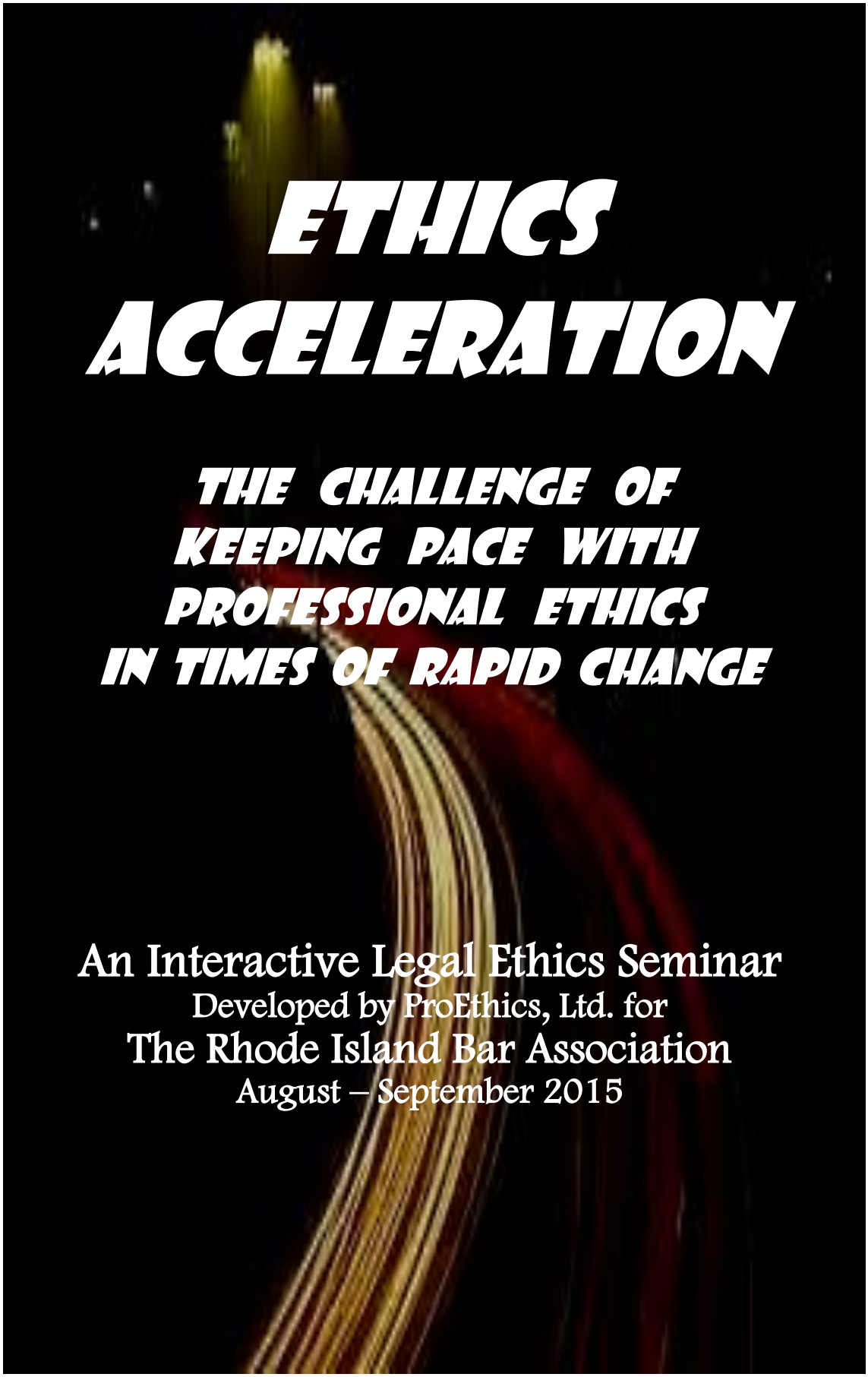


ETHICS ACCELERATION

THE CHALLENGE OF KEEPING PACE WITH PROFESSIONAL ETHICS IN TIMES OF RAPID CHANGE

An Interactive Legal Ethics Seminar

Developed by ProEthics, Ltd. for

The Rhode Island Bar Association

August – September 2015

ETHICS ACCELERATION

THE CHALLENGE OF KEEPING PACE WITH PROFESSIONAL ETHICS IN TIMES OF RAPID CHANGE

A Three-Hour Interactive Legal Ethics Seminar
Developed for The Rhode Island Bar Association
By ProEthics, Ltd.

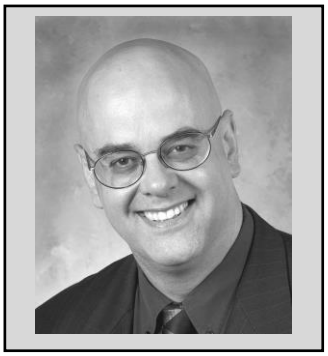
August 6, 2015 – Roger Williams University School of Law
August 7, 2015 – University of Rhode Island
September 15, 16, 17, 2015 – Rhodes on the Pawtuxet

For information about ProEthics and its
various ethics seminars, materials
and consulting services,
please contact:

ProEthics, Ltd.
2707 Westminster Place
Alexandria, Virginia 22305
703-548-5229
jamproethics@verizon.net - or - gbmcoo@verizon.net
www.proethics.com

TODAY'S SCHEDULE

1. Warm-Up Hypothetical: "*Fans on the Bench and in the Box*"
2. Speed Bumps: Impediments to Ethical Conduct
3. Hypothetical: *"Sonny Boy"*
4. Hypothetical: *""Both Sides Now"*
5. Accelerating Developments
6. Quiz: "*Disclosure Threshold*"
7. Tech Acceleration: *"Speed Test"*
8. Hypothetical: *"Suing Whoopie"*
9. Hypothetical: *"The Weenie"*
10. Concluding Remarks and Discussion



YOUR FACILITATOR
JACK MARSHALL, ESQ.
PRESIDENT, PROETHICS, LTD.

