first major case was *In re Himmel*.[24] Himmel, a solo practitioner,[25] was suspended from practicing law for a year by the Illinois Supreme Court because he failed to report the misconduct of another attorney.[26] *Himmel* came as a "dramatic surprise to the bar."[27] To that point, Professor Rotunda notes:

> [w]hile there [were] lawyers who [took] seriously their ethical obligations to report the violations of other lawyers, it [was] unusual to find the bar authorities enforcing this rule. . . . [Until *Himmel*, it was] virtually unheard of to find a case where a lawyer [was] disciplined merely for refusing to report another lawyer.[28]

22. Duane W. Krohnke, *ADR Ethics Rules to Be Added to Rules of Professional Conduct*, 18 ALTERNATIVES TO HIGH COST LITIG. 108, 115 (2000).

23. Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 979–80 (1988). Rotunda notes that the Rules contained a "vague" provision for whistleblowing in their original form, written in 1908. *Id.* The Rules were significantly amended in the 1980s; however, Rule 8.3 was in place in the 1969 revisions. *Id.* at 980.

24. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). The actual details of *Himmel*, while fascinating, are not as relevant here as the fact that the case happened at all.

25. Rotunda, *supra* note 23, at 982.

26. *Himmel*, 533 N.E.2d at 796. The attorney whose misconduct led to the charges against Himmel was disbarred. *Id*. at 790.

27. Rotunda, *supra* note 23, at 991. The case was described to the author by a member of the North Carolina Dispute Resolution Commission as the seed that grew into the recent changes in the North Carolina Code.

28. *Id*. at 982.

The dearth of case law noted by Professor Rotunda has not changed. One case that is frequently cited in discussions of mediation confidentiality is *In re Waller*.[29] Waller represented the plaintiff in a medical malpractice case that was sent to mediation.[30] As there was no mediation confidentiality statute in D.C. at the time, the trial court made an order regarding the mediation.[31] The order indicated that "no statements of any party or counsel shall be disclosed to the court or admissible as evidence for any purpose at the trial of this case."[32] The mediator realized that the surgeon who operated on the plaintiff was not named as a defendant, and asked Waller why not.[33] Waller told the mediator that he had not named the surgeon because he "was the surgeon's attorney."[34] The mediator encouraged Waller to tell the trial court about this, and when he did not, the mediator himself did so.[35] Waller made some excuses,[36] but was eventually disciplined by the D.C. Board of Professional Responsibility, an action confirmed by the D.C. Court of Appeals.[37]

The mediator, whose actions were technically in contempt of the court order, was not disciplined. Professor Irvine cautions that in the *Waller* case, "the attorney–mediator made a judgment call that was supported by the court. Not every attorney–mediator should expect to be so fortunate."[38] That mediators are rarely the subject of such disciplinary actions has several causes. Firstly, if we use the Smith hypothetical above as our example, the actual infraction was not committed by Smith—his liability is secondary and mainly to the profession, rather than to the wife. Secondly, there is usually a hold harmless clause in any mediation contract, so that the wronged party is contractually bound to overlook any primary liability of the mediator. A more persuasive reason is that the goal of mediation is a confidential settlement—parties are therefore reluctant to air their dirty

29. *In re* Waller, 573 A.2d 780 (D.C. 1990).

30. *Id*. at 781.

31. Mori Irvine, *Serving Two Masters: The Obligation under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155, 179 (1994).

32. *Waller*, 573 A.2d at 781 n.4.

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*. at 782 ("What really happened is that I said I represented Dr. Jackson [the surgeon] but I really meant that I didn't represent Dr. Jackson. Dr. Jackson wasn't a party so I didn't think it was important.").

37. *Id*. at 780 ("suspended from the practice of law in the District of Columbia for a period of sixty days").

38. Irvine, *supra* note 31, at 180.

laundry in the courts where everything is public record. Infractions of the Code or the mediation ethics rules by an attorney–mediator are not often adjudicated by the courts, but rather by ethics committees that publish decisions only when they would be helpful to future attorneys or mediators. A final reason is that some courts believe that the clash between the two sets of rules is a question for the legislature.[39]

Because the courts have been unhelpful in this area, attorneys and dispute resolution professionals have turned to the rules that govern attorneys and mediators in order to bring some order and guidance to the situation.

III. THREE APPROACHES TO THE PROBLEM

> The current Model Rules do not recognize the role of neutral for lawyers, and the prevailing paradigm of lawyering under the Model Rules is the lawyer functioning as a representative of a client. Arguably, the legal and ADR professional regimes are distinct, and lawyers acting as neutrals should be governed by ADR professional standards like any non-lawyer acting as a neutral. An analogous distinction is between lawyers and lawyers acting as judges, wherein the former are subject to the Model Rules and the latter are subject to the Judicial Code of Conduct.[40]

While some commentators may claim that the two standards are not in tension,[41] they are, and in fact cause problems in certain, easily repeatable situations.

In order to get an idea as to how the states have approached the conflict between mediation confidentiality and reporting requirements, this Comment looked at the Code and the mediation rules for each state and the District of Colombia.[42] The states fall into three basic categories: (1) those

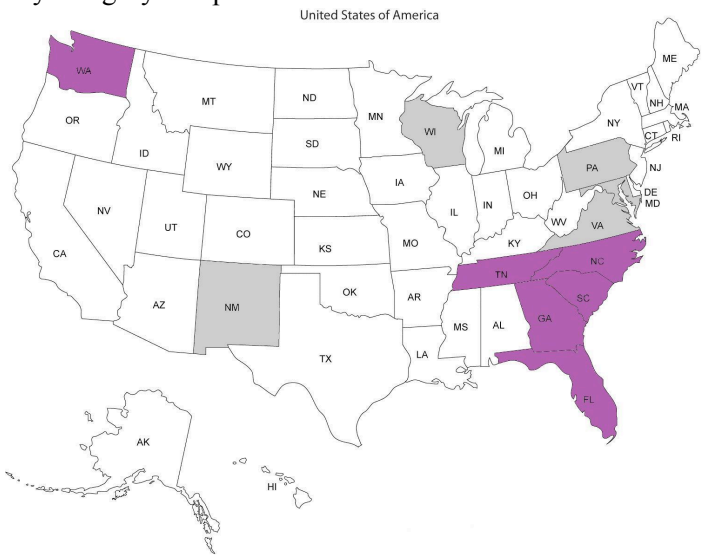
39. *See, e.g.*, Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1128 (Cal. 2001) ("Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable under [the] Code of Civil Procedure [or the Code] . . . is a policy question to be resolved by the Legislature.").

40. Yarn, *supra* note 16, at 220.

41. *See id*. at 216 (stating that the two standards "neither overlap nor conflict significantly"). Also note that the ADR rules generally provide for reporting of any matter "required by law or rule." Several mediators have commented to the Author that they are not willing to risk their professional reputations and mediation certifications on such vague language, especially since the Codes have not been enacted by the legislature.

42. In the analysis that follows, three states are not included: California, Michigan, and New York. The California Ethics Rules have no provision analogous to Rule 8.3. *See* CAL. RULES OF PROF'L CONDUCT R. 1-100 to 5-320. If there were an equivalent provision, California would fall into the second category of states, those where mediators are allowed to testify. See CAL. EVID. CODE § 703.5 (2011) ("[N]o arbitrator or mediator, shall be compe-

with direct tension between the mediation confidentiality requirements and the Code's reporting requirements under Rule 8.3,[43] (2) those with an "out" for the mediator *if* the misconduct has already been reported, and (3) those that have made an attempt to harmonize the two. A breakdown of the states by category is represented below.



States in black are those with harmonious rules. States in gray have rules that allow mediators to talk about misconduct, but not to report it. States in white have clashing rules.

A. Wishin' and Hopin'

Thirty-six states and the District of Colombia have mediation rules that clash with their Code of Professional Responsibility.[44] This means that

tent to testify . . . except as to a statement or conduct that could . . . be the subject of investigation by the State Bar or Commission on Judicial Performance . . . ."). What Michigan calls "mediation" is actually more like arbitration, with a panel of "mediators" and formal presentations of evidence by the parties. *See* MICH. COMP. LAWS § 600.4691 (2009). New York has no centrally-codified mediator ethics rules.

43. Or the equivalent.

44. This Comment considers only state rules, not all the rules for mediation in federal courts. In a few cases, the federal rules fall into a different category from the state rules. *Compare* GUIDELINES FOR HAWAI'I MEDIATORS § V.1. (2002) ("The mediator . . . should hold all information acquired in mediation in confidence. Mediators are obliged to resist disclosure of information about the contents and outcomes of the mediation process."), *available at* http://www.courts.state.hi.us/services/alternative_dispute/

in over seventy percent of jurisdictions, the highest court has adopted two sets of rules that are in direct conflict. An example of the clashing rules is provided by the District of Colombia. Pursuant to the D.C. Rules of Professional Conduct, "[a] lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority."[45] The operative words in this rule, of course, are "knows" and "shall." If the hypothetical involving Mediator Smith was in D.C. and he knew that the husband's lawyer was perpetrating a fraud, he would be required to report said behavior to the State Bar. However, pursuant to section 16-4207 of the D.C. Code, "[u]nless subject to [open meetings requirements], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the District of Columbia."[46] Mediators are trained to report child or elder abuse, threats of violence, or actual violence,[47] but they are extremely hesitant to make a call where the issue is professional malpractice. Many interpret the conflicting rules as requiring them only to confirm whether a mediation session did or did not take place and whether a settlement was reached.

There are a couple of explanations as to why so many states have clashing rules. Firstly, mediation is relatively new, and the rules are generally on their first or second iteration—all the kinks have not been noticed or ironed out. Secondly, attorneys generally abide by their Codes—it is rare that a mediator would have cause to report an attorney because of something that attorney did in a mediation session.[48] Also, as noted above, the liability of the mediator is usually secondary to that of the attorney involved. Any aggrieved party would need to take a lot of time and energy to bring charges under the Code against the mediator—time and energy that probably would be better spent pursuing the other party or his attorney.

selecting/guidelines/introduction.html, *with* D. HAW. LOCAL R. 88.1(k) (2009) (allowing mediators to break confidentiality "to provide evidence in an attorney disciplinary proceeding").

45. D.C. RULES OF PROF'L CONDUCT R. 8.3(a) (emphasis added).

46. D.C. CODE § 16-4207 (Westlaw through Sep. 2011).

47. These reporting requirements are explicitly required in some states and implicitly required in others. *Compare*, ME. R. CIV. P. 16B(k)(ii) ("A neutral does not breach confidentiality by making such a disclosure if the disclosure is . . . information concerning the abuse or neglect of any protected person."), *with* MASS. R. SUP. JUD. CT. 1:18 at R. 9(h)(i) ("[I]nformation disclosed in dispute resolution proceedings . . . shall be kept confidential by the neutral . . . unless disclosure is required by law or court rule.").

48. A cynic might note that this is because attorneys are smart enough to keep their misdeeds hidden and their clients quiet enough that a mediator would never notice the misconduct.

