Pre-Texting & Dissembling:
Lawyers and Little White Lies

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A. Dictionary Definitions

Pretexting – Employing an effort or strategy intended to conceal something.

Dissembling – Disguising or concealing behind a false appearance; to disguise one's real nature or motives.

Subterfuge – A deceptive stratagem or device.

Lying –To present a false statement as true; meaning to deceive or give a wrong impression; to convey a false image.

False – contrary to fact or truth.

B. Relevant Rules and Standards

I. RPC 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

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; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

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

[2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

Statements of Fact

[3] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[4] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so unless the disclosure is prohibited by Rule 1.6.

II. RPC 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;

…

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

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

III. Lawyer’s Oath (Excerpt)

I do solemnly swear (or affirm) that:

…

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

…

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law;

…

IV. RLDE 7 GROUNDS FOR DISCIPLINE

(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;

(6) violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR;

C. Sample Cases.

SOUTH CAROLINA

In the Matter of Walker (1991) A client hired Lawyer to expunge the client's record. Two years later, the client saw Lawyer at a party. Lawyer told the client that he "was a free man" when in fact Lawyer had done nothing to expunge his client's record. To support his misrepresentation, Lawyer signed a circuit court judge's name to a false order and gave it to the client. The client, concerned that the document did not appear to be properly filed, went to the Clerk of Court to file it. The Clerk rejected the order because the signature had been forged. The attorney argued that that the only reason that he signed the judge's name was so that client could see how the order would appear.

In the Matter of Mozingo (1998) Lawyer represented a client whose wages were being garnished to pay child support and alimony payments. The client's new wife and her father wanted the client to file suit to get his obligations reduced or eliminated. To help the client appease his family, Lawyer signed a letter to the client's employer falsely stating that an order terminating the payments was forthcoming and that garnishment was being waived. Lawyer also signed a letter to similar effect that was faxed to the father. Lawyer then, with the assistance of his paralegal, prepared a fake Family Court order and signed Justice Toal's name to it.

In re Belding (2003) Husband approached Lawyer and told him that he and his wife were undergoing a "Gestalt" method of therapy. Husband asked Lawyer to

create a fictitious set of divorce documents to “shock” his wife as prescribed by the therapy. According to this method, Wife would be “shocked” into mending the marriage upon seeing the fictitious documents. As requested, Lawyer prepared the documents. He drafted a Summons and Complaint using a fictitious docket number, a fictitious filing stamp for the Clerk of Court, and the signature of “Mark J. Taylor,” as Lawyer purported to be. Lawyer continued to draft fake documents that appeared authentic, including a consent order to change venue, interrogatories, requests for production, a request for a hearing and a settlement agreement. Lawyer also drafted phony letters on his own letterhead. The documents were entirely false and were never filed in any court. However, Lawyer gave the documents to Husband. Wife found the documents in the trunk of Husband’s car. She was shocked. Lawyer was suspended for one year.

OTHER JURISDICTIONS

Bar Counsel vs. Curry, Crossen, and Donahue (Massachusetts 2008) Lawyers unhappy with a judge’s decision to award hundreds of millions of dollars against their client in a civil dispute engaged in a complex ruse to obtain evidence that the judge was biased in order to get the judgment overturned. Lawyers’ scheme involved a series of phony contacts and employment interviews with the judge’s former law clerk, in which significant efforts were made to have the former law clerk incriminate the judge. In rejecting the lawyers’ defense that they were attempting to uncover wrongdoing similar to a law enforcement investigation or discrimination “testing,” The Court stated, “Whatever leeway government attorneys are permitted in conducting investigations, they are subject not only to ethical constraints, but also to supervisory oversight and constitutional limits on what they may and may not do, constraints that do not apply to private attorneys representing private clients…Constraints on government agents ensure that even undercover investigations conducted by government attorneys are reined in by the stringent constitutional requirements of fair and impartial justice. Crossen’s argument that he felt empowered as a private attorney to conduct the same kind of sting operation he could have conducted as a prosecutor both overstates the independence of prosecutorial power and understates the unique restraints and oversight on that power.”