Jack Marshall is the president and founder of ProEthics, Ltd., and the primary writer and editor of the ethics commentary blog, Ethics Alarms (www.ethicsalarms.com). He has taken the experience gleaned from a diverse career in law, public policy, academia and theater and applied it to the field of legal, business and organizational ethics. He has developed more than 160 programs for bar associations, law firms, government agencies, Fortune 500 companies, and non-profit organizations. He has worked to develop rules of professional responsibility for attorneys in emerging African democracies through the International Bar Association, and for the new judiciary of the Republic of Mongolia through USAID. With Pulitzer Prize-winning historian Edward Larson, Marshall compiled and edited The Essential Words and Writing of Clarence Darrow (Random House, 2007), and he was recently named to the "Top 100 Thought Leaders in Trustworthy Business" (www.trustacrossamerica.com).

A member of the Massachusetts and D.C. Bars, Mr. Marshall has been on the adjunct faculty of the Washington College of Law at the American University in Washington, DC. Marshall is a graduate of Harvard College and Georgetown University Law Center. His articles and essays on topics ranging from leadership and ethics to popular culture have appeared in numerous national and regional publications, and he has appeared on a variety of talk shows to discuss ethics and public policy, from "The O'Reilly Factor" to National Public Radio's "Tell Me More."

He is also an award-winning stage director, and is the artistic director of The American Century Theater, a professional non-profit theater company dedicated to producing classic American plays. He lives in Alexandria, Virginia with his wife and business partner, Grace Marshall, their son Grant, and their Jack Russell Terrier, Rugby. Like many who are interested in the nature of good, evil, justice, and chaos, Marshall is a lifetime fan of the Boston Red Sox.

1. WARM-UP HYPOTHETICAL

"FANS ON THE BENCH AND IN THE BOX"

A. Mike Crocosim frequently appears before the Federal Circuit, where by all accounts he is a stellar advocate. Mike argued two cases back-to-back on behalf of a firm client. to a Federal Circuit panel comprising Judges Gadsden, Lattimer, and Howard.

Following the resolution of the case, Chief Judge Carling emailed Mike saying that one of his colleagues had remarked over lunch on Mike's superb reasoning and presentation. The subject of the email was "A job well done" and it read,

Dear Michael,

On Wednesday, as you know, the judges meet for a strictly social lunch. Today, in the midst of the general banter, one of my colleagues changed the subject and said to me that she was hugely impressed with the advocacy of "your friend, Mr. Crocosim." She noted that you had handled two very complex cases, back to back and alone against tough opposition backed by multiple assistants. She was impressed that you knew the record cold and handled every question with confidence and grace.

Another judicial colleague immediately echoed her enthusiasm over your performance. I then added the little enhancement that you can do the same thing with almost any topic of policy. I was really proud to be your friend (and also your professor in law school) today, as you bring great credit on yourself and all associated with you!

Thus I encourage you to let others who might benefit from engaging you through your firm to see this message.

Your admiring friend.

Thrilled and flattered, Mike circulated the email to numerous existing and prospective clients, with the heading, "Thought you would be interested in this." The majority of the more than 70 individuals who received the communication were lawyers, but some were not.

B. Bella D'ball tried a civil case, defending her corporate clients against a class action lawsuit asking for massive product liability damages. She won. Three weeks later, a juror on the case sends her a message on Facebook and expresses an interest in meeting "for drinks." Bella, who is unmarried and recently ended a long-term relationship, remembers the juror, and that she found him attractive as well as sympathetic to her case during the trial.

She accepts his invitation.

QUESTION: *Have Mike or Bella, or both, violated any ethics rules?*

1. No.

2. Mike has, but not Bella

3. Bella has, but not Mike

4. Both Mike and Bella have violated ethics rules.

5. Neither violated a rule, but I wouldn't do what they did.

R.I. Rules of Professional Conduct:
1.1, 1.2, 1.3, 3.3, 3.5, 8.4

2. SPEED BUMPS!
IMPEDIMENTS TO ETHICAL CONDUCT

A. PRE-UNETHICAL CONDITIONS

1. Relying on consent to alleviate conflicts.
   (R.I. Rules 1.17, 1.8, 1.9, 1.10)

2. The Unethical Supervisor
   (R.I. Rules 5.1,5.2)

3. Failing to properly train non-lawyer assistants.
   (R.I. Rules 1.1, 5.3, 8.4)

4. Being rushed, pressured, or distracted.
   (R.I. Rules 1.1, 1.2, 1.4, 1.14, 2.1, 8.4)

5. Forgetting you are a professional.
   (R.I. Rules 1.2, 1.3, 1.7, 5.1, 5.2, 8.4)

B. RATIONALIZATIONS FOR UNETHICAL CONDUCT

(The Ten Most Tempting Rationalizations For Lawyers)

- *Everybody Does It*
- *Ethics Balancing*
- *"Don't sweat the small stuff."*
- *The Unethical Tree In The Forest*
- *"Tit for Tat"*
- *The King's Pass*
- *The Saint's Excuse*
- *Consequentialism*
- *"He/she would have done the same thing."*
- *"It's not the worst thing."*

3. HYPOTHETICAL
"SONNY BOY"

Infuriated by his mother's cruelty to his father, attorney Midas Touch has decided to represent his father in the divorce action initiated by her. Midas had spent many hours listening to his mother's complaints as she sought his advice, and has also observed her outrageous treatment of his father in recent months. She challenges the representation on ethical grounds.