B. The Ability to Testify Only

Five states (Maryland, New Mexico, Pennsylvania, Virginia, and Wisconsin) have mediation rules that allow the mediators some kind of "out" when allegations of misconduct are made.[49] These states do not allow the mediator to *report* misconduct, but will allow him or her to either testify or to disclose information that may be relevant after an accusation of misconduct is made or proven.[50]

In New Mexico, the mediator can be compelled to testify in cases where his or her testimony is needed to "disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant."[51] There is no provision for reporting misconduct by the mediator.[52] Virginia's rule is substantially the same.[53]

The rules in Maryland, Pennsylvania and Wisconsin are vaguer. Pursuant to section 904.085 of Wisconsin's General Statutes,

> [i]n an action or proceeding *distinct from the dispute whose settlement is at-*

49. Each has a Rule 8.3 that requires attorneys with knowledge of misconduct to report it. MD. LAWYER'S RULES OF PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); N.M. RULES OF PROF'L CONDUCT R. 16-803(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); PA. RULES OF PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); VA. SUP. CT. R. pt. 6, §. II, para. 8.3 ("A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate authority."); WIS. SUP. CT. R. 20:8.3 ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

50. *See, e.g.*, 42 PA. CONS. STAT. § 5949(b)(3) (Westlaw through 2011 Act 81) ("[Duty of confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

51. N.M. STAT. ANN. § 44-7B-5(A)(8) (Westlaw through 2011 1st Reg. Sess.).

52. *See id.*

53. VA. CODE ANN. § 8.01-581.22 (Westlaw through 2011 Reg. Sess.) (detailing that confidentiality may be waived "where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation").

> *tempted through mediation*, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is *necessary to prevent a manifest injustice* of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.[54]

Wisconsin attorney–mediators, therefore, cannot *report* misconduct that they become privy to via mediation. However, if there is an accusation in a hearing *distinct from the dispute that led to the mediation*—e.g., a grievance hearing or a hearing to set aside the settlement—and the court decides that the mediator's testimony would be in the interests of justice, then the mediator may be ordered to testify. The rules in Maryland and Pennsylvania are, though not as detailed, substantially the same.[55]

While the five states discussed here have rules that acknowledge that things occasionally go wrong in mediation and that parties do not always bargain in good faith, no state recognizes the requirement of reporting in its own version of Rule 8.3.[56] If there is a hearing and the mediator is called to testify, it may become obvious that the mediator has not reported misconduct that he had knowledge of, opening the mediator to professional sanctions.

It is worth noting that the Uniform Mediation Act states that where there has been "a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation[,]" the strict confidentiality requirements are relaxed.[57] However, they are only relaxed for the parties involved and their attorneys, for the Act goes on to state that "[a] mediator may not be compelled to provide evidence of a mediation communication" in order to substantiate such a claim.[58]

C. A Clear Harmonization

54. WIS. STAT. § 904.085(4)(e) (Westlaw through 2011 Act 44, except for Acts 32 and 37) (emphasis added), *amended by* Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference).

55. MD. R. OF ALT. DISP. RESOL. 17-109(d)(3) (indicating confidentiality may be waived to "assert or defend against a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded."); 42 PA. CONS. STAT. § 5949(b)(3) (Westlaw through 2011 Act 81) ("The privilege and limitation [to confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

56. *See supra*, notes 17, 21 and accompanying text.

57. UNIF. MEDIATION ACT § 6(a)(6) (2001).

58. *Id.* § 6(c).

Six states (Georgia, Florida, North Carolina, South Carolina, Tennessee, and Washington) have harmonious mediation and ethics rules.[59] These states are concentrated geographically in the southeast, which is an unexpected but explainable result. If states are a laboratory for experimentation,[60] then it stands to reason that nearby states will copy a state that has sensible and logical rules. The six states fall into two categories: those that use the *mediation rules* as the (to borrow a metaphor) exit door[61] and those that use the *Code* as the exit.[62] The same number of states fall into the former category (Florida, South Carolina, and Tennessee) as the latter, but North Carolina, as discussed below, is the latest state to harmonize its rules, and it chose to amend the Code.[63] It remains to be seen whether more states will follow the lead of these six states and which approach they will choose.

1. Reporting Permitted by Mediation Rules

Florida, South Carolina, and Tennessee all make provision in their mediation ethics rules for reporting of professional malpractice as required by the respective state Codes.[64] The malpractice must be *professional* to be

59. *Compare* FLA. BAR REG. R. 4-8.3, *and* GA. RULES OF PROF'L CONDUCT R. 8.3, *and* N.C. RULES OF PROF'L CONDUCT R. 8.3, *and* S.C. RULES OF PROF'L CONDUCT R. 8.3, *and* TENN. SUP. CT. R. 8 at R. 8.3, *and* WASH. RULES OF PROF'L CONDUCT R. 8.3, *with* FLA. STAT. § 44.405 (Westlaw through 2011 1st Reg. Sess.), *and* GA. ALT. DISP. RESOL. R. VII, *and* N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS R. III, *and* S.C. ALT. DISP. RESOL. R. 8, *and* WASH. REV. CODE. § 7.07.070 (Westlaw through 2011 legislation).

60. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (quoting New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

61. *See* FLA. STAT. § 44.405 ("[T]here is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding."); S.C. APP. CT. R. 407 ("This rule [guaranteeing mediation confidentiality] does not prohibit . . . [a]ny disclosures required by law or a professional code of ethics."); TENN. SUP. CT. R. 31 ("Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards.").

62. *See* GA. RULES OF PROF'L CONDUCT R 8.3 ("There is no disciplinary penalty for a violation of this Rule."); N.C. RULES OF PROF'L CONDUCT R. 8.3(e) ("A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators . . . is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report."); WASH. RULES OF PROF'L CONDUCT R. 8.3(a) ("(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . *should* inform the appropriate professional authority." (emphasis added)).

63. N.C. RULES OF PROF'L CONDUCT R. 8.3(e).

64. *See supra* note 61.

reportable—simple bad behavior or bad faith is not enough.[65] Pursuant to the Florida mediation rules, "there is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice . . . [or] professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."[66] Pursuant to the South Carolina rules, one of the limited exceptions to confidentiality is "[a]ny disclosure[] required by law or a professional code of ethics."[67] Pursuant to the Tennessee mediation rules, "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information."[68] However, "[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling."[69]

Each of the three states, then, permits the disclosures required by the mediator's professional Code.[70] The flaw in the design is clear. Some mediators will be bound by professional codes, and some will not. This will have two distinct impacts on mediations. Firstly, the mediator who is bound by the code will be forced to keep an eye out for infractions that he is bound to report—Smith, in the hypothetical above, would have had to report (under the attorney Code of ethics) what the husband's lawyer was doing. Secondly, parties to the mediation will (or should) be aware that their actions will be subject to an extra layer of scrutiny by the mediator.

If the mediator is required to abide by the reporting requirements of his professional Code, then he cannot give his full attention to the mediation; he must necessarily give some of his attention to possible reportable infractions. A nonattorney–mediator, when confronted with a situation like the one described above, would work to encourage disclosure, urge the husband to recognize the problem with failing to disclose the asset, and the discuss issues with negotiating in bad faith. In other words, the nonattorney–mediator would be focused on the mediation and on getting both parties to a successful and fair resolution. An attorney–mediator, on the other hand, would be focused on the mediation, but a small voice in the back of his or her head would be calculating the risks and rewards of reporting the

65. *See supra* note 61.
66. FLA. STAT. § 44.405(4)(a)(4), (4)(a)(6).
67. S.C. ALT. DISP. RESOL. R. 8(b)(5).
68. TENN. SUP. CT. R. 31, at app. A § 7(a).
69. *Id.* § 2(b).
70. *See supra* note 61 and accompanying text.

conduct of the husband's lawyer. If the attorney–mediator reports the lawyer and the complaint is without foundation, the mediator has broken confidentiality as a mediator and will be subject to sanctions by the board that oversees mediators.[71]

Reporting—even if the report is substantiated—will give the mediator a reputation in the community as a reporter. This reputation should not scare attorneys who negotiate in good faith and ethically, but may well cause a drop in the reporter's mediation business because attorneys may worry that the mediator will report first and think later.[72] Even if parties continue to use the mediator, there is a chance that they will be less forthcoming than they would be with a nonattorney–mediator or with an attorney–mediator who has no history of reporting, out of concern that their legitimate actions could be misconstrued and lead to an investigation by the state bar.

The solution to Smith's dilemma used by Florida, South Carolina, and Tennessee is, therefore, not without complication. While the method used by these states is infinitely preferable to simply ignoring the problem, it has flaws that may negatively impact the mediation process.

2. Harmonization Through the Ethics Code

Three states with harmonious rules (Georgia, North Carolina, and Washington) use their Codes to provide the harmony. The differences between the three are interesting and instructive. Georgia's mediation rules are substantially the same as those in the states with clashing rules—mediators are required to report child abuse and may break confidentiality to defend against claims of mediator misconduct. However, Georgia has no provision for testimony where misconduct has already been reported (as in the states like Maryland with some kind of exit for testimony) and no harmonization as in Florida, South Carolina, or Tennessee.[73] In Georgia, the exit is in the Code: "[a] lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *should* inform the appropriate professional authority."[74] The rule continues: "[t]here is no disciplinary penalty for a violation of this Rule."[75] In every other state with an equiva-

71. *See* Irvine, *supra* note 31, at 180.

72. Mediation is, after all, a place where lying is accepted—the dance of negotiation requires that both sides conceal their bottom line, at least in the beginning.

73. *See* discussion *supra* Part III.C.1.

74. GA. RULES OF PROF'L CONDUCT R. 8.3 (emphasis added).

75. *Id.*

lent to Rule 8.3, the lawyer who knows of the misconduct is required to inform the appropriate authority.[76] The Georgia Code was amended in 2001 to its current form. Before 2001, the pertinent rule read:

> (A) A lawyer possessing unprivileged knowledge of [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.[77]

The mediation rules were enacted in 1993 and require complete confidentiality except in four situations: (1) confirming appearance (or not) at a scheduled mediation, (2) reporting child abuse or threats, (3) documents or communications needed to prove or disprove misconduct on the part of the mediator, and (4) statutory duties.[78] The rules have been amended but not substantially altered since their enactment.[79] Perhaps concluding that the

76. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 8.3 ("A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)); IND. RULES OF PROF'L CONDUCT R. 8.3 ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority." (emphasis added)).

Interestingly, the official comment to the Georgia Rule reads: "Self-regulation of the legal profession *requires* that members of the profession initiate disciplinary investigations when they know of a violation of the Georgia Rules of Professional Conduct[,]" even though the language of the rule makes it clear that reporting is not required. GA. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (emphasis added).

77. GA. RULES OF PROF'L CONDUCT DR 1-103 (repealed 2001), *available at* http://www.gabar.org/handbook/part_iii_before_january_1_2001_-_canons_of_ethics/_rule_3-101/.

78. GA. ALT. DISP. RESOL. VII. In many states, "statutory duties" refer to open meeting requirements. *See* 710 ILL. COMP. STAT. 35/8 (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) ("Unless subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.").

79. There have been multiple amendments: removing protections of confidentiality where there have been threats or reports of child abuse (February 1995); making intake sessions confidential (November 1996); making notes and records of a court ADR program immune from discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program (November 1996); removing confidentiality where there has been a complaint against the mediator (November 1996); and limiting discovery to written and executed agreements only (May 1999). *See* GA. ALT. DISP. RESOL.

rules were intentionally harmonized with the Code is a charitable interpretation, but it does explain why Georgia's Code is different from that in almost every other state.

