What NASCAR, Jay-Z & The Jersey Shore Teach Us About Attorney Ethics

Wednesday, July 13, 2011
9:00 a.m. – 12:15 p.m.
Hotel Captain Cook
Anchorage, AK

CLE #2011-018 3.0 Ethics CLE Credits

These materials are presented with the understanding that the publisher and authors do not render any legal, accounting, or other professional service. Due to the rapidly changing nature of the law, information contained in these publications may become outdated. As a result, an attorney using these materials must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of these materials. Alaska Bar Association to obtain additional copies of this material contact the Alaska Bar Association at 907-272-7469/fax 907-272-2932 or e-mail info@alaskabar.org

Copyright ©2010. Alaska Bar Association.
All Rights Reserved.

Bio of Stuart I. Teicher, Esq.

CLE Performer

Stuart I. Teicher, Esq. is a professional legal educator. A practicing attorney for over 15 years, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and gives keynote speeches at conventions and association meetings.

Stuart helps attorneys get better at what they do (and enjoy the process) through his entertaining and educational *CLE Performances*. His expertise is in the "Knowledge Gap"—those topics that volunteer attorneys and law-firm partners are often not inclined to teach: Cutting edge ethics and critical lawyering skills.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys and he is an adjunct Professor of Law at Rutgers Law School in Camden, New Jersey where he teaches Professional Responsibility.

Seminar Written Materials
What NASCAR, JAY-Z and the Jersey Shore Teach Us About Attorney Ethics

I. Introduction: Why I Created the Seminar

I created this odd sounding seminar with a particular purpose in mind. I wanted to combine something lawyers like to talk about with something lawyers need to talk about. My theory is that if we can actually enjoy talking about ethics, we have a far greater chance that the lessons will be memorable.

Clearly, the thing we "like" to talk about is popular culture. No one needs to be convinced about the truth of that statement. Of course we all know that we "need" to talk about attorney ethics because the MCLE rules demand that we do so. We also "need" to talk about it because we must be aware of the consequences of our actions when we practice. But I believe that there's a need for us to talk about attorney ethics that goes beyond the MCLE mandate and even the threat of disciplinary action.

I believe that true success in the practice of law can only be realized by following an ethical, professional path. I also believe that the rules of attorney ethics lay out a formula for long term success in our practice and a sense of enduring satisfaction in our lives.

II. What the Ethics Rules are *Really* About[1]

The soul of the ethics code -- come on, there's no way you've ever heard an ethics teacher talk about the "soul" of the code, right? I digress…The soul of the ethics code is about values. Each of the restrictions in the code grew from a basic value to which the drafters wanted attorneys to adhere. Those values would include such things as integrity, loyalty, candor, etc. It's the particular behaviors that flow from those values that, when exhibited, steer us clear from disciplinary violations, yield tangible positive results in our practice and also guide us toward a long term sense of satisfaction in our lives. I call that direction, "True North." The rules put us on a heading toward True North—the direction that we're *required* to go in order to avoid disciplinary action, which not-so-coincidentally is also the direction toward professional success in the law (a place where every attorney *wants* to go).

So what the rules are really about are values and behavior which provide a roadmap to success in the profession and satisfaction in our lives. That, of course begs the question: What is the behavior that will head us toward True North? Unfortunately it's not always clear because the rules don't always explicitly state the proper behavior. Often the code is written in the negative, telling us what attorneys can't do. The code usually sounds like pure discipline but, trust me, those restrictions actually reflect the values that the drafters want to promote even though it doesn't always say it so directly.

---

1 One note about the rules I'll be referring to throughout these materials: As I'm sure you're aware, the overwhelming majority of states in our country have adopted some version of the ABA Model Rules of Professional Responsibility so I'd like to refer to those rules throughout this paper. Copyright restriction, however, prohibit me from doing so. As a result, all references in this paper to the "Rules" are actually references to the Delaware Rules of Professional Conduct, which are virtually identical to the ABA Model Rules (at least the parts that I'm quoting), but are not subject to the same copyright restrictions. There may be some minor differences in the text, but any difference does not impact the concepts discussed herein.

This seminar reveals some of those behaviors and sketches out the roadmap provided by the rules. There are a myriad of behaviors involved and I've selected a few important ones for us to discuss in this seminar. I've chosen behaviors that hold us back and subject us to discipline, but I've also chosen several behaviors that propel us toward greatness. All of those behaviors are grounded in the rules of professional conduct and, you may have guessed, are also reflected in pop culture.