QUESTION: *Should his representation be barred?*

1. Yes. There is a conflict of interest.

2. Yes. She has shared confidential information with him.

3. Yes. He may have to be a witness.

4. No. No ethics rules are violated by the representation.

5. It may be permitted by the Rules, but it's still unethical.

R.I. Rules of Professional Conduct:
1.2, 1.3, 1.4, 1.6, 1.7, 1.8. 1.9, 3.7, 8.4

4. HYPOTHETICAL
"BOTH SIDES NOW"

In 2009, a court in Lago Agrio, Ecuador, ordered Chevron to pay billions to repair environmental damage and to deal with public health problems in the rainforest region of Sucumbios, where it had drilled for decades. Gibson, Dunn & Crutcher came on to appeal this judgment in *Chevron v. Donziger*, and sought an injunction in the Southern District of New York against collection of the award under federal anti-racketeering law.

Lawyers for the Ecuadoreans have argued that RICO law does not permit injunctive relief even if Chevron's claims were true.

Meanwhile, four plaintiffs accused a debt-buying company, a law firm, a process-service company and others of scheming to net fraudulent default judgments against them and more than 100,000 other consumers in the case of *Monique Sykes v. Mel Harris and Associates LLC*. In 2012, a judge certified the Sykes class on claims carrying the possibility of injunctive relief, declaratory relief and damages.

The defendants in that case retained appellate lawyers from Gibson Dunn, whose Washington-based partner Miguel Estrada signed his name to a 52-page 2nd Circuit brief that essentially duplicated the arguments made by the Ecuadorians in the Chevron case, saying…

"Indeed, the text and history of the RICO statute show that Congress affirmatively decided not to authorize private injunctive claims - a conclusion that the Ninth Circuit and the United States have correctly reached. This court has twice remarked that RICO 'likely' was not intended to provide private parties injunctive relief. It should now confirm that private RICO claims for injunctive relief fail as a matter of law, and thus that district courts cannot certify a class action raising such claims."

On February 10, 2015, the 2nd Circuit affirmed the certification in the Harris case. Gibson Dunn's client lost.

QUESTION: *Has Gibson Dunn violated any ethics rules?*

1. Yes. Taking on the Harris appeal created a positional conflict with its representation of Chevron.

2. No. A separate Gibson Dunn team, in a different case, involving different clients has no relevance to its RICO claims in the Chevron case.

3. Yes. Taking on the anti-Rico position in Harris, the firm had acknowledged that their prosecution of the *Chevron v. Donziger* case has wasted its client's time and resources and constitutes an abuse of the civil justice system.

4. No, because the decision in Harris won't hurt Chevron.

5. I have another answer.

R.I.. Rules of Rules of Professional Conduct 1.1, 1.2, 1.13, 1.7, 8.4

REFERENCE: D.C. Bar Opinion 265

Positional Conflicts of Interest in Simultaneous Representation of Clients Whose Positions on Matters of Law Conflict With Other Clients' Positions on Those Issues in Unrelated Matters

When a lawyer is asked to represent an entity that takes positions on matters of law in a subject area in which the lawyer practices regularly on behalf of other clients, the lawyer may not, without the informed consent of all affected parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely affect the representation of the other….

2. Positional Conflicts in General

A traditional notion in the law of legal ethics holds that there is nothing unseemly about

a lawyer's taking directly opposing views in different cases so long as the lawyer does not do so simultaneously. Thus, a lawyer who is a prosecutor may urge that the death penalty be imposed in appropriate criminal cases. If the lawyer then leaves the government and moves to a private firm, there would be nothing improper about the lawyer's subsequently urging that the death penalty was unconstitutional in all cases despite having argued the contrary as a prosecutor.

The movement from one office to another is not necessary to legitimize this change of positions on a particular issue. A lawyer engaged by a plaintiff in a particular personal injury case may be called upon to argue that punitive damages should be awarded in copious amounts. Once that engagement has been concluded, the same lawyer may urge on behalf of a subsequent civil defendant that punitive damages ought to be eliminated entirely. Lawyers are hired by clients to take positions and are not necessarily expressing their own personal views when they advocate on behalf of clients.

However, a different sort of problem may arise when the lawyer simultaneously argues inconsistent positions on behalf of two different clients. The lawyer's credibility, and therefore the lawyer's ability to represent the lawyer's two clients effectively, may be undermined by the lawyer's appearing simultaneously, or virtually simultaneously, to argue two totally inconsistent positions. Moreover, a successful outcome for one client could prejudice the other.