Washington State adopted new ethics rules in 2006.[80] The state bar debated modifying Washington's permissive reporting requirement to make Rule 8.3 reporting mandatory.[81] The committee charged with determining whether to amend the rule (the WSBA Ethics 2003 Committee) debated for over two months whether to require mandatory reporting under Rule 8.3, and eventually decided against such a move.[82] The debate over whether to move to mandatory reporting is fascinating, but nowhere in the minutes of the meetings is mediation mentioned.[83]

North Carolina has recently amended its Code in order to exempt attorney–mediators from the reporting requirements imposed by Rule 8.3.[84] Pursuant to North Carolina's new Rule 8.3,

> [a] lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report . . . .[85]

In North Carolina, attorney–mediators are mediators first and attorneys second. North Carolina is the only state in the union to have rules that are written in this manner.[86] The amendment to Rule 8.3 was recommended by the Standards, Discipline and Advisory Opinions Committee of the Dispute Resolution Commission.[87] The Commission had been asked by the State Bar to examine the conflict between the Code and the mediation rules, and, after "wrestl[ing] with the Rule 8.3 scenario as well as with the larger issue of what happens when a mediator's ethical obligations conflict with the standards of conduct of another profession to which he or she belongs," the Commission decided to recommend amending the Rule to make the media-

VII, *available at* http://www.godr.org/files/CURRENT%20ADR%20-RULES%20COMPLETE%201-19-2010.pdf.

80. *Ethics 2003 Committee*, WASHINGTON STATE BAR ASSOCIATION, http://www.wsba.org/Resources-and-Services/Ethics/Ethics-2003 (last visited Oct. 23, 2011).

81. *Id.*

82. *Id.*

83. *Id.*

84. N.C. RULES OF PROF'L CONDUCT R. 8.3(e).

85. *Id.*

86. *See supra*, notes 17, 21 and accompanying text.

87. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 5 (2010).

tion rules dominant.[88]

The difficulty with using the Code to ease the tension between the mediation ethics and the Code is that the Code only applies to attorneys. Attorneys, therefore, will know that they should keep misconduct of other attorneys, revealed in mediation, confidential. Nonattorney–mediators may, however, be bound by a Code applicable to their own profession—for example, the mediator may be a Doctor of Medicine (MD). Nonattorney–mediators may see misconduct like that described above, know that it is ethically bad, but not know to whom they should report the misconduct. The body that oversees mediation ethics would advise nondisclosure.[89] If the misconduct is especially egregious, it is easy to imagine that a mediator frustrated by this answer would look around for someone to whom he or she could to report the attorney's conduct.

IV. WHERE DO WE GO FROM HERE?

There are four issues that are important to consider when examining the tensions that have been identified here. These are (1) whose interests would (and would not) be served by reporting attorney misconduct; (2) whether confidentiality can ever be absolutely guaranteed; (3) whether keeping misconduct confidential is within the reasonable expectations of the parties to the mediation; [and] (4) whether it is possible to provide clear guidance for all parties involved.[90]

A. Whose Interest Are Best Served by the Confidentiality Rules?

Public confidence in lawyers and the legal profession is undermined when stories of misconduct come to light. This is doubly so if the misconduct was ignored by other lawyers. In ruling on *Himmel*, the Illinois Supreme Court held that the "underlying purposes" of the disciplinary rules were to "maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public."[91] Each of

88. *Id.*

89. *See* N.C. DISPUTE RESOL. COMM'N, ADVISORY OP. 10-16 (2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf.

90. The four have their genesis in the minority report from a committee of the N.C. Dispute Resolution Commission. *See* N.C. DISP. RESOL. COMM'N. STANDARDS AND DISCIPLINE COMM., MINORITY REPORT TO THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION 2–4 (November 3, 2006) (on file with the Campbell Law Review) [hereinafter Minority Report].

91. *In re Himmel*, 533 N.E.2d 790, 795 (Ill. 1988) (quoting *In re LaPinska*, 381 N.E.2d 700, 705 (Ill. 1978)).

the three purposes identified in *Himmel* is impaired when attorneys fail to abide by the requirements of Rule 8.3. Notwithstanding the damage external to the mediation, the confidence of parties to the mediation in the fairness of the settlement would be undermined if one party learned of misconduct serious enough to have been subject to reporting requirements that was not reported.

If stories of misconduct come to light, they also erode the confidence of the parties to mediation. No matter if one's mediation was conducted according to the highest ethical standards and the resultant settlement was fair to all parties, if one of the parties hears about some misconduct that occurred in his mediation, he is going to reexamine his settlement. If the misconduct becomes known before the mediation is scheduled, both parties may be on the defensive from the start, expecting that the other party may be acting unethically and that the mediator is acting as an accomplice.

B. Are Guarantees of Confidentiality Disingenuous?

Very few states have mediation rules that demand absolute confidentiality.[92] In most of the other states, there are four common exceptions that either require or allow mediators to disclose information they learned in the mediation: (1) child or elder abuse;[93] (2) threats to people or property;[94] (3) to defend against allegations of mediator misconduct,[95] and (4) to train or consult with other mediators.[96] In three states (Mississippi, Louisiana, and Arkansas) a court may examine the mediator's testimony *in camera* in order to make a determination as to whether "the facts, circumstances and context of the communications or materials sought to be disclosed warrant

92. *See* DEL. CH. CT. R. 95(b) (Delaware); IND. R. OF ALT. DISP. RESOL. 2.11 (Indiana); N.H. SUPER. CT. R. 170(E)(1) (New Hampshire); R.I. GEN. LAWS § 9-19-44 (Westlaw through 2011 Jan. Sess.) (Rhode Island); TEX. CIV. PRAC. & REM. CODE § 154.053(c) (Westlaw through 2011 1st Called Sess.) (Texas).

93. *See, e.g.*, ME. R. CIV. P. 16B(k) ("[I]nformation concerning the abuse or neglect of any protected person" is not confidential).

94. *See, e.g.*, OR. REV. STAT. § 36.220(6) ("A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.").

95. *See, e.g.*, OKLA. STAT. tit. 12. § 1805(f) ("If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation . . . [confidentiality] shall be deemed to be waived as to the party bringing the action.").

96. *See, e.g.*, UTAH CODE ANN. §78B-6-208(5) (Westlaw through 2011 2nd Special Sess.) ("An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.").

a protective order of the court or whether the communications or materials are subject to disclosure."[97]

Are absolute guarantees of confidentiality, especially in court-ordered mediation, a good idea? Would they simply mean that parties have an incentive to hide assets or material facts? With lowered guarantees of confidentiality, the parties and their attorneys know where the line is and what behavior will put them over that line, making the chances of a fair and honest negotiation that much higher.

C. What Are the Reasonable Expectations of Parties to a Mediation?

It is unlikely that a person can become an attorney without having some working knowledge of the Code in his or her state.[98] As a member of North Carolina's Dispute Resolution Commission Standards and Discipline Committee put it, "[t]he unethical attorney should have no reasonable expectation that an attorney–mediator will keep his professional misconduct in confidence."[99] Attorneys know that professional misconduct will be reported by other attorneys with knowledge.[100] Attorneys who know about misconduct value their law license too highly not to report such behavior.

It is harder to argue that parties to mediation will reasonably expect that misconduct will be kept confidential. If a lawyer tells his client that there is a way to hide assets and that he or she will not tell the mediator about those assets, the client would reasonably assume that the lawyer has a legal, ethical way to hide the assets.

D. Can We Provide Clear Guidance?

The need for a firm, simple, *clear* rule is obvious. As things stand in the overwhelming majority of states, attorney–mediators must make very tough choices when confronted with clear misconduct. They know that state Bar Associations are willing and able to sanction attorneys who do not report misconduct, that mediation ethics bodies zealously guard the integri-

97. MISS. MEDIATION R. CIV. LIT. § VII(D); *see also* LA. REV. STAT. ANN. 9:4112 (Westlaw through 1st Extra. Sess.); ARK. CODE ANN. § 16-7-206 (Westlaw through 2011 Reg. Sess.). These states are not included in the "partly harmonious" category because there is nothing in those rules about misconduct—the *in camera* review is limited to issues concerning the underlying case.

98. Law schools typically require law students to take a course in Ethics and Professional Responsibility and all but four states require would-be attorneys to pass the Multistate Professional Responsibility Examination (MPRE). NATIONAL CONFERENCE OF BAR EXAMINERS, http://www.ncbex.org/multistate-tests/mpre/ (last visited Oct. 21, 2011).

99. *See* Minority Report, *supra* note 90 and accompanying text.

100. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3.

ty of the process, and that those bodies are willing to suspend the attorney–mediator if he or she breaches their rules. They also know that nonattorney–mediators do not face the same high-stakes choices that they do. While there is pressure on attorney mediators to decide which side their bread is buttered on,[101] there is also increasing demand for attorney–mediators.[102] After all, an attorney–mediator knows the lay of the land, so to speak, and can give the parties informed guidance on chances of litigation success or failure.

Clear guidance will help all of the parties prepare for the mediation. The parties will know what they should disclose and that the other side will be held to the same standard; the attorneys will know the consequences of unethical behavior, and the mediator will have no discretion about reporting misconduct.

E. The Way Forward

So where does this leave us? We need a way to harmonize the Code and the mediation rules that takes into account the interests of both the parties and the wider community, that recognizes that confidentiality is not always absolute, that conforms to the reasonable expectations of all involved, and that is clear and simple to apply. This Comment argues that the best rule is that used by Tennessee. Pursuant to the Tennessee mediation rules: "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information."[103] However, the general standards of the mediation rules provide that: "[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling."[104]

These rules allow the attorney–mediator to be bound by both sets of rules at the same time.[105] As noted *supra*, there is the problem that nonat-

101. That is, whether they would rather lose their law license or their mediation certification.

102. *See* Urska Velikonja, *Making Peace and Making Money; Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 263 (2009) (arguing that there is "attorney domination of the mediator selection process" because "most of the private mediators' caseload is disputes already in litigation or about to be litigated.").

103. TENN. SUP. CT. R. 31 at app. A § 7(a).

104. *Id.* § 2(b).

105. The problem with this whole system, of course, is that nonattorney–mediators are not bound by the Code as attorney mediators are, raising the inference that there are two

torney–mediators will not be beholden to the Code, but they are not bound by it in any other situation, so it is unfair to complain that they are not bound in this situation. This rule allows the attorney–mediator to create a mediation that is fair to all involved and to report misconduct when necessary. The rule also formalizes the expectations of all parties that a mediator who is also an attorney will not completely shed that persona when he acts as a neutral. It is also clear; the rule itself says that confidentiality is not absolute where it conflicts with the professional code of the mediator.

This rule does, however, require the mediator to wear two hats—that is, to focus both on the mediation at hand *and* on any potential ethical violations that may be revealed. However, as noted *supra*, ethical violations are rare. The author could not find any published mediation ethics opinions that dealt with the subject, and the first court case that dealt with Rule 8.3 was not until 1988 (almost twenty years after the modern Code was written).

If we return to the hypothetical, Smith would be required to report the misconduct of the attorney for the husband if he cannot persuade him to reveal the asset. In this way, Smith can protect the wife *and* his own law license *and* the interests of the wider community.