A note about Professionalism: Nearly every state has a statement on Professionalism, whether it's Ohio's "A Lawyer's Creed," New Mexico's "Creed f Professionalism," or the New Jersey Bar Associations, "Principles of Professionalism." Despite the apparent differences among them, a review of each reveals that the values and professional ideals that these statements promote are similar, if not identical. Even if you're in a jurisdiction that doesn't make professionalism education a mandatory element of your CLE experience, it's worth considering for a few reasons.

First, the concepts are worthy of our understanding regardless of whether their study is mandated. Also, the concepts of professionalism are almost all actually reflected in the codified rules. For instance, concepts such as honesty and integrity are inherent in Rule 4.1, "Truthfulness in Statements to Others;" our obligations to treat other members of the bar appropriately is codified in Rule 3.4, "Fairness to Opposing Party and Counsel," and; our obligation to the overall community is reflected in Rule 6.1, "Voluntary Pro Bono Publico Service."

III. The most notorious pop idols exhibit behavior that is condemned by the rules

As you'll see in the seminar, the most notorious pop idols exhibit behavior that's condemned by the rules of professional conduct. What behaviors are we talking about? Let's

start with Improper behavior, generally, and talk about Rule 8.4 entitled, “Misconduct.” That rule codifies some obvious concepts and also casts a wide net to ensnare violators.

A. Misconduct

Rule 8.4. Misconduct
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The sections that I find most interesting are (b), (c) and (d). In subsection (b) the rules tell us that misconduct can be the commission of certain crimes that impact our fitness to be an attorney. Do you think that driving drunk would fall in there? Maybe that's debatable. How about drug offenses? Of course it seems to get a little easier when you talk about check fraud or theft. What's interesting, though is that the rule doesn't say that you must be “convicted” of a criminal act, only that you “commit” the act. As a result, discipline may be forthcoming if the criminal behavior occurred, even if there were no formal consequences in the justice system.

Subsections (c) and (d) are what I call the “catch all” sections. For instance, I think we could spend an entire day giving examples of, “conduct involving dishonesty, fraud, deceit or misrepresentation.” What's critical to remember is that the conduct we're talking about is not limited to the things you do in your office-- the rule doesn't make that distinction. That's one of the reasons that I tell attorneys that there is almost no separation between the professional and private life of an attorney. What you do outside the office matters and if your behavior

outside the office violates Rule 8.4, you're going to be subject to discipline

Likewise, I could imagine a slew of actions that could be considered "prejudicial to the administration of justice." What about blogging about how you believe a judge is a thief and a liar? How about stealing evidence out of a courthouse. The list could go on. An interesting side note: 8.4(d) would probably be the section that would be cited in a claims of discrimination in the profession. Many states have adopted specific ethics rules outlawing discrimination, but not all of them. 8.4(d) would serve the purpose for states without a specific prohibition.

B. Misleading Statements and Deception

Self-promotion is the cornerstone of any business's marketing effort. It's the same way with celebrities. Major stars employ publicists and scores of other personnel whose sole job is to promote the celebrity and get them noticed. As we all know, many will sink to almost any level in order to get attention. As the old saying goes, "Bad publicity is better than no publicity." That's what the drafters of the rules of professional conduct were afraid of.

To a certain extent, lawyers are no different. We need to attract clients and self-promotion is certainly a way of doing that. The drafters know that, if left to our own devices, many attorneys would likely indulge in ethically questionable tactics in order to get noticed and would end up denigrating the integrity of the profession in the process. Thus, it regulates advertising through Rules 7.1 and 7.2. There are other reasons that lawyer advertising is regulated, such as protecting the long standing professional traditions in the practice. The commentary to Rule 7.2 expresses that best when it states, "Advertising involves an active quest for clients, contrary to the tradition that lawyers should not seek clientele." Rule 7.2, Comment [1].

On the other hand, there are reasons to permit attorney promotion such as the desire to encourage competition among lawyers to keep the cost of legal services at a reasonable level for the public and the "interest in expanding public information about legal services" Rule 7.2, Comment [1].

Two rules to be aware of when dealing with attorney advertising are Rules 7.1 and 7.2. Those Rules state:

> ***Rule 7.1. Communications concerning a lawyer's services***
> ***A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.***
>
> ***Rule 7.2. Advertising***
> ***(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.***
> ***(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may***
> ***(1) pay the reasonable costs of advertisements or communications permitted by this Rule;***
> ***(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and***
> ***(3) pay for a law practice in accordance with Rule 1.17.***
> ***(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.***

Basically. Rule 7.2 tells us where we're permitted to advertise. The content of our advertisements, however, must be seen through the prism of Rule 7.1. By way of example, we are permitted to put an ad in an, "electronic communication," per 7.2, but the content of that communication may not contain a "material misrepresentation of fact," per 7.1. One of the underlying goals of these rules is to make sure that attorneys avoid deceptive tactics.