The paradigm case is that of the lawyer who argues a case to a court of appeals, arguing that the court ought to reach a certain conclusion of law. In this paradigm, the oral argument in the first case is concluded, the clerk calls the next case, and the same lawyer returns to the podium representing another client, this time on the opposite side of the identical issue, to urge a position that is flatly inconsistent with the one that the lawyer took five minutes ago before the same appellate panel. In that situation, one or both of the clients is thought to have been deprived of effective representation.

While these concepts are fairly easy to perceive in the paradigm example given, they become more attenuated and less easy to define as one moves away from the paradigm example given above. Can a lawyer simultaneously urge inconsistent positions before two different appellate panels in the same court? Generally, it is thought that the lawyer cannot do so because of the communication that goes on between members of different appellate panels and because of the deference that one panel would give to the decision of another.

The commentary to the American Bar Association conflicts rule would seem to limit this problem to appellate courts. ABA Model Rule 1.7, Comment [9]. However, legal scholars have widely criticized this comment, pointing out that a functional analysis is more appropriate than one that turns entirely upon the nature of the court, Underwood & Fortune, *Trial Ethics* § 3.4.3 at 84 (1988), Wolfram, *Modern Legal Ethics* 355 n.41 (1986); the ABA's Ethics Committee has indicated that the comment cannot be read literally (*see* ABA Opinion 93-377); and the comment was dropped from the District of Columbia version of Rule 1.7.

What if one of the representations is in the trial court and the other is in a directly superior appellate court? It is possible that a lawyer may not be fully effective in this

circumstance since a favorable decision for one client in the appellate court could directly undermine the lawyer's efforts on behalf of the other client in a subordinate trial court. A third and more difficult situation is posed where the lawyer simultaneously takes inconsistent positions before two different judges of the same trial court. Even in this case, simultaneous inconsistency may in some cases be undesirable because co-ordinate judges of the same trial court, while not strictly bound by the decisions of their fellow judges may, nevertheless, pay considerable deference to them, and one or the other of the lawyer's two clients may thereby be adversely affected.

The conflicts rules implement ethical norms that are contained in other rules. For instance, Rule 1.3 speaks of a lawyer being diligent and zealous on behalf of his client. It is difficult to know how a lawyer could be equally diligent and equally zealous on behalf of two clients when simultaneously taking inconsistent positions before the same court, where the results of the lawyer's representation of one client will directly and adversely impact another client of the same lawyer.

The answer to the problem posed turns upon the likelihood that the representation of one client will, in some foreseeable and ascertainable sense, adversely affect the lawyer's effectiveness on behalf of the other. The mere possibility that a result in one representation will affect the outcome of another is not enough to trigger a conflict as to which waiver must be sought. But if an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other, then a cognizable conflict arises under our rules, and disclosure must be made and a waiver sought.

Central to deciding whether adverse effect, and therefore a conflict, exists will be issues such as: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation.[6] In sum, we believe that the 6 focus of the analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients. …

5. ACCELERATING DEVELOPMENTS

- Life imitates Saul
- The Atticus Finch dilemma
- Intra-firm privilege
- The docket mistake
- Shocking misconduct in Utah
- The public's ignorance of legal ethics kills
- The Reason debacle
- Throwing the client under the bus
- The Hastert Affair: Settlement or extortion?

6. QUIZ
"DISCLOSURE THRESHOLD"

A. "NICK AND THE NANNY"

Nick, married with six kids, had an affair with Poppins, his nanny. Lawyer Mel Likillikimaka represented Nick in defending against divorce and domestic violence charges by his wife, Nora. But the love birds reconciled, and the action was terminated.

Then Mel, Nick's lawyer, agreed to represent Poppins the now ex-nanny in a divorce action against *her* husband, Bert. That divorce went through to completion, with Bert was ordered to pay temporary support for their child, little Michael.

But Michael's father was really *Nick.* Poppin's old employer and occasional lover. Mel discovered the truth subsequent to the hearing in which Bert had been ordered by the court to pay child support. He informed Bert's attorney -- but not the court -- and advised Poppins that she could no longer collect child support from Bert, that she would be required to reimburse him, and that it would be necessary to file an action to legally establish Nick as the father. Poppins and Bert worked out a settlement, agreeable to both, accomplishing these ends.

Mel then represented Nick at the hearing where his paternity for Poppins's child was established.

Now Nora filed a new divorce action, for the reconciliation didn't last. Her lawyer attempted to intervene in Nick's child support matter requiring him to pay for the nanny's child, claiming that the arrangement had been made to ensure that Nick's child support payments to Poppins took precedence over any financial obligations to Nora. The judge in the case contacted the judge who made the original child support order burdening Bert with paying for the child that wasn't his. The judge was furious that nobody,

including Mel, had told that judge that Poppins had lied in his courtroom. He filed a complaint with the bar against Mel.

B. "THE FLEXIBLE CLIENT"

Sheila Mazue refused to let her habitually dishonest client testify in the civil matter, and was shocked when he was called by opposing counsel as an adverse witness. Sure enough, the liar lied his head off, and opposing counsel couldn't put a dent in his testimony. Indeed, his testimony was helpful, probably decisive to Sheila's case. "All I have to do is leave it alone and we win," she thought. "Probably can't refer to his testimony in my closing, though. Or can I? Never mind -- don't need to."