Rosemary J. Matthews

separate standards. In the regular case, however, where attorneys for the parties behave ethically, there will be no difference between the two mediators. The issues discussed here will only have an effect where one attorney behaves unethically. Deciding how to resolve this distinction is, thankfully, beyond the scope of this Comment.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

To supplement the other materials submitted with respect to the Committee on Standards of Attorney Conduct, attached are comments submitted by the Criminal Justice Section.

March 22, 2019

Recommendations of the Criminal Justice Section

The Criminal Justice Section has been requested by other sections to review and comment on certain proposed revisions to the Rules of Professional Responsibility. Following are our recommendations and comments:

1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.
2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable

facilitating quick compensation for deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman
Chair
Criminal Justice Section Ethics and Professional Responsibility Committee

Relevant COSAC Recommendations and Criminal Justice Section Response

MEMORANDUM

April 11, 2019
(excerpted from January 3, 2019 report)

To: **NYSBA Executive Committee**

Cc: **Kathy Baxter, NYSBA General Counsel**

From: **NYSBA Committee on Standards of Attorney Conduct ("COSAC")**
Roy D. Simon, Co-Chair of COSAC
Barbara S. Gillers, Co-Chair of COSAC
Joseph E. Neuhaus, Chair of COSAC Review Committee

Subject: **COSAC Proposals Regarding Rule 3.4**

Summary of Proposals

COSAC proposes the following changes to the black letter Rules, along with corresponding changes to the Comments:

- ***Rule 3.4(e)***. Amend the existing prohibition on presenting or threatening "criminal charges solely to obtain an advantage in a civil case" so that it prohibits presenting "criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*"

Rule 3.4
Fairness to Opposing Party and Counsel

COSAC recommends amending Rule 3.4(e) by expanding the rule to cover disciplinary charges and by narrowing the rule via adding two qualifying phrases. As amended, Rule 3.4(e) would provide:

> A lawyer shall not ... (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith or are unrelated to the civil matter.

COSAC believes that, in its current form, Rule 3.4(e) is both too broad and too narrow. It is too broad because it might preclude a threat to honestly report a crime

in an effort to obtain restitution for the harm done by the crime, something that Comment [5] to Rule 3.4 expressly says would not be improper. Comment [5] says:

> [5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), *the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done.* But extortion is committed if the threat involves conduct of the third person *unrelated* to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).
> [Emphasis added.]

Since COSAC believes that Comment [5] correctly states the law, COSAC also believes that the current blanket ban on threatening to present criminal charges is too broad.

Rule 3.4(e) is also too narrow because it does not prohibit threatening meritless or unrelated *disciplinary* charges in ways that might be as improperly coercive as a threat to present criminal charges and might also pressure lawyers who are the target of such charges to act in ways that conflict with their clients' best interests. For example, a lawyer who has been threatened with disciplinary charges might seek to settle litigation or might yield to a negotiating demand in a transaction on terms unfavorable to the lawyer's client in the hope (or on the express condition) that the opposing lawyer would then drop the threat to file meritless disciplinary charges.

COSAC's proposed changes to Rule 3.4(e) attempt to rectify these two problems.

> March 22, 2019
>
> Recommendations of the Criminal Justice Section
>
> The Criminal Justice Section has been requested by other sections to review and comment on certain proposed revisions to the Rules of Professional Responsibility. Following are our recommendations and comments:
>
> 1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or

single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.

2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable facilitating quick compensation for

deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman
Chair
Criminal Justice Section Ethics and Professional Responsibility Committee

MEMORANDUM

August 13, 2019

For Public Comment

COSAC Proposals to Amend Rules 4.2, 4.3, 8.1, 8.3, and 8.4 of the New York Rules of Professional Conduct

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The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is circulating for public comment proposals to amend various New York Rules of Professional Conduct and their Comments. We invite comments. **Comments are due at 5:00 p.m. on Friday, October 25, 2019.**

Rule 8.3 (first proposal)
Reporting Professional Misconduct

Proposed amendments to Rule 8.3(c)(1) and Comment [2]

COSAC proposes two changes to Rule 8.3 and its comments so as to refine or clarify the scope of that Rule's reporting obligation and its exceptions.

First, Rule 8.3 requires that lawyers in certain circumstances report professional misconduct, and Rule 8.3(c) sets forth certain exceptions to that requirement. While the exceptions currently apply to information confidential pursuant to Rule 1.6, they do not currently extend to information that is confidential under Rules 1.9 or 1.18.

Second, some lawyers and law firms may believe that they can escape from the duty to report another lawyer in their own firm by entering into a confidential settlement agreement (or other form of nondisclosure agreement) with an accuser.

To remedy these shortcomings, COSAC proposes both (i) an amendment to the text of Rule 8.3(c)(1) and (ii) a corresponding explanatory amendment to Comment [2] to Rule 8.3. The proposed amendment to the text of Rule 8.3 provides that there is an exception to the reporting requirement for information that is confidential under certain rules other than Rule 1.6. The proposed amendment to Comment [2] makes clear that confidential settlement agreements by themselves do not excuse otherwise

mandatory reporting. The amended versions of the Rule and Comment would provide as follows:

> **(c) This Rule does not require disclosure of:**
>
> **(1) information otherwise protected by Rules 1.6, 1.9. or 1.18; or ...**
>
> **Comment**
>
> [2] A report about misconduct is not required where it would result in violation of Rules 1.6, 1.9, or 1.18. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality Rules then Rule 8.3(a) requires a lawyer to report the information to a tribunal or other appropriate authority even if there are contractual restrictions on disclosing the information, such as in a settlement agreement or nondisclosure agreement. For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm come to know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a lawyer, the other lawyers in the firm cannot avoid their reporting obligations under Rule 8.3(a) by signing a confidential settlement agreement with the accuser.

COSAC Discussion of Rule 8.3(c)(1) and Comment [2]

The proposed change to the text of Rule 8.3(c)(1) would provide that the exception includes not only information that is confidential with respect to current clients under Rule 1.6, but also information that is confidential with respect to former clients under Rule 1.9 and with respect to prospective clients under Rule 1.18. COSAC believes that the policy considerations supporting the exception apply equally no matter which of these Rules provides the basis of confidentiality. This proposal would align the confidentiality exception to Rule 8.3 with the confidentiality exception to Rule 8.1 as COSAC has proposed to amend the latter (discussed above), and for the same reasons.

The second issue addressed in this proposal concerns the relationship between Rule 8.3 and nondisclosure agreements ("NDAs") or other contractual confidentiality

provisions. This issue came to COSAC's attention in March 2018 when the Solicitors Regulation Authority in the U.K. sent lawyers a notice reminding them that lawyers are required to report potential professional misconduct to disciplinary authorities, and warning law firms that nondisclosure agreements do not negate that reporting requirement. "The authority noted that it has received `relatively few' complaints of inappropriate sexual behavior, just 21 complaints over a two-year period ending in October 2017," and noted that media reports have suggested that "the low levels of reporting may be the result of NDAs and cultural issues within some firms." Coe, *UK Regulator Sends Law Firms Gag Order Warning Shot* (Law360 Mar. 12, 2018).

The proposed amendment would clarify that a lawyer otherwise required to report misconduct cannot expand the exceptions to the reporting requirement set forth in Rule 8.3 (b) by contracting to keep the information confidential. *See* Krane, *You Can't Stop Client from Complaining*(NYPRR Sept. 2003).

Rule 8.3 (second proposal)
Reporting Professional Misconduct

Proposed amendment to Comment [3] to Rule 8.3

Many lawyers are uncertain about when Rule 8.3(a) requires them to report another lawyer's violation of the Rules of Professional Conduct. COSAC proposes to add some guidance in this area by amending Comment [3] to Rule 8.3 as follows:

> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. For example, when a lawyer learns that another lawyer has violated the Rules through conversion or theft of a client's or third party's funds, such a violation raises a substantial question as to the accused lawyer's honesty, trustworthiness or fitness as a lawyer. For other examples of violations that would mandate reporting, see Rule 8.4, Comment [2]. A report should be made to a

> tribunal or other authority empowered to investigate or act upon the violation.

COSAC Discussion of Rule 8.3, Comment [3]

Rule 8.3(a) mandates reporting when a lawyer's known violation of the Rules "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." That standard is extremely ambiguous. None of the terms triggering a reporting obligation are defined in Rule 1.0 ("Terminology") or elsewhere in the Rules. Comment [3] to Rule 8.3 is relevant but not particularly helpful to the practitioner - it merely states that a "measure of judgment" is required, and that the word "substantial" refers to the "seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." By contrast, ABA Model Rule 1.0(*l*) defines the term "substantial" as follows: "Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." (New York has not adopted this definition and the New York Rules do not define the term "substantial.")

Comment [2] to Rule 8.4 (not Rule 8.3) says more about the types of conduct that meet the mandatory reporting test. It says:

> [2] ... Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Simon and Hyland comment that it is easy to come up with examples of violations that implicate a lawyer's "honesty" (*e.g.*, fraud, deception, misrepresentation, backdating documents, creating false evidence, and stealing funds from trust accounts), but it is difficult to come up with examples of conduct that implicates "fitness as a lawyer." *Simon's New York Rules of Professional Conduct Annotated 1681* (2019 ed.).

In Massachusetts, the Office of Bar Counsel (the Massachusetts disciplinary authority) has published an official Policy Statement that provides some additional guidance on conduct lawyers are required (or not required) to report. Of particular import here, the Policy Statement says:

> ***There are some such matters that clearly fall within the scope of "substantial" misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client*** a felony conviction, or perjury or a misrepresentation to a tribunal or court. As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.
>
> There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer's judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer's misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.
>
> There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others. [Emphasis added.]

Reporting Professional Misconduct: An Analysis of the Duties of a Lawyer Pursuant to Mass R. Prof. C. 8.3 (1998) (citations omitted). *See also* S. Best, *The Snitch Rule and Beyond, Mandatory and Permissive Reports of Lawyer Misconduct under Mass. RPC 8.3* (2016).

The Massachusetts Bar Counsel's Policy Statement thus "clearly" mandates reporting of misconduct involving client financial matters.

Courts in New York have also consistently emphasized the serious nature of escrow account violations and other financial malfeasance by lawyers. Each Appellate Department has in recent years disbarred lawyers who misused or misappropriated escrow funds or otherwise breached fiduciary duties regarding money. *See, e.g., In re Bloomberg,* 154 A.D.3d 75 (1st Dep't 2017) (disbarment for lawyer who

intentionally converted $200,000 of client funds); *Matter of McMillan, 164* A.D.3d 50 (2d Dep't 2018) (disbarment for lawyer who deprived sister of inheritance while acting as administrator of deceased mother's estate); *Matter of Castillo,* 157 A.D.3d 1158 (3d Dep't 2018) (disbarment for converting client funds to personal use); *In re Agola,* 128 A.D.3d 78, 6 N.Y.S.3d 890 (4th Dep't 2015) (disbarment for misappropriating client advances earmarked for expenses).

Likewise, all four Appellate Departments have suspended lawyers who engaged in financial misconduct. *See, e.g., Matter of Pierre,* 170 A.D.3d 36 (1st Dep't 2019) (five year suspension for commingling client and personal funds using escrow account to pay personal and business expenses); *Matter of Costello*, 174 A.D.3d 34 (2d Dep't 2019) (one year suspension for misappropriating client funds and failing to maintain required bookkeeping records for attorney escrow accounts); *Matter of Kayatt,* 159 A.D.3d 101 (3d Dep't 2018) (two year suspension for using escrow accounts as business and personal accounts to shield personal funds from tax authorities); *In re McClenathan,* 128 A.D.3d 193 (4th Dep't 2015) (one year suspension for misappropriating client funds and engaging in other escrow account violations).