Deception is an issue that was dealt with by the Philadelphia Bar Association as well. In Opinion 2009-02, the bar dealt with permissible actions in the world of social media. What's helpful to attorneys is that the decision hinged on the issue of deception (Note: The opinion is reprinted in its entirety in the Appendix). It's often been difficult to determine when a statement is permissible or so misleading that it violates the code. I think decisions like the Philadelphia opinion give that issue some teeth-- if you intended to deceive, then your statements/actions are probably in violation of the rule.

C. Preying on Vulnerabilities

Popular culture rewards people when they're able to push someone past a breaking point. Well, at least that appears to be true for the paparazzi. In fact, it often seems as if the paparazzi's very reason for existence is to prey on vulnerable celebrities. It seems like they're always hounding someone on their way to a court hearing, sticking a camera lens in their face while trying to navigate a crowd while carrying their small children through a crowd, dealing with a throng of rude fans or otherwise provoking them in situations where the celebrity is under a large amount of stress.

Rather than give the celebrity some space, the paparazzi pushes the celebrity, maybe even taunting them. The reason is clear -- the objective is to push the personality past a breaking point. They purposefully prey upon celebrities in vulnerable situations because what the paparazzi is looking for is the opportunity to capture the resulting meltdown. That objective is wholly rejected in the world of the lawyer. We are categorically prohibited from preying on the vulnerability of another and Rule 7.3 is a great illustration of that concept.

The drafters know that there is a very real risk that lawyers will resort to questionable tactics in their effort to drum up business. That aggressiveness may manifest itself in

misleading advertisements as we discussed in the previous section, but it may also appear in the context of soliciting clients for work. The drafters realized that lawyers might put undue pressure on people in order to convince them to retain the services of the lawyer, so Rule 7.3 was created.

> ***Rule 7.3. Direct contact with prospective clients***
> ***(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:***
> ***(1) is a lawyer; or***
> ***(2) has a family, close personal, or prior professional relationship with the lawyer.***
> ***(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by para-graph (a), if:***
> ***(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or***
> ***(2) the solicitation involves coercion, duress or harassment.***
> ***(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).***
> ***(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.***

Rule 7.3 places different restrictions on different types of conduct. The rule distinguishes the conduct by the ability for the lawyer to coerce the potential client. Thus, subsection (a) addresses the more pressure-filled communication of in-person, live telephone or real time electronic contact. Since the potential to coerce in those instances is so great, the rule outright prohibits that kind of solicitation, unless the lawyer has a close relationship with the prospect.

That restriction exists because there is an inherent potential for abuse in direct interpersonal communication. Rule 7.3, Comment [1]. With in-person communication there is a greater potential that a lawyer could persuade the client in a way that overwhelms the client's judgment. Comment [2].

Note, however that the rule does not prohibit contact with *any* person, rather the rule refers to contact with a "prospective client." Rule 7.3, Comment [1] describes that person as one who is, "known to need legal services." The key here is that the pressing need for legal services puts the prospective client in a more vulnerable mental state. Thus, the purpose of the rule prohibiting solicitation is to protect vulnerable people from being preyed upon.

I want to bring an issue to your attention about Rule 7.3 that I find interesting, even though it's a bit off the beaten path. I'm fascinated with the ethical implications of social media and I see a problem with this rule. Specifically, what is "real time" electronic contact referred to in 7.3(a)? Facebook can fall into either definition. Take an example where " John" posts a status update. "Mary" sees that update an hour later and makes a comment under John's update. Well what if both John and Mary were both on Facebook at their individual computers at the same time. Then John might update his status and Mary might comment within only a few seconds of each other. That situation happens all of the time in the virtual world.

Is "real time" reserved only for when you use the chat function? I doubt that the drafters would intend to limit that phrase to a particular software platform. On the other hand, how do deal with Facebook, which seems to slip in and out of the definition of "real time" and "non-real time" communication at a moment's notice? As you can see, the problem with discussing these ethical issues in social media is that you usually raise more questions than you answer, as we've just done!