QUESTION: *Is Mel's and Sheila's conduct consistent with their ethical obligations?*

1. Yes. Neither had an obligation to disclose to the court under those circumstances.

2. No. They are both in violation of Rule 3.3.

3. Mel is in the clear, but Sheila had to disclose.

4. Sheila had no obligation to disclose, but Mel did.

5. I have another answer.

R.I. Rules of Professional Conduct:
1.2, 1.3, 1.4, 1.6, 1.7, 1.9, 1.16, 2.1, 3.3, 4.1, 8.4

REFERENCE

New York City Bar Formal Opinion 2013-2

A lawyer's obligation to take action if, after the conclusion of a proceeding, the lawyer comes to know that material evidence offered by the lawyer, the lawyer's client or a witness called by the lawyer during the proceeding was false.

DIGEST: *When counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take "reasonable remedial measures," which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.*

QUESTION: *If a lawyer, a lawyer's client or a witness called by the lawyer offered material, false evidence in a proceeding before a tribunal, and the lawyer comes to know of the falsity after the proceeding has concluded, is the lawyer obligated to take action and, if so, what action must the lawyer take?*

OPINION:

Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"), with limited specified exceptions, prohibits a lawyer from revealing "confidential information," which the rule defines as "information gained during or relating to the representation of a client, whatever its source" that is protected by the attorney client privilege, or that is likely to embarrass or harm the client if disclosed, or that the client has asked to be kept confidential. Rule 3.3(a)(3) creates a disclosure obligation: "If a lawyer, a lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." (Emphasis added.)[1] Rule 3.3(c) makes clear that this obligation trumps a lawyer's duty of confidentiality. Specifically, Rule 3.3(c) states that the remedial obligation in Rule 3.3(a) applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." To "know" of the falsity of proffered evidence, the lawyer must have "actual knowledge of the fact in question," but such knowledge "may be inferred from circumstances." Rule 1.0(k).

Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result. If the false evidence is material, it makes no difference if the falsity was intentional or inadvertent – in either instance, the lawyer who discovers the falsity has a duty to act under the Rule.

Rule 3.3 represents a significant change from the predecessor rule in the Code of Professional Responsibility, which provided that the lawyer was required to "reveal the fraud to the … tribunal, except when the information is protected as a confidence or secret."[2] Before April 1, 2009, when New York adopted the Model Rules format and amended a number of its rules, a lawyer's obligation to make disclosure to the tribunal was subordinate to the lawyer's duty of confidentiality to the client. Since April 1, 2009, when the courts promulgated Rule 3.3(c), under certain narrow circumstances the lawyer's duty to protect the integrity of the adjudicative process trumps the lawyer's duties of confidentiality and loyalty to the client. Indeed, Rule 1.1(c)(2) acknowledges that a lawyer has a duty not to harm the client "except as permitted or required by these Rules," and Rule 1.6(b)(6) expressly allows a lawyer to reveal confidential information 'when permitted or required under these Rules or to comply with other law or court order."

Moreover, unlike in other jurisdictions, Rule 3.3 is the only mandatory exception in New York to the obligation of confidentiality contained in Rule 1.6.[3] As the unique nature of Rule 3.3 suggests, the obligation to take reasonable remedial measures is premised on "the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence." Rule 3.3, cmt. [5] (emphasis added.) This exception to the lawyers' obligation of confidentiality, which is one of a lawyer's bedrock obligations, is intended to protect the integrity of the adjudicative process. Significantly, the adjudicative process is not limited to proceedings before courts. Instead, Rule 1.0(w) defines a "tribunal" as including not only courts, but also arbitral panels, and legislative, administrative and other bodies acting in an adjudicative capacity. Indeed, the adjudicative process includes proceedings before the tribunals listed in Rule 1.0(w) as well as ancillary proceedings conducted pursuant to the tribunal's adjudicative authority, such as depositions. Rule 3.3, cmt. [1]. The obligation to make disclosure set forth in Rule 3.3, therefore, applies across a broad spectrum of settings and should be parsed carefully.

Finally, Rule 3.3 is silent on when the obligation to take remedial action ends. ABA Model Rule 3.3(c) states that the obligation to take remedial action required by Rule 3.3(a)(3) only continues "to the conclusion of the proceeding,"[4] but that phrase is absent from New York's formulation. Although the rules of professional conduct for lawyers that have been adopted in most states include the ABA endpoint language in their version of Rule 3.3, a few (Florida, Illinois and Texas[5]) explicitly extend the obligation beyond the conclusion of a proceeding. Only Virginia and Wisconsin have, like New York, adopted versions of Rule 3.3 that are silent on whether the obligation survives beyond the proceeding.[6]

ANALYSIS

1. How Long Does the Obligation Under Rule 3.3(a)(3) Last?

As a preliminary matter, we conclude that the obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented… The State Bar ethics committee has reached the same conclusion. See N.Y. State 831 n. 4(2009) (obligation continues "for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever.") and N.Y. State 837 at ¶16 (2010) ("the endpoint of the obligation

nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3.").
We agree with the State Bar and conclude that the obligations under Rule 3.3 do not continue forever. Instead, because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable "remedial" measure is no longer available….

2. What Measures Should a Lawyer Take Upon Discovering that Material False Evidence was Presented?

…Before making any disclosure pursuant to Rule 3.3(a)(3), the lawyer should first remonstrate with the client and seek the client's cooperation in making a disclosure that will correct the record. See Rule 3.3, cmt. [10] (upon learning of the falsity of material evidence, the "proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action.").