Ethics opinions also emphasize the importance of abiding by the rules relating to honesty and escrow accounts. *See* N.Y. State Ethics Op. 1165 (2019) (under Rule 1.15, a lawyer "must not remove from the trust account those sums that the client questions until the dispute is resolved"); N.Y. City 2017-2 (a lawyer who learns that another lawyer has fraudulently billed a client must report the other lawyer pursuant to Rule 8.3 unless the report would reveal client confidences without client's consent); N.Y. State Ethics Op. 965 (2014) (under Rules 1.15 and 8.4, "[c]lient funds in a lawyer's escrow account may not be shielded from lawyer's creditor by transferring them to an escrow account held by the lawyer's lawyer").

COSAC believes it would make sense for the Comments to Rule 8.4 to include a statement recognizing the consistent treatment by courts of lawyers who convert or steal client funds, or otherwise breach their duty to maintain "a high degree of vigilance" to ensure that funds entrusted to lawyers in a fiduciary capacity are returned upon request. *See Matter of Galasso,* 19 N.Y.3d 688 (2012) (affirming finding of Rule 1.15 violation by a lawyer who had failed to supervise his law firm's bookkeeper, resulting in loss of client funds). The proposed amendment to Comment [3] to Rule 8.3 therefore makes clear that offenses such as conversion or theft of client funds must be reported. The proposed amendment also cross-

references Comment [2] to Rule 8.4, which provides additional and helpful guidance as to what kinds of misconduct reflect adversely on fitness to practice law.

Relevant New York Rules of Professional Conduct

RULE 3.4
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

x x x

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENT

x x x

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

RULE 8.3
REPORTING PROFESSIONAL MISCONDUCT

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

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

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation to cooperate with authorities empowered to investigate judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

[3A] Paragraph (b) requires a lawyer in certain situations to respond to a

lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

RULE 3.1
NON-MERITORIOUS CLAIMS AND CONTENTIONS

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

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

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 8.4
MISCONDUCT

A lawyer or law firm shall not:

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

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

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

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

x x x

Rule 4.1
TRUTHFULNESS IN STATEMENTS TO OTHERS

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

RULE 4.4
RESPECT FOR RIGHTS OF THIRD PERSONS

(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 a person.

ABA Model Rules
Rule 3.4 and 8.3

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Definitional Cross-References

"Knows" *See* Rule 1.0(f)
"Substantial" *See* Rule 1.0(l)

Relevant Ethics Opinions

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

Formal Opinion 2015-5: WHETHER AN ATTORNEY MAY THREATEN TO FILE A DISCIPLINARY COMPLAINT AGAINST ANOTHER LAWYER

TOPIC: Threatening to file a disciplinary complaint against another lawyer

DIGEST: An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules of Professional Conduct (the "New York Rules" or "Rules"). Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.

RULES: 1.6, 3.1, 3.4(a)(6), 3.4(e), 4.4(a), 8.3(a), 8.4(a), 8.4(b), 8.4(c), 8.4(d) or 8.4(h)

QUESTION: May an attorney threaten to file a disciplinary complaint against another lawyer?

OPINION:

I. Introduction

According to the Scope of the New York Rules, the purpose of the Rules is "to provide a framework for the ethical practice of law." Scope, at [8]. Compliance with the Rules "depends primarily on understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, where necessary, upon enforcement through disciplinary proceedings." *Id.* One of several tools that the disciplinary system relies on for enforcement of the Rules is the mandatory reporting obligation, which requires lawyers to report certain types of ethical violations. *See* R. 8.3(a) (requiring attorneys to report another lawyer's "violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer"). Short of reporting unethical conduct, however, many attorneys are uncertain of their obligations when they perceive that another lawyer has violated the disciplinary rules. One question that continues to plague many attorneys is whether – and under what circumstances – they are ethically permitted to *threaten* another lawyer with disciplinary charges. Here, we use the term "threat" to mean a "statement saying you will be harmed if you do not do what someone wants you to do." Merriam-Webster Dictionary, at http://www.merriam-webster.com/dictionary/threat. In our view, merely advising

another lawyer that his conduct violates a disciplinary rule or could subject them to disciplinary action does not constitute a "threat" unless it is accompanied by a statement that you intend to file disciplinary charges unless the other lawyer complies with a particular demand.

Rule 3.4(e) arguably comes closest to addressing this issue, as it prohibits lawyers from threatening "to present criminal charges solely to obtain an advantage in a civil matter." It is silent, however, with respect to threatening disciplinary charges. Accordingly, as discussed below, we conclude that Rule 3.4(e) does not expressly prohibit disciplinary threats. Nevertheless, an attorney who contemplates making such a threat should carefully consider whether doing so violates other Rules. In this opinion, we discuss several other Rules that may apply to threats of disciplinary charges, depending on the circumstances. Although we have attempted to address a variety of scenarios in which disciplinary threats arise, there may be situations that implicate other Rules, which are not addressed in this opinion.

II. Rule 3.4(e) Does Not Apply to Threats to File Disciplinary Grievances

Rule 3.4(e) states: "A lawyer shall not . . . present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Comment [5] elucidates the Rule further:

> The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

Several states do have rules that explicitly prohibit threatening to file a disciplinary grievance against an adversary to gain an advantage in a civil matter. In California, for example, a lawyer "shall not threaten to present *criminal, administrative or disciplinary charges* to obtain an advantage in a civil dispute." California Rules of Prof'l Conduct, R. 5-100(A) (emphasis added). District of Columbia also prohibits a lawyer from "seek[ing] or threaten[ing] to seek criminal charges *or disciplinary charges* solely to obtain an advantage in a civil matter." D.C. Rules of Prof'l Conduct, R. 8.4(g) (emphasis added).[1] Unlike these states, New York's corresponding rule prohibits only a

[1] Other states have similar rules. *See, e.g.*, Louisiana Rules of Prof'l Conduct, R. 8.4(g) ("It is professional misconduct for a lawyer to . . . [t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."); Colorado Rules of Prof'l Conduct, R. 4.5 ("A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter."); Ohio Rules of Prof'l Conduct, R. 1.2(e) ("Unless otherwise required by law,

threat to file criminal charges and omits any reference to disciplinary charges. Further, in an opinion analyzing the predecessor of Rule 3.4(e), the Committee on Professional Ethics for the New York State Bar Association ("NYSBA") declined to extend the rule to threats of disciplinary charges. *See* NYSBA Ethics Op. 772 (2003) (discussing former DR 7-105(A) of the New York Code of Professional Responsibility (the "Code")). Opinion 772 examined whether a lawyer could ethically threaten a stockbroker with a disciplinary complaint filed with a self-regulatory body unless he returned funds wrongfully taken from a client. The opinion states:

> In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions . . . .
>
> Thus, we conclude 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).

Id. Therefore, according to the opinion, "the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer *solely to obtain the return of the client's funds*." *Id.* n.4 (emphasis added). We agree that Rule 3.4(e) does not extend to the threat of disciplinary charges.

This view is not without contrary authority. The Nassau County Bar Association Committee on Professional Ethics ("Nassau") concluded that DR 7-105 applied to threats to file disciplinary charges. *See* Nassau Ethics Op. 98-12 (1998) ("An actual threat to file a grievance if the adversary attorney would not offer a better settlement would . . . violate DR 7-105."). While we agree that this conduct may violate other New York Rules, as discussed below, we do not believe it violates Rule 3.4(e), the successor to DR 7-105. Likewise, in *Zubulake v. UBS Warburg LLC,* 230 F.R.D. 290, 293 (S.D.N.Y. 2003), Judge Scheindlin extended the application of DR 7-105(A) by analogy to "threats of regulatory enforcement," noting that the analogy was "especially apt" where "regulatory enforcement can result in industry wide 'censure' and fines upward of one million dollars." In our view, however, the plain language of Rule 3.4(e) should govern and we decline to extend the rule by analogy to threats of disciplinary action against attorneys. Our conclusion does not mean, however, that lawyers are free to threaten disciplinary charges with impunity. As discussed below, other ethical rules impose limits on making such threats.

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a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.").

III. An Attorney May Not Threaten to File a Disciplinary Complaint Where There is a Mandatory Duty to Report the Other Lawyer's Misconduct

Under Rule 8.3(a), New York attorneys are required to report certain misconduct by other lawyers. Specifically, "[a] lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that *raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer* shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." R. 8.3(a) (emphasis added).[2] The policy behind this mandatory reporting requirement is to foster an effective system of self-regulation by lawyers. As explained in the Comments, "[s]elf-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." R. 8.3, Cmt [1]. Even an "apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." *Id.* Further, "[r]eporting a violation is especially important where the victim is unlikely to discover the offense." *Id.*

Before concluding that there is a mandatory duty to report, an attorney must "know" that another lawyer has violated the Rules. R. 8.3(a). The term "knows" means to have "actual knowledge of the fact in question." R. 1.0(k). The attorney need not be an eyewitness to the conduct, however, because "knowledge can be inferred from the circumstances." *Id.* In addition, not every violation triggers a duty to report – only those violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a); *see also* ABA Ethics Op. 94-383 (1994) (noting that the "Rules do not require the reporting of every violation of the Rules"). Subjecting every rule violation to a mandatory report would be unworkable. Not only would every insignificant or inadvertent violation be a reportable offense, but the very failure to report such violations would itself be a reportable offense, potentially creating an endless loop of reportable violations. Consequently, Rule 8.3(a) "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." R. 8.3, Cmt [3]. For example, a lawyer who believes an attorney on the opposite side of a real estate transaction is charging an unreasonable fee is not necessarily required to report the violation. *See* NYSBA Ethics Op. 1004 (2014). Reporting is required only if the lawyer concludes "under all circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty." *Id.*

Once an attorney concludes that she has a mandatory duty under Rule 8.3(a) to report another lawyer's conduct, failing to report the misconduct would itself violate Rule 8.4(a), which prohibits a lawyer from "violat[ing] or attempt[ing] to violate the Rules of Professional Conduct." ABA Ethics Op. 93-383. By extension, *threatening* to file a

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[2] There are several exceptions and exclusions to this reporting requirement. Reporting is not required if the information is protected by Rule 1.6 (confidentiality) or was gained during participation in a "bona fide lawyer assistance program." R. 8.3(c). In addition, the "duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question." R. 8.3, Cmt. [4]. Rule 8.3(a), which refers only to the misconduct of "another lawyer," does not require a lawyer to report his or her own misconduct or the improper conduct of a nonlawyer.

disciplinary complaint unless the other lawyer accedes to some demand would, likewise, violate Rule 8.4(a). Even if the attorney who made the threat ultimately reports the other lawyer's conduct (perhaps because the lawyer does not succumb to the threat) she would still be in violation of Rule 8.4(a), which prohibits a lawyer from attempting to violate the New York Rules. That said, before making a report, an attorney is permitted to confront her adversary with evidence of misconduct to confirm that an ethical violation has occurred. *See* Roy D. Simon, "Threatening to File Grievance Against Opposing Counsel," New York Legal Ethics Reporter (Originally published in NYPRR, Nov. 2005), available at http://www.newyorklegalethics.com/threatening-to-file-grievance-against-opposing-counsel/ [hereinafter, Simon, "Threatening to File Grievance"]. As Professor Simon explains, "a lawyer has the right . . . to notify opposing counsel, as a courtesy, of the intention to file the grievance." *Id.* Further, the attorney may "confront opposing counsel with evidence of misconduct" and may "ask whether opposing counsel denies the misconduct or can cast doubt on whether it occurred." *Id.* What the attorney may not do is condition the handling of a mandatory grievance on compliance with a particular demand. So, if after confronting the opposing lawyer with evidence of the misconduct, the attorney is convinced that the other lawyer in fact committed the misconduct, it would be improper, in the words of Professor Simon, to "invit[e] the opposing lawyer to bargain away the grievance." *Id.*

Example: Defendant's lawyer submits a brief in support of his motion to dismiss, which cites several fictitious judicial opinions. Plaintiff's counsel contacts defendant's lawyer and presents him with proof that the citations are fictitious. Defendant's lawyer insists that the false citations are valid and not an inadvertent mistake. Assuming Plaintiff's counsel concludes that such conduct triggers a mandatory duty to report, she may not threaten to report the violation unless the motion is withdrawn.