D. Bias and Discrimination

Sexual harassment is common on reality TV where characters purposely push the boundaries of good taste and legal conduct. Does that activity rise to the level of unlawful bias? It may be debatable under the circumstances, but one thing that's for sure is that the standard would be far lower for members of the legal profession. Bias and discriminatory behavior would certainly be contrary to the rules of ethics and concepts of professionalism. Unfortunately, however, the reality is that discrimination is still alive in the legal profession.

The most publicized are the battles against age discrimination- mandatory retirement or demotion for graying lawyers. As recently as January of 2010 the EEOC was battling with some large law firms about the permissibility of their mandatory retirement schemes. It seems that there is a loophole in the Age Discrimination in Employment Act that large firms have been using to require that partners retire or get demoted in the later years.

State ethics codes have dealt with discrimination in different ways. For a long time states that adopted the ABA version of the Rule considered discrimination to be conduct that violated Rule 8.4(d) because it was "engaging in conduct that is prejudicial to the administration of justice." However, over the years different states have addressed discrimination in varying ways.

Some jurisdictions have enacted court rules that have codified the prohibition against discrimination, like California's Rule 2-400 entitled, "Prohibited Discriminatory Conduct in a Law Practice," which states:

(A) For purposes of this rule:[2]

(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;

(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal,

the time for filing an appeal must have expired, or the appeal must have been dismissed.

(Discussion Intentionally Omitted)

Clearly, California's approach is to prohibit discriminatory practices in hiring and firing as well as other aspects of management of a law office. However, compare a State like New Jersey, who purposefully took an alternative approach. New Jersey's Rule 8.4(g) reads:

"It is professional misconduct for a lawyer to…(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm."

2 Source: http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf last checked by the author on January 4, 2010.

The commentary explains the rationale for the rule best when it states that, "...the addition of paragraph (g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would…cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm."

The commentary further notes that the state is relying on existing law to deal with employment issues. Thus, New Jersey's approach is to forgo regulating discrimination in employment and instead the state has chosen to address bias and discrimination in interpersonal relationships. I wonder how the reality show stars would fare under this rule!

E. Substance Abuse

You can't shake a stick at any segment of pop culture without hitting a substance abuse issue. Whether it's drugged up rock and roll stars, celebrity rehab-ers or struggling athletes, it's all over the place. The truth is that it's not restricted to popular culture. Unfortunately it's all to common in the practice of law as well and if you've ever heard me speak, then you know what I say-- no seminar on legal ethics is complete unless you at least mention substance abuse in the profession.

Substance abuse is a particularly dangerous pitfall because we're all susceptible. It isn't a malady that's confined to the weak or those with substance abuse in their family history. It's a pitfall that befall us all and there are valuable lessons to be learned by every attorney.

The first critical thing to know is that not all substance abusers start out as addicts. Not all substance abusers have parents who were alcoholics and not all substance abusers end up in the street, losing their jobs families and life savings. Lots do, but not all. Hitting bottom is different for everyone.

For many attorneys substance abuse isn't like a truck that comes out of nowhere and hits them blindside as they cross a street. They don't go to sleep one night the picture of perfect health and wake up the next day a drunk. Quite often it's an insidious, disguised progression that they don't see coming on.

According to the US Department of Health and Human Services, there is no one reason that people become substance abusers, rather there are several risk factors. They include a person's biology, environment and stage of development. There's a lot of talk among scientists about how some people are genetically predisposed to abuse alcohol and having a family history is certainly a factor, but it's not always about your genes. The more risk factors someone has, the greater the likelihood that they'll develop a substance abuse problem, so there's a very real reason for all of us to be aware.

It's critical to realize that alcoholism and substance abuse is very much a disease. Research has come quite a long way in the past decades and it's now generally accepted that alcoholism is actually a disease of the brain. The following information from the National Institute on Drug Abuse and the National Institutes of Health helps us understand the essential elements of this complex malady.

Understanding Drug Abuse and Addiction[3]

Many people do not understand why individuals become addicted to drugs or how drugs change the brain to foster compulsive drug abuse. They mistakenly view drug abuse and addiction as strictly a social problem and may characterize those who take drugs as morally weak. One very common belief is that drug abusers should be able to just stop taking drugs if they are only willing to change their behavior. What people often underestimate is the complexity of drug addiction—that it is a disease that impacts the brain and because of that, stopping drug abuse is not simply a matter of willpower. Through scientific advances we now know much more about how exactly drugs work in the brain, and we also know that drug addiction can be successfully treated to help people stop abusing drugs and resume their productive lives.