Disclosure to the tribunal under Rule 3.3(a)(3) is only appropriate "if necessary." See N.Y. State 837 at ¶20 (2010) (affirming lawyer's withdrawal of false evidence where practical so that explicit disclosure is not necessary). Once a proceeding is concluded, it is too late for an attorney to withdraw the material evidence or make clear that the evidence is not being relied upon. …Accordingly, disclosure to the tribunal is the ultimate step that the rule requires an attorney to take, but must be narrowly-tailored to limit the disclosure to that information "reasonably necessary to remedy" the fraud on the tribunal created by the tribunal's reliance on false evidence…

7. TECH ACCELERATION SPEED TEST

A. Recent Legal Ethics Technology Botches and Traps

- E-mail
- Social media
- Powerpoint

B. Technology Risk Spotting Exercise: "The Devolving Ethics Of Albert Hall"

[Identify the legal ethics problems as they arise in the following scenario.]

Albert Hall is serving as outside counsel for a longtime client of his firm, the Hillbleeze Foundation.

He has important client data on his computer, and knows that he will want to work on it over the long weekend, when he has no choice but to accompany his family on a short vacation to Vermont. He emails it to himself along with some other client files. He also saves a copy of a controversial proposed new grant-making policy that is being closely guarded to Google Docs.

As he works on the current Hillbleeze matters on his office computer in his office, Albert clicks "Cancel" on the annoying popup that keeps asking him to permit an update to the Java software, so that he can get right to work.

He meets with Bev, the assistant executive director at Hillbleeze in the nearby Starbucks at her request. Sipping a latte, she expresses some serious concerns about the foundation's management that she feels he needs to address. She says that Beverley Hillbleeze, the heiress who oversees the foundation, recently was admitted to an expensive Arizona spa to deal with what has been rumored to be an alcohol and cocaine addiction. "This isn't general knowledge -- the family is keeping it very hush-hush," she says. Before she leaves, she takes a selfie with him, and later posts it to Facebook

with a note: "Here I am meeting with the hot lawyer from the firm that works for my company."

He writes a memo to himself about Bev's information after Bev she has left with her coffee, and is about to send sends it via e-mail to his home account when Albert realizes he has had too much coffee. He runs to the men's room, leaving the computer on the table. When Albert returns he realizes his computer is missing, and panics. Then figures out that he had just forgotten where he was sitting. His laptop is right where he left it!

Whew!

He checks his e-mail before leaving. Some guy has endorsed him on LinkedIn. Who is that guy? Another LinkedIn contact wants a recommendation. Fine, Albert sends one. He notices that someone has apparently trashed him and the firm on AVVO. Curious, he visits the site, and is shocked at what a former client wrote there, total lies. He writes a brief, curt rebuttal of all the points, as well as note that the firm declined to represent after only a week, as she was constantly inebriated and unstable during meetings.

Now home, Albert goes to check his Google Docs but can't remember his Google password, which is the name of Chinese restaurant he loved when he was in college. How could he forget that? He gets on Facebook and messages his old roommate. "I have a mental block on the name of our favorite Chinese food place in Cambridge he tells his friend." "Are you still using that as your favorite password, you idiot?" his friend replies. "It's "FONG FOO TWO." "That's it!" writes Albert.

Albert has to take his son to the Department of Motor Vehicles for his license test and other paperwork, and decides to bring his old laptop.

He stores the Hillbleeze data he needs for an hour or so of work on a thumb drive, and while there, converses with Bev via cell phone about the client, asking and getting some answers about aspects of the data he finds troubling, again using Facebook messaging after the connection on a cell phone call is weak and he finds himself shouting.

Now that his son has passed his test, Albert returns home and cracks out his Christmas gift to himself, a new, top of the line Samsung cell phone with all the bells and whistles. He adds a new app, "DataWhiz," that allows him to pull up his client management system, documents and time keeping programs all in one.

R.I. Rules 1.1, 1.6, 8.4

REFERENCE:

ABA Formal Opinion 11-459 (August 4, 2011)

Duty to Protect the Confidentiality of E-mail Communications with One's Client

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

8. HYPOTHETICAL
"SUING WHOOPIE"

The mood in the meeting at the Atlanta law firm Mene, Mene, Tekel and Upharsin was tense. The managing partner and ethics were taking up the ethical and business propriety of its representation of Novelties Titans, the large, international practical jokes and magic equipment manufacturer, which was suing Whoopie Corp, its largest competitor, seeking damages and injunctive relief as a result of Whoopie's alleged infringement of U.S. Patent No. 880996775433 for the manufacture and sale of its unique rubber chicken, "Plucky." NT also moved to preliminarily enjoin Whoopie from continuing to infringe the Plucky patent either directly or by inducing others by continuing to sell the chicken to its customers.

"Novelties wants us to enter an appearance on its behalf to represent it in this matter before the district court and on appeal," said the managing partner, Ray Sipsa. It's a huge company, and they're suing people all the time, sometimes just for the fun of it."

"Well, it is a practical joke company," said Bella De Ball, the ethics counsel.

"Yes, but this is no joke," said Ray. "Whoopie supplies one of our longtime clients, Klown Kolleges USA, with all their gags, including the rubber chickens, which they use in every class. And Novelties Titans has contacted the President of KKU, Bozo Floppipants, with a copy of its motion and a request to work with the clown schools to find a mutually beneficial business arrangement to resolve the issues around infringement of Novelties' intellectual property.

"The question is, can we take the representation? Or is there a conflict with our representation of Klown Colleges that would prevent us from taking on the case?"