IV. Threatening to File a Disciplinary Grievance Against Another Lawyer May Violate Other Rules

As discussed above, attorneys are not required to report every ethical violation. For example, an attorney is not required to report conduct that she merely suspects – but does not "know" – has been committed. Nor is she required to report conduct that does not raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a). Even where an attorney is not required to report unethical conduct, however, she is *permitted* to report such conduct, subject to confidentiality restrictions and provided she has a "good faith belief of suspicion that misconduct has been committed." *See* NYSBA Ethics Op. 635 (1992). Professor Simon refers to this type of violation as a "discretionary grievance." Simon, "Threatening to File Grievance," *supra.*

The New York Rules do not expressly prohibit attorneys from threatening to report discretionary grievances. Depending on the circumstances, such threats may be consistent with a disciplinary system that is based, at least in part, on self-regulation. For example, if an attorney suspects another lawyer is unaware that his conduct violates the Rules, it may be appropriate to educate the lawyer about the violation and give him an opportunity to change his conduct, before filing a disciplinary violation. In addition, it

may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court.

Example: A personal injury plaintiff's lawyer receives a settlement payment on behalf of a client. A dispute arises between the plaintiff's lawyer and client concerning the amount of the lawyer's fee. Instead of retaining only the amount of the disputed fee in his trust account, as permitted by Rule 1.15(b)(4), the plaintiff's lawyer withholds the entire settlement payment. The client then hires a second attorney to assist in recouping the client's share of the settlement funds. The new attorney sends a letter to the plaintiff's lawyer demanding return of the undisputed portion of the settlement funds and stating "if you refuse to return the funds, you will be in violation of Rule 1.15 of the New York Rules of Professional Conduct, and we will report you to the appropriate disciplinary authority unless the funds are disbursed." In our view, it is permissible to include this language in the demand letter. At this stage, the attorney does not "know" that the plaintiff's lawyer's retention of the funds "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," as specified in Rule 8.3(a). The plaintiff's lawyer may simply misunderstand his obligations under Rule 1.15 and may genuinely believe he has a right to withhold the funds until the fee dispute is resolved. If the attorney subsequently concludes, however, that the plaintiff's lawyer is intentionally and improperly withholding the client's funds, that would likely trigger a duty to report the violation.

We recognize that not all lawyers who threaten to file disciplinary complaints do so for laudable reasons. Lawyers should not interpret the Committee's opinion as an unfettered license to threaten their adversaries with disciplinary violations. Given the opportunity for abuse, we emphasize that the right to threaten a disciplinary grievance is subject to important limitations, which are discussed below.

A. Before Threatening to File a Disciplinary Complaint, an Attorney Must Have a Good Faith Belief That the Other Lawyer is Engaged in Unethical Conduct

An attorney must not threaten to file disciplinary charges against another lawyer absent a "good faith belief" that the lawyer is engaged in conduct that has violated or will violate a disciplinary rule. NYSBA Ethics Op. 635 (1992) ("[I]t would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation "without having a reasonable basis for doing so . . . ."). Such baseless threats would violate multiple provisions of Rule 8.4. *See, e.g.*, R. 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"); R. 8.4(c) (prohibiting "conduct that is prejudicial to the administration of justice"); R. 8.4(h) (prohibiting "other conduct that adversely reflects on the lawyer's fitness as a lawyer").

Example: Plaintiff's counsel sends a letter to Defendant's counsel stating that she has been gravely injured in a car accident and requesting adjournment of an upcoming hearing date. Without taking steps to verify the accuracy of Plaintiff's statements,

Defendant's counsel accuses Plaintiff's counsel of lying about her injuries and threatens to file a disciplinary complaint against her if she seeks an adjournment from the court. Unless Defendant's counsel has a good faith basis to believe that Plaintiff's counsel has lied about the car accident or misrepresented the extent of her injuries, his threats are improper.

Given that any disciplinary threat must be based on a good faith belief, it necessarily follows that a lawyer may not make a threat she *knows* to be false. 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." This prohibition includes threatening to file a disciplinary grievance that is based on a false statement of fact or law. Such a threat would also violate Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

Example (false statement of fact): After a long, acrimonious negotiation over a multi-million dollar corporate acquisition, the parties finally come to terms. When the buyer's lawyer delivers the execution copy of the purchase agreement, however, the seller's attorney falsely accuses the buyer's lawyer of altering some of the negotiated language. In reality, the seller has simply had a change of heart and wants more money. The seller's attorney threatens to file a disciplinary complaint against the buyer's lawyer unless the purchase price is increased by $1 million. This threat violates Rule 4.1 because it is based on a false statement of fact: that the buyer's lawyer altered the negotiated terms.

Example (false statement of law): A class action lawyer creates a website aimed at attracting clients for a lawsuit against a large pharmaceutical company. The company's in-house lawyer, under pressure from the CEO to "do something about that lawyer," sends a letter threatening to report the class action lawyer for "multiple egregious violations of the advertising and solicitation rules" if he does not take down his website. In fact, the website complies with the advertising rules. In our view, this threat violates Rule 4.1 because it is based on a false statement of the law regulating lawyer advertising.

In addition, making such a threat in a civil or criminal proceeding may also violate Rule 3.1(a), which states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." According to the Rule, "[a] lawyer's conduct is 'frivolous' if," *inter alia*, "the lawyer knowingly asserts material factual statements that are false" or "the conduct . . . serves merely to harass or maliciously injure another." R. 3.1(b).

B. An Attorney Must Not Make a Threat That Has No Substantial Purpose Other Than to Embarrass or Harm Another Person

Like Rule 3.1(b), Rule 4.4(a) serves to curb misconduct that is aimed at harming third parties. Unlike Rule 3.1(b), which applies only in the litigation context, Rule 4.4(a) applies to all types of representations. Rule 4.4(a) states, *inter alia*, "[i]n representing a

client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Threatening to file a disciplinary complaint against an adversary in order to gain a strategic advantage violates this rule, if the threat serves no substantial purpose other than to embarrass or harm the other lawyer or his client.

Example: An attorney who represents several plaintiffs in a personal injury lawsuit discovers that a private investigator hired by defense counsel has friended the plaintiffs on social media in order to obtain evidence that their injuries are not as serious as claimed. Although this conduct violates Rule 4.2 ("Communication with Person Represented by Counsel") and Rule 8.4(a) (violating the rules "through the acts of another"), it is not necessarily a mandatory reporting violation. Plaintiffs' attorney threatens to report defense counsel's conduct to the court unless the defendant settles the case on terms the defendant is otherwise unwilling to accept. This threat may harm both the defense lawyer and his client because it could create a conflict of interest between them and interfere with the sanctity of their attorney-client relationship. The defense lawyer may face pressure to recommend a settlement that he believes is against the client's interests in order to protect the lawyer's personal and professional interests. We do not believe that the goals of the disciplinary rules are served when an attorney uses a disciplinary threat improperly to create a conflict of interest between another lawyer and his client. There are legitimate options available to the plaintiffs' attorney to address the misconduct, including seeking sanctions or disqualification.

C. An Attorney May Not Make a Threat in Violation of Substantive Law

Certain types of threats may violate the law. For example, New York Penal Law prohibits the taking of another person's property by "extortion." The statute provides, *inter alia*:

> A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or . . . Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

N.Y. PEN. LAW § 155.05(1)(e)(v), (ix).

Under certain circumstances, threatening to file a disciplinary complaint may violate New York's law against extortion or other criminal statutes.[3] In such cases, the

[3] We reference New York's extortion statute merely as an example of the type of law that might be violated by threats of disciplinary action. Because the Committee has no jurisdiction to interpret substantive law, we offer no opinion on whether a particular threat would violate Section 155.05 or any substantive law.

lawyer's conduct would also violate Rule 3.4(a)(6) ("A lawyer shall not . . . knowingly engage in other illegal conduct") and multiple subsections of Rule 8.4, including Rule 8.4(b) (prohibiting "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"), Rule 8.4(d) (prohibiting "conduct that is prejudicial to the administration of justice"), and Rule 8.4(h) (prohibiting "conduct that adversely reflects on the lawyer's fitness as a lawyer").

V. Conclusion

An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules. Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.

BAR ASSOCIATION OF NASSAU COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1998-12

(Inquiry No.)

Topics:

Duty when confronted with information raising a substantial question as to the fitness of another attorney to practice law – – bringing fraud to the attention of a tribunal.

Digest:

An attorney who has information indicating the possibility of an adversary attorney being involved in perpetrating a fraud upon a court must make a determination whether the attorney has knowledge sufficient to require reporting of such information, and if so, when and how to make such report.

Code Provisions:

EC 1-1

EC 1-5

EC 7-1

DR 1-102(A)(4)

DR 1-103(A)

DR 7-102(A)(4), (5), (6), (7), (B)(2)

DR 7-104(A)(1)

DR 7-105

Facts Presented:

During a contested Child Support proceeding, the Inquiring Attorney learned from an investigator who independently communicated with the adversary attorney's client that the client was working (refinishing floors) off-the-books, and gave the name of the adversary attorney as his reference. Yet, the adversary attorney has submitted and notarized papers to the court representing that the client is injured and cannot work or pay more than the statutory minimum amount of child support.

Inquiry:

What are the ethical obligations of an Inquiring Attorney under the Code of Professional Responsibility upon receiving information independently obtained by an investigator about a fraud perpetrated by an adversary and possibly by his attorney in a pending matter before a tribunal?

Determination:

The information presented may indicate not only the possibility of a fraud upon a tribunal, and thus conduct in violation of DR 7-102(A) (4),(5),(6), or (7), and may raise a substantial question as to the fitness

of another attorney, but also the possibility of the adversary attorney's client's intention to commit violations of state and federal laws that may carry criminal penalties. The Inquiring Attorney has obligations regarding such a matter under the Code. However, it is also a tactical matter within the discretion of the Inquiring Attorney as to how and when to act on this information. One option that is supported by both the Code of Civility and Ethical Consideration 1-5 would be to first confront the adversary attorney to verify any assumption regarding the adversary attorney's own awareness or participation in such conduct, and provide him or her with the chance to pursue adequate corrective measures necessary to rectify any misrepresentation made. If the adversary attorney will not act to correct any inaccuracies or misrepresentation made or endorsed by the attorney to the court, then under several provisions of the Code the Inquiring Attorney is obligated to inform either the court or a disciplinary authority. Another option within the discretion of the Inquiring Attorney, if he or she determines it to be in the best interest of his or her client, would be to bring out such facts in the course of cross-examination, where the duty to report to the tribunal would also be satisfied.