Drug abuse and addiction are a major burden to society. Estimates of the total overall costs of substance abuse in the United States—including health- and crime-related costs as well as losses in productivity—exceed half a trillion dollars annually. This includes approximately $181 billion for illicit drugs,1 $168 billion for tobacco,2 and $185 billion for alcohol.3 Staggering as these numbers are, however, they do not fully describe the breadth of deleterious public health—and safety—implications, which include family disintegration, loss of employment, failure in school, domestic violence, child abuse, and other crimes.

What is drug addiction?

Addiction is a chronic, often relapsing brain disease that causes compulsive drug seeking and use despite harmful consequences to the individual who is addicted and to those around them. Drug addiction is a brain disease because the abuse of drugs leads to changes in the structure and function of the brain. Although it is true that for most people the initial decision to take drugs is voluntary, over time the changes in the brain caused by repeated drug abuse can affect a person's self control and ability to make sound decisions, and at the same time send intense impulses to take drugs.

It is because of these changes in the brain that it is so challenging for a person who is addicted to stop abusing drugs. Fortunately, there are treatments that help people to counteract addiction's powerful disruptive effects and regain control. Research shows that combining addiction treatment medications, if available, with behavioral therapy is the best way to ensure success for most patients. Treatment approaches that are tailored to each patient's drug abuse patterns and any co-occurring medical, psychiatric, and social problems can lead to sustained recovery and a life without drug abuse.

Similar to other chronic, relapsing diseases, such as diabetes, asthma, or heart

3 Source: National Institute on Drug Abuse, http://www.drugabuse.gov/infofacts/understand.html last checked January 5, 2010.

disease, drug addiction can be managed successfully. And, as with other chronic diseases, it is not uncommon for a person to relapse and begin abusing drugs again. Relapse, however, does not signal failure—rather, it indicates that treatment should be reinstated, adjusted, or that alternate treatment is needed to help the individual regain control and recover.

What happens to your brain when you take drugs?

Drugs are chemicals that tap into the brain's communication system and disrupt the way nerve cells normally send, receive, and process information. There are at least two ways that drugs are able to do this: (1) by imitating the brain's natural chemical messengers, and/or (2) by overstimulating the "reward circuit" of the brain.

Some drugs, such as marijuana and heroin, have a similar structure to chemical messengers, called neurotransmitters, which are naturally produced by the brain. Because of this similarity, these drugs are able to "fool" the brain's receptors and activate nerve cells to send abnormal messages.

Other drugs, such as cocaine or methamphetamine, can cause the nerve cells to release abnormally large amounts of natural neurotransmitters, or prevent the normal recycling of these brain chemicals, which is needed to shut off the signal between neurons. This disruption produces a greatly amplified message that ultimately disrupts normal communication patterns.
Nearly all drugs, directly or indirectly, target the brain's reward system by flooding the circuit with dopamine. Dopamine is a neurotransmitter present in regions of the brain that control movement, emotion, motivation, and feelings of pleasure. The overstimulation of this system, which normally responds to natural behaviors that are linked to survival (eating, spending time with loved ones, etc.), produces euphoric effects in response to the drugs. This reaction sets in motion a pattern that "teaches" people to repeat the behavior of abusing drugs.

As a person continues to abuse drugs, the brain adapts to the overwhelming surges in dopamine by producing less dopamine or by reducing the number of dopamine receptors in the reward circuit. As a result, dopamine's impact on the reward circuit is lessened, reducing the abuser's ability to enjoy the drugs and the things that previously brought pleasure. This decrease compels those addicted to drugs to keep abusing drugs in order to attempt to bring their dopamine function back to normal. And, they may now require larger amounts of the drug than they first did to achieve the dopamine high—an effect known as tolerance.

Long-term abuse causes changes in other brain chemical systems and circuits as well. Glutamate is a neurotransmitter that influences the reward circuit and the ability to learn. When the optimal concentration of glutamate is altered by drug abuse, the brain attempts to compensate, which can impair cognitive function. Drugs of abuse facilitate nonconscious (conditioned) learning, which leads the user to experience uncontrollable cravings when they see a place or person they

associate with the drug experience, even when the drug itself is not available. Brain imaging studies of drug-addicted individuals show changes in areas of the brain that are critical to judgment, decisionmaking, learning and memory, and behavior control. Together, these changes can drive an abuser to seek out and take drugs compulsively despite adverse consequences—in other words, to become addicted to drugs.

Why do some people become addicted, while others do not?