QUESTION: *Is there?*

1. No, this is not "directly adverse to a current client."

2. As long as Klown Kolleges isn't named in the complaint, there's no conflict.

3. No, as long as the firm limits the scope of the representation with a provision that it will not counsel Novelties Titans in any matter adverse to KKU, including licensing negotiations.

4. If Klown Kolleges says there's a conflict, then there's a conflict.

5. I have another answer.

R.I. Rules of Professional Conduct 1.1, 1.2, 1.13, 1.7

9. HYPOTHETICAL
"THE WEENIE"

Meckles had been the outside Counsel for Harding Gas and Electric for years. Now he was in unfamiliar waters, however: the company wanted to challenge an SEC ruling permitting the merger of two competing utilities in the same area. He had never had any dealings with the SEC, so he called on a law school acquaintance, Burt St. George, who combined an effective SEC practice with a lucrative personal injury client list. St. George had gained particular notoriety from bringing a series of power line tort suits against Dragon Power, one of the utilities that was merging.

"I love beating these guys," he told Meckles. "This will be fun."

Meanwhile, at Dragon, the management team was discussing what to do about St. George. The general counsel, Shirley Cathedral, had an idea.

"You know, Burt's a wimp," she said. He's got a balloon payment coming up on his house, and our investigators who have been digging into his finances say he's got a big gambling problem. He's counting on us settling this latest "electromagnetic field causes baldness" class action to pay his bills, as well as his gambling debt marker, before he gets his legs broken. Let's tell him if he doesn't drop the SEC case, we'll keep the baldness case tied up in court."

"But we don't *want* that case in trial; we want a confidentiality agreement," said James Picard, the company's outside counsel running his hand nervously over his bald pate. "The field does cause baldness!"

"Yeah, but he'll cave," said Shirley. "But the call should come from you. I wouldn't feel right doing it myself."

Picard protested that it was an unethical tactic.

"Oh, who's the weenie now?" she said. "It's just hardball, that's all. We're just representing our client. Nothing unethical about that. Trust me on this. I used to be on the ABA rules committee."

Picard made the call. Two hours later, St. George faxed a letter to Meckles, announcing that he was withdrawing from the case, due to a "conflict of interest."

QUESTION: *Which statement is the most accurate diagnosis of whether Burt, Cathedral or Picard have engaged in unethical conduct?*

1. Only Burt.
2. Only Cathedral, the general counsel.
3. Cathedral and Picard, the outside counsel.
4. All of them.
5. None of them.

R.I. Rules of Professional Conduct: 1.1, 1.2, 1.3, 1.4, 1.16, 5.1, 5.2, 5.6, 8,3, 8.4

10. CONCLUDING REMARKS AND DISCUSSION

APPENDIX

Issues, Comments and References

1. Section #1 "Fan on the Bench and In the Box"

Best Answer: 2. A lawyer may not suggest that he or she has a special relationship with the judiciary, or contribute to an instance of judicial misconduct. Bella's actions are unwise, but probably not a rules violation.

a. Issues

- Social relations with judges
- Duty to report judicial misconduct
- Lawyer advertising
- "Ethics chess"; fixing a problem
- Ethics traps
- Communicating with jurors
- Duty to report juror misconduct
- "Appearance of impropriety"

b. Comments

- A California lawyer was reprimanded under this scenario, It is a tough ruling. The opinion did not explore the reporting requirements.
- The dating scenario opens the door to possible ethics dilemmas, such as the lawyer learning about jury misconduct.

c. **References**

- http://ipethicslaw.com/cafc-disciplines-patent-litigator-who-forwarded-former-chief-judges-bff-email-to-clients/

- http://www.cafc.uscourts.gov/images/stories/opinions-orders/14-ma004.pdf

2. #3 "Sonny Boy"

Best Answer: 4.

a. **Issues**

- Conflict of interest. Is this reasonably waived by the father? Can the lawyer truthfully say he won't be conflicted?

- Confidentiality. Were both parents assuming so because their son was a lawyer?

- Lawyer as witness.

- Appearance of impropriety. Is this even a legitimate ethical issue?

b. **Comment:** The major lesson to be gleaned from cases of this sort is that judges often evaluate legal ethics problems by judicial ethics principles…which include the appearance of impropriety.

c. **Reference**

- http://www.abajournal.com/news/article/top_nevada_court_says_attorney_son_can_represent_dad_in_divorce_from_mom/?utm_source=maestro&utm_medium=email&utm_campaign=daily_email

3. #4 Positional Chaos: "Both Sides Now"

Best Answer: 1. The representation of a client requiring the firm to take the opposite position of a matter still pending, where the results in the new case might adversely affect the current client, was a 1.7 breach.

a. Issues

- Positional conflicts
- "Appearance of impropriety"

b. Comments

- The account is adapted from several published accounts and commentary.
- In legal ethics, there really is no foul if there is no harm. Because Gibson Dunn lost the non-Chevron case, the conflict caused no damage. Its client may be annoyed, but ironically, the result helped Chevron, if anything.
- The DC Bar has the definitive LEO on the topic of positional conflicts, which predated any ABA acknowledgment of the issue.

c. References

- http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion265.cfm

4. #5 Accelerating Developments

- Life imitates Saul (Rules 7.1, 7.2, 7.3, 8.4)
- The Atticus Finch dilemma (Professionalism)
- Intra-firm privilege (Rules 1.6, 1.7)
- The docket mistake (Rule 1.1)
- Shocking misconduct in Utah (Rule 8.4)