Analysis:

This inquiry raises serious issues relevant to the integrity of the legal profession where an attorney may knowingly have participated in perpetrating a fraud upon a court. Under the Code, the Committee notes that there is an affirmative responsibility on all attorneys to protect the integrity, of the profession. This is consistent with the Inquiring Attorney's duty's to the Court, to the legal profession and to the public, and is further supported by the recently enacted Code of Civility adopted by New York. Yet, the Inquiring Attorney must use discretion to determine whether such course of action is advisable and consistent with pursuing the best interests of the client. It would also fulfill obligations under the Disciplinary Rules to bring out the discovery of facts showing a fraud in the course of discovery, cross-examination or otherwise during a litigated proceeding.

A necessary matter for consideration identified in the inquiry is that the Inquiring Attomey has learned from an investigator who communicated directly with a represented party, calling the party after he had done surveillance upon his activities. This involves DR 7-104(A)(1) which states: "During the course of the representation of a client a lawyer shall not. . . communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." Here, however, the Inquiring attorney did not cause the investigator to communicate with the represented party. Instead, the investigator made the communication without the advance knowledge of the Inquiring Attorney, who subsequently learned of the communication when the investigator apprised him of the results of his investigation. Had the Inquiring Attorney assigned the investigator to communicate with the represented party, this would violate DR 7-104. Here DR 7-104 does not appear to apply because the information was obtained unilaterally by the investigator, without any intentional communication initiated by, or on behalf of the Inquiring Attorney. Nevertheless, attorneys should heed the provisions of DR 7-104(A), "During the course of the representation of a client . . . [not to communicate or cause

another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter " without that lawyer's consent. (Emphasis added.)

While the information as presented appear to reasonably point in the director of a possible fraud, the Inquiring Attorney still does not know whether the adversary attorney (1) employed the client in the recent past, (2) is aware of an ongoing use of the attorney's name by the client as a work reference; and (3) knows that this employment was "off-the-books," which may have implications for violations of child support obligations. The Inquiring Attorney ought to bear in mind EC 1-5 which sets forth: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise." This ethical consideration suggests that the Inquiring Attorney attempt to verify or disprove any assumptions by confronting the adversary attorney.

Assuming the adversary attorney is not aware that the papers submitted to the court contain factual inaccuracies, then he should correct any misrepresentation that is now established or may wish to withdraw from the representation. The adversary attorney should work through his or her own responsibilities as governed by the Code, noting in particular that DR 4-101 (C)(3) may permit the adversary attorney to reveal the client's secrets to prevent what may constitute the future commission of crimes with regard to the Internal Revenue Code, Worker's Compensation regulations and federal law governing child support obligations. If the adversary attorney is willing and able to pursue the necessary corrective measures, the matter may be resolved without further action on the part of the Inquiring Attorney.

If the adversary attorney will not take the steps necessary to correct a knowing misrepresentation, the Inquiring Attorney has no choice but to bring the matter to the attention of a proper authority in accord with DR 1-103(A) or DR 7-102(B). DR 1-103(A) states: "A lawyer possessing knowledge, (1) not protected as a confidence or secret ... of a violation, of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." DR 1-102(A)(4) defines it as misconduct whenever lawyers "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Thus, the identified conduct here appears to trigger the reporting requirement under DR 1-103(A). See Bar Association of Nassau County ("BANC") Opinions ## 92-29, 93-34, 93-41.

While DR 1-103 leaves the Inquiring Attorney the option to report the conduct of an adversary attorney either to the court or in this county, the grievance committee, DR 7-102(B)(2) calls upon the Inquiring Attorney to act in his own capacity as an officer of the court, as it states: "A lawyer who receives information clearly establishing that ... a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." Where the adversary attorney has for any reason failed to take steps to correct a fraudulent misrepresentation, the Inquiring attorney must take steps to inform the court, which at the same time acts to protect the integrity of the legal profession. Yet it should be clarified that both DR 1-103 and DR 7-102 have been determined to leave attorneys some discretion whether they believe there is sufficient knowledge as to fraudulent conduct that triggers a reporting

obligation, as opposed to a mere suspicion of misconduct, that triggers only an optional mandate to report on such conduct. See BANC ## 93-41 and 93-34, which examine this question in further detail.

Furthermore, DR 7-102(A) provides, inter alia, that an attorney shall not: (4) "knowingly use perjured testimony or false evidence"; (5) "knowingly make a false statement of law or fact"; (6) "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false"; and (7) "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent." In this context, the adversary attorney's conduct implies a fraud not just upon the court but also upon society at large, when the attorney knowingly allows a client to violate tax law, worker's compensation regulations, and child support laws. In this situation, because of the seriousness stemming from the adversary attorney's apparent awareness of a client's actions, the Inquiring Attorney may choose to act in his capacity as an officer of the court in order to protect the integrity of the legal profession by reporting the knowing perpetration of fraud to a tribunal or disciplinary authority under DR 1-103. However, there is no compulsion on the Inquiring Attorney to choose to make this report to the disciplinary authority.

In the course of confronting the adversary attorney and discussing how to rectify this problem, the Inquiring Attorney may obtain a beneficial offer of settlement of the underlying dispute. As to the propriety of using such information, EC 7-1 requires that: "The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." The Inquiring Attorney may thus use the acquired information for the benefit of his or her client, while still being careful to observe DR 7-105, which sets another boundary on such discussions with the adversary attorney: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges. People v. Harper, 75 N.Y.2cl 313, 552 N.Y.S.2d 900 (1990). Thus, the Inquiring Attorney may communicate with the adversary attorney about the information and the necessity of correcting any misrepresentation which has been made. An actual threat to file a grievance if the adversary attorney would not offer a better settlement would, however, violate DR 7-105. The Inquiring Attorney has both the right and obligation to use the information however he or she deems most helpful and permissible in the attorney's professional judgment.

[Approved by the Exec. Subcomm. 10/20/98; Approved by the Full Committee 10/28 /98.]

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 772 – 11/14/03	Topic: Threatening and presenting criminal, administrative and disciplinary charges to obtain an advantage in a civil matter.
	Digest: DR 7-105(A) prohibits the presentation and threatened presentation of criminal charges when the purpose is to effect a resolution of a civil dispute; the disciplinary rule does not embrace administrative or disciplinary charges that may be threatened or presented in connection with a civil dispute, regardless of purpose.
	Code: DR 1-102(A)(4), 1-102, 1-102(A)(3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21.

QUESTION

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

OPINION

When a client invests funds with a Broker who is an associated member of a self-regulatory body, such as the NYSE or the National Association of Securities Dealers, and the Broker then wrongfully takes a portion of those funds for his or her own benefit, the Broker's conduct can have a variety of legal consequences. Viewed as a conversion of the client's funds, the taking may become the subject of a civil liability claim asserted by the client, perhaps leading to the filing of a lawsuit or arbitration. Viewed as a theft, the taking may become the subject of a criminal complaint filed by the client with a Prosecutor, perhaps leading to a criminal prosecution. Viewed as a violation of the rules of the NYSE or any other self-regulatory body of which the Broker is associated, the taking may become the subject of a professional disciplinary proceeding to revoke the Broker's license to practice.

Consequently, when a client believes that a Broker has wrongfully taken funds, the lawyer is faced with various choices about how best to represent and promote the client's interests. Of course, it is the client who decides the objectives of the representation. See DR 7-101(A)(1); EC 7-7. If the client's primary objective is to obtain the return of such funds, the lawyer is likely to suggest first writing a letter to the Broker demanding the return of the funds. If the Broker does not return the funds within the specified time period, the client often will authorize the filing of a lawsuit or arbitration proceeding against the Broker for conversion. But if the client asks about alternative or additional ways of proceeding, a question of legal ethics is likely to arise: may the lawyer file or threaten to file a complaint or charge regarding the Broker's alleged wrongful conduct with either a Prosecutor or the NYSE?[1]

I. The Filing of a Complaint With a Prosecutor or the NYSE

A. The General Ethical Rules Regarding the Filing of any Complaint

In deciding whether to file any complaint against the Broker -- whether a lawsuit or an arbitration or a letter of complaint with either a Prosecutor or the NYSE -- there are a number of applicable disciplinary rules. DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim . . . that is unwarranted under existing law, except that a lawyer may advance such claim . . . if it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 7-102(A)(l) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position . . . or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Thus, before filing any complaint against the Broker, the lawyer must determine that the client's claim is warranted in law and in fact and that the complaint is not being made merely to harass or injure the Broker.

Two other disciplinary rules are relevant in preparing such a complaint. DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law or fact." Together, these two disciplinary rules impose additional ethical limits on what can be said in any such complaint.

Another disciplinary rule that deals specifically with the interplay of the system of civil liability and the criminal justice system, DR 7-105(A), states "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

EC 7-21 explains the purposes underlying DR 7-105(A):

> 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 the 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 all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine -- that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system -- DR

7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Does DR 7-105(A) apply to the lawyer's filing of a complaint about the Broker's conduct with either a Prosecutor or the NYSE? [2]

B. Filing a Complaint With a Prosecutor

Whether the lawyer's filing of a complaint about the Broker's conduct with a Prosecutor violates DR 7-105(A) depends, in part, upon the meaning of the phrase "present criminal charges." If that phrase refers only to a Prosecutor's actions, then a lawyer's filing of a complaint would not qualify as either presentation of such charges, or participation in such presentation.

We have been unable to find any ethics opinions or court decisions interpreting DR 7-105(A) that address the definition of "present criminal charges." Perhaps this phrase was intended as a term of art, referring to the Fifth Amendment's requirement of a grand jury presentment or indictment for capital and infamous crimes. *See* 1 Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999) ("The Constitution speaks also of a 'presentment' but this is a term with a distinct historical meaning now not well understood. Historically presentment was the process by which a grand jury initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."). Likewise, some criminal cases from the 1940s and 1950s refer to a prosecutor's presentation of criminal charges to the grand jury. *See, e.g., Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T. Monroe County 1957).

Despite this historical context, the fact remains that numerous ethics opinions and court decisions concerning DR 7-105(A) assume that a lawyer's conduct in reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). *See, e.g., Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3. [3]

Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor.

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. *See* §II (B) below. As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

C. Filing a Complaint With the NYSE

In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates

DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to "administrative or disciplinary charges" in addition to criminal charges, *see* Maine Bar Rule 3.6(c), or just "disciplinary charges," *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning §7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney "from present[ing] criminal, administrative, or disciplinary charges to obtain an advantage in a civil action").

Thus, we conclude 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). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. *See, e.g.*, Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system -- to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges."[4] In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

II. Sending a Demand Letter

DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges,"[5] and (ii) do so "solely to obtain an advantage in a civil matter."

A. Threats

Some letters contain unambiguous threats to present criminal charges. In *In re Hyman*, 226 App. Div. 468 (1929), the First Department censured a lawyer who wrote a letter to the driver of an automobile that hurt his client, Miss Horn, stating:

> Unless you show some substantial evidence of your willingness to compensate Miss Horn [the attorney's client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered.