No single factor can predict whether or not a person will become addicted to drugs. Risk for addiction is influenced by a person's biology, social environment, and age or stage of development. The more risk factors an individual has, the greater the chance that taking drugs can lead to addiction. For example:

- *Biology. The genes that people are born with—in combination with environmental influences—account for about half of their addiction vulnerability. Additionally, gender, ethnicity, and the presence of other mental disorders may influence risk for drug abuse and addiction.*

- *Environment. A person's environment includes many different influences—from family and friends to socioeconomic status and quality of life in general. Factors such as peer pressure, physical and sexual abuse, stress, and parental involvement can greatly influence the course of drug abuse and addiction in a person's life.*

- *Development. Genetic and environmental factors interact with critical developmental stages in a person's life to affect addiction vulnerability, and adolescents experience a double challenge. Although taking drugs at any age can lead to addiction, the earlier that drug use begins, the more likely it is to progress to more serious abuse. And because adolescents' brains are still developing in the areas that govern decisionmaking, judgment, and self-control, they are especially prone to risk-taking behaviors, including trying drugs of abuse.*

Prevention is the Key

Drug addiction is a preventable disease. Results from NIDA-funded research have shown that prevention programs that involve families, schools, communities, and the media are effective in reducing drug abuse. Although many events and cultural factors affect drug abuse trends, when youths perceive drug abuse as harmful, they reduce their drug taking. It is necessary, therefore, to help youth and the general public to understand the risks of drug abuse, and for teachers, parents, and healthcare professionals to keep sending the message that drug addiction can be prevented if a person never abuses drugs.

IV. The most enduring pop idols exhibit the behaviors promoted by the ethics rules

Believe it or not, but there are good things about popular culture. It's not all about substance abuse and bias and negative stuff. Many of the most popular sports figures and celebrities exhibit behavior that's worthy of consideration. Concepts like pursuing excellence, being innovative, maintaining credibility, selflessness and loyalty. You probably saw this coming but, coincidentally, these behaviors are reflected in our rules of professional conduct. We see these behaviors exhibited in everything from Competence to Conflicts. The rules that advocate those positive behaviors provide a roadmap for professional success.

What follows below is a discussion about the six most important bits of direction we get from the rules of professional conduct: Pursue a sense of mission, be your best, take care of yourself, live a rich life outside the office, be vigilant and focus on the present.

#1: Pursue a Sense of Mission

After the NFL's New Orleans Saints won the 2009 Superbowl ,the star quarterback, Drew Brees, explained part of the team's motivation to win. The team was motivated by their personal desires, of course, but they also played for the struggling people in New Orleans who were still reeling from the effects of hurricane Katrina. That sense of mission, of pursuing a goal that was larger than themselves, was a significant factor in their ultimate success. Similarly, I believe that if we are to achieve long term success in the law and an enduring sense of satisfaction in our lives, we must each must pursue some sense of mission about the law.

The practice of law is uniquely suited to pursuing a sense of mission…since we are a "representative of clients" as the Preamble to the rules states, we have another person's interests on our mind almost by default . Service of your clients in general could certainly be

you mission, but it could also be more tailored. You could be committed to rehabilitating the image of lawyers, helping those suffering domestic abuse or even a less flashy goal of being committed to making real estate transactions less burdensome. It doesn't matter what the mission, as long as you have one and it has an element of selflessness.

A significant problem with pursuing a sense of mission, however, is cynicism. Cynicism is rampant in our profession and it holds many of us back from pursuing a mission that is larger than ourselves. However, there's a way to beat that cynicism—by keeping the nobility of our profession alive in your heart.

The ethics rules help us keep the fire burning in the hearts of lawyers because they are a constant reminder of the nobility of our profession. They do that by showing us that our role is critical to society and that we occupy an exalted position.

The rules show us how our role is critical to society in Comment 13 to the Preamble when it states, "Lawyers play a vital role in the preservation of society." It makes sense, after all, we are a society of laws and lawyers hold together the fabric of a society based on laws. We can see how distinguished our position is when we realize that we are "a public citizen having special responsibility for the quality of justice," a sentiment also mentioned in the commentary. We're not just any public citizen with normal civic duties, rather, when you take that oath you acknowledge that you have a special responsibility to society. But how does this belief in the importance of our profession lead to practical success?

If you believe in the nobility of the profession, you are more likely to follow a sense of mission about the law. The level of pride you feel in the profession and the dedication you have to that mission is directly related to the amount of dedication you will have to your craft and ultimately, to your clients. That dedication is what yields the results you crave, whatever their form. A sense of mission propels lawyers to greatness.

#2: Be Your Best

The rules want us to be our best. It is just that simple.