- The public's ignorance of legal ethics kills (Rule 1.6)
- The Reason debacle (Rule 3.8, 8.4)
- Throwing the client under the bus (Rule 1.6)
- The Hastert Affair: Settlement or extortion? (Rule 1.3, Rule 8.4)

5. #6 "Disclosure Threshold"

Best Answer: 3.

a. Issues

- Dealing with client perjury
- Obligation as an officer of the court vs. confidentiality
- Limits of 3.3: what is a "reasonable remedial measure?
- Differences among jurisdictions.

b. Comments

- The nanny scenario is based on a real, if incredibly convoluted case. The lawyer was under fire from the judge in the nanny's divorce because the judge was never informed of the nanny's deception. But the in the Illinois case of "In Re Rantis," the Review Board found that the lawyer handled it just right. He fixed the problem without getting his client into more trouble.
- The situation where a witness lies to help your case, but lies after being called as witness by the opposing party, is not really covered by the ABA version of rules because the situation was not anticipated. The relevant provision is ABA 3.3 (3) (b)

  … A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take

reasonable remedial measures, including, if necessary, disclosure to the tribunal.

This was intended to apply to bribery or other activities, not testimony. But under the language, the situation in the hypothetical is covered.

- DC gets around this problem by phrasing the Rule like this:

(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

c. Reference:

https://www.iardc.org/09PR0065RB.html

6. #7 *"Speed Test"*

The discussion of issues raised in the various scenarios involve ABA rule 1.1, as well as rules 1.2, 1.3, 1.4, 1.6, and 8.4

. Issues

- Human error and competence
- Technology agreements
- Duty to inform clients
- Social media
- Cyber-security
- Copy machines
- Cell phones

7. #8. "Suing Whoopie"

Best Answer : #5. .

a. **Issues**

- Is it still a conflict of interest when a firm's representation will have adverse effects on another client but there is no direct adversity?
- Does financial adversity constitute direct adversity if it is serious and certain?
- How would a firm screen for such conflicts, if so?
- Is the case so holding a game-changer for corporate representations?
- Increasingly, limiting the scope of representation (Rule 1.2) has been employed to deal with such potential conflicts. It didn't work here. Why not?

b. **Comments**

1) From the Comments to the District of Columbia Rules:
Representation Conditionally Prohibited—Rule 1.7(b)

[7] Paragraphs (b) and (c) are based upon two principles: (1) that a client is entitled to wholehearted and zealous representation of its interests, and (2) that the client as well as the lawyer must have the opportunity to judge and be satisfied that such representation can be provided. Consistent with these principles, paragraph (b) provides a general description of the types of circumstances in which representation is improper in the absence of informed consent. The underlying premise is that disclosure and consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

[8] A client may, on occasion, adopt unreasonable positions with respect to having the lawyer who is representing that client also represent other parties. Such an unreasonable position may be based on an aversion to the other parties being represented by a lawyer, or on some philosophical or ideological ground having no foundation in the rules regarding representation of conflicting interests. Whatever difficulties may be presented for the lawyer in such circumstances as a matter of client relations, the unreasonable positions taken by a client do not fall within the circumstances requiring notification and consent. Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds.

[9] If the lawyer determines or can foresee that an issue with respect to the application of paragraph (b) exists, the only prudent course is for the lawyer to make disclosure, pursuant to paragraph (c), to each affected client and enable each to determine whether in its judgment the representation at issue is likely to affect its interests adversely.

[10] Paragraph (b) does not purport to state a uniform rule applicable to cases in which two clients may be adverse to each other in a matter in which neither is represented by the lawyer or in a situation in which two or more clients may be direct business competitors. The matter in which two clients are adverse may be so unrelated or insignificant as to have no possible effect upon a lawyer's ability to represent both in other matters. The fact that two clients are business competitors, standing alone, is usually not a bar to simultaneous representation. Thus, in a matter involving a specific party or parties, paragraphs (b)(1) and (c) require notice and consent if the lawyer will take a position on behalf of one client adverse to another client even though the lawyer represents the latter client only on an unrelated position or in an unrelated matter. Paragraphs (b)(2), (3), (4) and (c) require disclosure and consent in any situation in which the lawyer's representation of a client may be adversely affected by representation of another client or by any of the factors specified in paragraph (b)(4).

2) The case in the United States Court of Appeals for the Federal Circuit is CELGARD, LLC, Plaintiff - Cross Appellant, v. LG CHEM, LTD. AND LG CHEM AMERICA, INC

3) This ruling raises a constant problem in legal ethics: Do the Rules of Professional Conduct unwisely create the same ethical standards for different fields of law?

c. **Reference:**

http://patentlyo.com/media/2015/01/celgard.pdf

8. Section #9 - Hypothetical: "The Weenie"

Best Answer: 4.

All of them.

Bert placed himself in a position where he was in a personal conflict by being financially dependent on an opposing party. He also was a weenie: a competent and zealous lawyer would have called the bluff

a. **Issues**

- Unethical negotiation tactics
- Conflicts of interest
- Supervising attorney and subordinate attorney ethics
- Restriction of the right to practice

b. **Comments**

The hypothetical is based on the case of *Bullard v. Chrysler*

c. **References**

- http://leagle.com/decision/19962105925FSupp1180_11961.xml/BULLARD%20v.%20CHRYSLER%20CORP.