226 App. Div. at 469. Four years after *In re Hyman*, the First Department censured another lawyer who sent a letter stating that unless money was paid immediately he "would present the matter to the district attorney upon a charge of larceny and embezzlement." *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933).[6] More recently, the Third Department

censured a lawyer for sending a letter to a workman which stated that unless the workman returned a sum of money to his client the lawyer would "have a warrant issued for [the workman's] arrest;" "you will return the money or go to jail." *In re Glavin*, 107 A.D.2d 1006- 1007 (1985).

In each of these cases, the letter refers to future criminal prosecution, but provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision.[7]

Based on these cases, we conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds. In reaching this conclusion, we consider it immaterial under DR 7-105(A) whether the Broker actually owed the client the requested funds or whether the client had good grounds for believing the funds were owed. As stated below, DR 7-105(A) prohibits a letter that threatens to file a complaint with a Prosecutor solely to obtain a civil advantage, regardless of whether the threat is extortionate or justifiable. *See* § II(C) below.

Other letters are more ambiguous in their intention to present criminal charges. Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See, e.g., In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cf.* District of Columbia Opinion 220 (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g., In re McCurdy*, 681 P.2d 131, 132 (Or. 1984).

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

B. The "Solely" Requirement

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.

Consider, for example, the letter sent by the lawyer in *Decato's Case*, 379 A.2d 825 (N.H. 1977):

In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore (sic). Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of services. Unless you communicate directly with me and give me some proof that the damages sustained to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

379 A.2d at 826. The New Hampshire Supreme Court imposed no discipline based on that letter, holding that the purpose of the lawyer's letter was not to gain leverage in a civil action by the threat of filing criminal charges, because Decato made no demand or request for payment from the letter's recipient – he only asked for information about the recipient's legal position.

Similarly, ethics committees in several other jurisdictions have opined that a letter referring to the criminal sanctions imposed for stopping payment on a check was not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g.*, Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979). These opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action. *But see* New Mexico Opinion 1987-5 ("threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105[A]").

Thus, if the lawyer sent a letter to the Broker stating that the Broker's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and requesting an explanation or justification of the Broker's conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the Broker's conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific. However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously. *See* Connecticut Informal Opinion 98-19 ("Such an examination [of a lawyer's motivation] is very fact specific"); Florida Opinion 89-3 ("The motivation and intent of the attorney involved obviously will be a major factor in determining whether his or her actions are ethically improper. The Committee believes that such determinations necessarily must be made on a case-by-case basis").

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose – the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.[8]

C. DR 7-105(A)'s Relation to Illegal Conduct

Under New York law, proof of a threat to present criminal charges unless a certain specified action is performed constitutes a *prima facie* case of criminal coercion in the second degree, *see* N.Y. Penal Law § 135.60(4) (Consol. 2003), and, if property is obtained, makes out a *prima facie* case of extortion, *see* N.Y. Penal Law §155.05(2)(e)(iv) (Consol. 2003). However, New York law provides that such conduct is not unlawful if the person making such a threat "reasonably believed the threatened [criminal] charges to be true and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law § 135.75 (Consol. 2003) (affirmative defense to criminal coercion). *Accord* N.Y. Penal Law § 155.15(2) (Consol. 2003) (affirmative defense to extortion).

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

CONCLUSION

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

(44-01)

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[1] In focusing this opinion on questions regarding the lawyer's actual or threatened filing of a complaint on behalf of a client, we choose not to opine on any related questions regarding whether it would be permissible for a non-lawyer client, who is not bound by the constraints of the New York State Lawyer's Code of Professional Responsibility (the "Code"), to file such a complaint on his or her own behalf. In this opinion, we are concerned only with the lawyer's professional responsibilities regarding the lawyer's own conduct.

[2] We assume throughout this opinion that the lawyer's client has consented to the lawyer filing or threatening to file a complaint about the Broker's conduct. Such consent would be necessary under the Code if the disclosure of the Broker's conduct would be embarrassing or detrimental to the client or the client expressly asked the lawyer not to disclose the Broker's conduct, because the lawyer is prohibited from revealing to third parties the client's "secrets," *see* DR 4-101(B)(1), and, by definition, the Broker's conduct would be a "secret" under DR 4-101(A).

[3] These ethics opinions and court decisions contain no discussion and, therefore, provide no guidance as to whether the filing of such a complaint is construed as the presentation of criminal charges or participation in the presentation of criminal charges.

[4] We also reject the specific analysis underlying Nassau County 98-12 (1998). In that opinion, the Committee concluded that DR 7-105(A) prohibits an attorney from threatening to file a report with disciplinary authorities against another attorney. Citing *People v. Harper*, 75 N.Y.2d 313 (1990), the Committee stated: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." But *Harper* did not find that DR 7-105(A) covered threats of filing or the actual presentation of disciplinary charges. *Harper* was an appeal from a jury verdict that a witness had received a bribe. The *Harper* Court referred to DR 7-105 solely with reference to the People's argument that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." 75 N.Y.2d at 318. The *Harper* Court rendered no opinion about the actual or threatened reporting of disciplinary violations by lawyers.

[5] Because, for the reasons stated above, the filing of a complaint against the Broker with an administrative or disciplinary authority, such as the NYSE, is not within the scope of DR 7-105(A), the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds.

[6] This short decision does not make it clear whether the respondent lawyer was acting on behalf of a client or for himself in sending the threatening letter. In our view, however, that does not matter. We agree with the numerous decisions in other jurisdictions holding DR 7-105(A) or its counterparts applicable where the respondent lawyer is acting on his or her own behalf. *See, e.g., Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718-19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993).

[7] As stated below, in some circumstances such a threat in itself may violate New York's Penal Law because it constitutes criminal coercion or extortion. *See* § II(C) below. In those circumstances, the threat not only violates DR 7-105(A); it also violates DR 1-102(A)(3)'s prohibition against "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

[8] The Model Rules have no analogue to DR 7-105(A). The drafters of the Model Rules apparently believed that to the extent DR 7-105(A) serves legitimate purposes, the conduct it proscribes is prohibited by other ethical rules, such as Model Rule 8.4 (which is analogous to DR 1-102), Model Rule 4.1 (which is analogous to DR 1-102[A][4] and DR 7-102[A][5]), Model Rule 4.4 (which is analogous to DR 7-102(A)(1)), and Model Rule 3.1 (which is analogous to DR 7-102[A][2]). *See* ABA 92-363. To the extent that DR 7-105(A) prohibits conduct other than that prohibited by those Rules -- such as the actual or threatened presentation of criminal charges in a civil matter to gain relief for a client when the criminal charges are related to the civil matter, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the facts and the law, and the lawyer does not attempt to exert or suggest improper influence over the criminal process, *see* ABA 92-363, -- the drafters of the Model Rules appear to have believed that DR 7-105(A) was overbroad because it "excessively restrict[ed] a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system." *Id. See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering*, § 40.4, at 40-7 (3d ed. 2000) ("rules like DR 7-105[A] . . . are overbroad because they prohibit *legitimate* pressure tactics and negotiation strategies") (emphasis in original).

2005 FORMAL ETHICS OPINION 3 (North Carolina)

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IMMIGRATION PROSECUTION TO GAIN AN ADVANTAGE IN A CIVIL MATTER

Adopted: July 14, 2005

Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

Inquiry:

During the discovery phase of a civil lawsuit, the defense lawyer learns that the plaintiff may be in the country illegally. Some of the plaintiff's witnesses may also be in the country illegally. The plaintiff's immigration status is entirely unrelated to the civil suit.

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

Opinion:

This is a matter of first impression. The Rules of Professional Conduct and the ethics opinions have previously addressed only the issue of threatening criminal prosecution to gain an advantage in a civil matter.

Before 1997, Rule 7.5 of the Rules of Professional Conduct made it unethical for a lawyer "to present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter." The rule was not included in the Rules of Professional Conduct when they were comprehensively revised in 1997. Nevertheless, a lawyer may not use a threat of criminal prosecution with impunity. Threats that constitute extortion, compounding a crime, or abuse of process are already prohibited by other rules. See Rule 3.1 (meritorious claims); Rule 4.1 (truthfulness in statements to others); Rule 4.4 (respect for rights of third persons); Rule 8.4(b) and (c)(prohibiting criminal or fraudulent conduct). Moreover, 98 FEO 19 provides that a lawyer may present or threaten to present criminal charges in association with the prosecution of a civil matter but only if the criminal charges are related to the civil matter, the lawyer believes the charges to be well grounded in fact and warranted by law, and the lawyer does not imply an ability to improperly influence the district attorney, the judge or the criminal justice system.

The present inquiry involves the threat, not of criminal prosecution, but of disclosure to immigration authorities. Whether making such a threat is criminal extortion is a legal determination outside the purview of the Ethics Committee. If it is, the conduct is prohibited under Rule 8.4(b). Even where a lawyer may lawfully threaten to report a party or a witness to immigration authorities to gain leverage in a civil matter, the exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime.

In ABA Formal Opinion No. 92-363, threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges. As explained in the opinion, requiring a relationship between the civil and criminal matters

> tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Formal Op. No. 92-363; see also Rule 8.4(d)(prohibiting conduct that is prejudicial to the administration of justice).

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. In addition, the prohibition on conduct that is prejudicial to the administration of justice "should be read broadly to proscribe a wide variety of conduct including conduct that occurs outside the scope of judicial proceedings." Rule 8.4, cmt. [4]. The threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

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To: Committee on Standards of Attorney Conduct

From: Deborah Masucci, Chair of the Dispute Resolution Section

Re: Proposed Changes to New York Rule 3.4 (e)

Date: January 7, 2019

The Executive Committee of the New York State Bar Association's Dispute Resolution Section ("the Section"), and the Section's Ethics Committee, reviewed the Committee on Standards of Attorney Conduct's ("COSAC") proposed change to New York Rule 3.4(e).

The Section lauds the efforts of COSAC to clarify the obligations of counsel under the Rules of Professional Conduct. This area involves competing considerations. On one hand, principled bargaining, whether in negotiation or mediation, can involve coordinated discussions with an eye towards satisfying the interests of all parties. On the other hand, threatening disciplinary or criminal action could generate a counterproductive culture of coercion, manipulation and recrimination.

Rule 3.4(e) is significant to the field of Dispute Resolution, which includes negotiation and mediation. It is the experience of members of this Section that threats of this kind do, in fact, surface, at times, during negotiations and mediations. For purposes of regulating the culture of negotiation and mediation in which counsel are involved, and to retain or enhance the civility of those proceedings while also furthering the interests of all parties and the legitimate interests of counsel, the Section provides the following comment.

First, the Section supports the inclusion of the phrase "***or disciplinary***" in the Rule. Prohibition of a threat of this kind is entirely apt. In this context, it can be helpful to consider all pertinent and material information, including the risk of discipline or criminal action.

Second, the Section recommends that the balance of the proposed change should be withdrawn for further study. Recognizing that there are challenges on either side of this equation -- and that this is an area with serious impact on the domains of dispute resolution with potentially criminal legal implications -- the Section recommends that the additional changes be withdrawn for further study. The Section, in particular, recommends study and comment by the Criminal Justice Section of the NYSBA. The Section offers a representative to study the potential changes and its impact on negotiations within the context of mediation and settlement discussion.