The ethics rules encourage lawyers to perform at optimal levels in two ways. The most popular incentive is the negative incentive. If you fail to perform appropriately and abide by the rules, you will be disciplined. However, the rules also show us that there are certain steps we can take that will cause us to be the best. The place to look in that regard are a group of rules that I call "The Grand Troika" – Rule 1.1 Competence, 1.3 Diligence and 1.4 Communication.

> ***RULE 1.1 COMPETENCE***
> ***A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.***
>
> ***RULE 1.3 DILIGENCE***
> ***A lawyer shall act with reasonable diligence and promptness in representing a client.***
>
> ***RULE 1.4 COMMUNICATION***
> ***(a) A lawyer shall:***
> ***(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;***
> ***(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;***
> ***(3) keep the client reasonably informed about the status of the matter;***
> ***(4) promptly comply with reasonable requests for information; and***
> ***(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.***
> ***(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.***

Let's start with Rule 1.1, "Competence." I think it's important to take a moment to talk about the term, "competent" because I think it's gotten a bad rap. Competent seems to have

been denigrated to mean something like “good enough to get by,” but I don’t agree. A better definition would be, “adequate,” but even that sounds like it falls short. I believe that competency is a much higher standard and it only takes a quick look at Rule 1.1 to see what I mean. That Rule states, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” When an attorney performs according to that standard, they are providing quality legal reputation. Anything less is not competent representation.

Of course, when one goes beyond what’s “reasonably necessary,” and provides thorough, high caliber legal services, an attorney transcends competence and provides superior representation. That should be our goal as attorneys—to constantly strive to provide better-than-acceptable representation for our clients.

Let’s get back to the elements of contained in what I call the “Grand Troika” of Attorney Performance—the Rules regarding competence, diligence and communication (Rules 1.1, 1.3 and 1.4). When one breaks down the Rules, one sees that those basic elements are: legal knowledge, skill, thoroughness, preparation, diligence, promptness and the need to inform and consult the client.

A wise counselor would take the elements that are set forth in the “Grand Troika” of Rule1.1, 1.3 and 1.4 and formulate a checklist. If you do so, you’ll see that the contents of these Rules don’t just serve as a list of minimum standards for “acceptable” representation, rather, they provide direction for attorneys to give “complete” representation to clients as well.

The following idea may be a bit off the beaten path, but I want to make sure I mention something about Rule 1.4, Communication. Here’s a tip that will improve your relationship with your client and also help you fulfill your ethical requirement to communicate with your client. When I first take a client, I like to send a short letter to them that summarizes my

understanding of their case. That includes the relevant facts, the legal issues as I see them and also a recap of the client's objectives as I understand them. In a situation where I've already discussed the possibility of negotiation, I also try to include a short summary of the parameters that the client's given me as well. Also, I rehash any risk tolerances that may be relevant.

That process lets the client know that you're engaged in their matter and it can only serve to enhance the attorney/client relationship. From a selfish point of view, the letter you send helps you document that you've fulfilled sections of Rule 1.4, which require that an attorney, "reasonably consult with the client about the means by which the client's objectives are to be accomplished," Rule 1.4(a)(2), and that counsel explain matters as required by Rule 1.4(b). Finally, a periodic follow up letter in that regard will ensure that you "keep the client reasonably informed about the status of the matter," as required by Rule 1.4(a)(3).

#3: Take Care of Yourself

The most basic of attorney responsibilities is that "A lawyer...is a representative of clients."[4] We are an agent for someone else-- it's the very core of the attorney-client relationship. When you think about it, there is no 'single' part of the attorney's our psyche that's devoted to addressing the concerns of our client. Rather, we have been trained to dedicate *every* part of our mental make-up to serving our clients. Because of this unique aspect of our job, most of the practice requires a heightened state of awareness that's not necessarily in the forefront of the consciousness of other professionals. Whether it's in the courtroom or the conference room we are constantly asked to think on our feet and provide instantaneous reactions to some prompting.

4 Preamble, Comment [1]

If we fail to maintain a heightened state of awareness-- if we fail to maintain a state of mind that allows us to exercise the judgment upon which our clients depend, then we are failing at the most basic of attorney duties, the competence we owe our client (Rule 1.1). Unfortunately, the reality is that an attorney who is suffering from mental and emotional problems is likely to slack off in that regard. Emotional instability can very often lead us to letting our guard down and the likelihood of making gaffes that damage our client are increased if you're in a bad mental place.

Quite simply, we must acknowledge the following basic truth: If you don't take care of the machine, you can't expect it to work properly. If your machine doesn't work properly, you fail yourself and your client. This, it is critical for us to take care of ourselves mentally and emotionally if we expect to be able to function at optimal levels and exhibit the other behaviors that are emphasized by the rules.

#4: Live a Rich Life Outside of the Office

No one is defined completely by their career. Let me rephrase that. No one *sane* is defined completely by their career. Unfortunately, attorneys have a real, and dangerous tendency to have their entire identity overwhelmed by their career. However, if we can't find enjoyment in other areas of our lives and we're completely absorbed with the stresses of the practice of law, then we enter the danger zone where things like substance abuse starts to rear its head. This is why Lawyer's Assistance Programs have jobs – because most of us don't appreciate that to function properly, your brain needs a rest.

Your continued performance at levels that are mandated by the ethics rules is directly contingent upon a relief valve of sorts. The truth is that If you don't voluntarily find a healthy outlet— a productive place to seek refuge from the practice, then your brain will find a

way for you to escape and it may not always take you to a good place. These diversions are the glue that keeps or head attached properly. Living a rich life outside of the office keeps our psyche intact and allows you to comply with our professional and ethical mandates.

#5: Have an Assertive Attitude: Be Vigilant.

There is an Evil Trilogy of bad habits that absolutely plagues our profession and we just can't seem to shake them. They are Distraction and Procrastination and Neglect and there's something about the practice of law in particular that makes us wildly susceptible to those traits. It's so bad that they ethics rules specifically discuss these matters in the commentary when it states, "Perhaps no professional shortcoming is more widely resented than procrastination."[5]

As usual, the ethics rules provides helpful direction. The rules say that the behavior lawyers should exhibit that will counteract procrastination and neglect is to be diligent. Rule 1.,3 states that, "A lawyer shall act with reasonable diligence and promptness in representing a client." If you search further you'll see that Black's Law Dictionary defines diligence as "a continual effort to accomplish something." The key phrase there is "a continual effort"-- that's what being diligent is all about….engaging in an effort.

Dig through the text and you see the sentiment of a "continual effort" all over the rules. Throughout the code you see references to "commitment," "dedication," "zealousness." So what it says to me, when you put all of this text together, is that the answer to this quandary is that attorneys must always act with relentless determination. That's about an unyielding pursuit of your client's interest-- it's almost being a fanatic about it.

Apply that theory to Procrastination: The only way to get past procrastination is to

5 Rule 1.3, Comment [3].

kill it outright. You can't make a half-hearted attempt at procrastinating less because that's probably that type of approach that got you to develop the bad habit in the first place. You've got to declare a personal war on procrastination-- the only way you will beat it is by being relentlessly determined to stop. You can apply the theory to neglect as well. If you are relentlessly determined to prepare for every matter in your office then, by definition, you will never neglect another file.

#6 Focus on the Present

The ethics rules provide more direction for us when we talk about defeating the final leg of the Evil Trilogy, distraction. The direction there is about "focus."

We take on a lot of files. We have a myriad of different clients and issues swarming around at any given time. People are clamoring to get our attention at every hour of the day (and night). That reality hampers our ability to be prompt in responding to our clients, it affects our ability to meet deadlines and it's a big contributor to the neglect so commonly leads to disciplinary violations. It's absolutely devastating to a lawyer—ultimately there's a lack of concentration, which is deadly in a profession where attention to every detail is critical.

What do the rules say? The rules allude to the need to focus. The code state that, "a lawyer should carry through to conclusion all matters undertaken for a client."[6] It doesn't say, *a lawyer shall give partial effort to a matter and leave it half way through.* It says "carry through," meaning *stay with it...focus...execute and complete.* Focusing on the present moment is the key to eliminating distraction.

6 Rule 1.3, Comment [4]

APPENDIX

THE PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE[7]

Opinion 2009-02
(March 2009)

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

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

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

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

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

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

7 Used with permission. Philadelphia Bar Association, all rights reserved. The opinion is reprinted in its entirety.

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

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that, With respect to a nonlawyer employed or retained by or associated with a lawyer:…(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; …

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

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

Rule 8.4. **Misconduct** provides in part that,
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; …
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; …

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

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not

sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

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

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

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; …

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

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a.[8] The Committee is aware that there is con-

---

8 The Committee also considered the possibility that the proposed conduct would violate Rule 4.3,

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

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

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

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

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

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

"The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order. As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice – this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania's Rule 8.4], and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree." The opinion can be found at http://www.publications.ojd.state.or.us/S45801.htm

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

---

person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

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

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

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

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

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

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