In re Office of Lawyer Regulation vs. Hurley (Wisconsin 2009) Lawyer representing a defendant accused of child molestation and child pornography contrived a scheme to obtain the 15 year-old child’s home computer in an attempt to gain evidence that the child had “an independent interest in and the ability to access” the pornography the defendant allegedly provided to the child, an essential element of his defense. Lawyer assumed that an attempt to obtain the computer by ordinary means would result in the child’s attempt to destroy evidence on it. Lawyer hired a private investigator who owned a side business. The PI fabricated a letter using the letterhead of the side business addressed to the child that his company was conducting research on computer usage of

teenagers. The letter said that the child would receive a free laptop in exchange for his old computer for use in the "research." The PI met with the child and his mother and exchanged the old computer for a new one. The child's computer was turned over to a forensic examiner who found pornography on it. In response to the subsequent disciplinary action against Lawyer, the Wisconsin Supreme Court upheld the referee's recommendation that Lawyer not be sanctioned. The referee had written, "Mr. Hurley was faced with a very difficult decision, with concurrent and conflicting obligations: should he zealously defend his client, fulfill his constitutional obligation to provide effective assistance of counsel, and risk breaking a vague ethical rule that, according to the record, had never been enforced in this way? Or should he knowingly fail to represent [his client] in the manner to which he was entitled and hand him persuasive grounds for appeal, an ethics complaint, and a malpractice claim? The Sixth Amendment seems to have broken the tie for Mr. Hurley. A man's liberty was at stake. Mr. Hurley had to choose, and he chose reasonably, in light of his obligations and the vagueness of the [ethical rule]."

In re Chancey (Illinois 1994) Solicitor was handling a criminal case involving an alleged abduction of a child by the child's father. Father said that he would return the child under certain conditions, one of which was that he get an order allowing for visitation. Solicitor prepared a fake appellate court order and signed the name of a retired judge to it. He attempted to justify his actions by explaining that he knew it would be impossible to get a legitimate order because there was no case pending, but he was concerned about the safety of the child. He was publicly reprimanded for his dishonesty and deceit in spite of his good motives.

In re Gatti (Oregon 2000) Prosecutors conducted an undercover operation in the course of investigating certain chiropractors and workers' comp lawyers suspected of participating in fraudulent worker's compensation claims. The prosecutors employed investigators to pose as janitors and injured workers. Gatti filed a grievance alleging that the prosecutors' conduct was deceitful. Gatti received a letter from the disciplinary authority dismissing his grievance because a prosecutor is required only to avoid the use of illegal means to obtain evidence. Later, the comp claim of one of Gatti's clients was denied. He suspected the employer's insurance company was denying claims based upon improper conduct of a company it hired to perform medical reviews. He then initiated his own 'sting' operation by making a series of phone calls to the medical review company misrepresenting his identity and attempting to elicit information about the protocols and guidelines used to prepare its reports. In defense of the resulting grievance filed against Gatti, he argued that he relied on the result of his prior grievance about prosecutors in conducting his investigation of the medical review company. The Oregon Court stated that nothing in the bar's letter responding to Gatti's complaint had implied that lawyers in the private sector were permitted to misstate their identity or purpose in investigating a matter. Gatti also argued that the court should read into the rule prohibiting misrepresentation an exception for investigatory activities. The Court ruled that the wording of

Oregon's rules did not permit recognition of an exception for any lawyer to engage in dishonesty or deceit. Gatti was publicly reprimanded for his misconduct. The Oregon legislature, in response to the cessation of covert law enforcement activities by government lawyers in the wake of In re Gatti, enacted legislation to permit such covert activities conducted by state or federal actors.

In re Ositis (Oregon 2002) Lawyer had a client named Hickey who bought and sold animals used for medical research. His business had been targeted by animal rights activists and he felt that he was in personal danger. Hickey suspected that a neighbor, a woman named Settlemier, let the activists use her farm as a staging area for their "raids" on Hickey's business. Lawyer introduced Hickey to a private investigator who then "interviewed" Settlemier under false pretenses. Specifically, the investigator telephoned Settlemier, introduced himself as a reporter for International News Service, and asked if Settlemier would answer some questions about Hickey's animal research supply business. The investigator' statement that he worked for International News Service technically was true: International News Service was the name that he used for a sideline business. The investigator tape-recorded Settlemier's responses to his questions about previous statements she had made alleging that Hickey was involved in animal abuse and pet theft. He never informed Settlemier that he was gathering information for Hickey. Hickey later sued Settlemier for defamation and the tape-recordings came out. Formal disciplinary charges were subsequently filed against Lawyer alleging that he had violated ethics standards by participating in a covert operation. Lawyer unsuccessfully argued the ethics rules did not bar him from collecting information from potential adversaries before the institution of legal action. He claimed this sort of deceptive practice is a common practice among lawyers. Lawyer also argued that the investigator worked for Hickey, not him, and that he had no actual control over Steven's actions. The Court rejected these arguments. Lawyer was reprimanded.

In the Matter of Pautler (Colorado 2002) Deputy District Attorney Pautler arrived at the scene of a gruesome crime where three young women lay murdered. He discovered that a law enforcement officer was in contact with the suspect by telephone. The suspect demanded to speak to an attorney before surrendering. After a brief, unsuccessful attempt to reach his former attorney by a separate telephone line, Pautler offered to impersonate a public defender. When the suspect requested to speak to an attorney, the law enforcement officer told him that "the PD has just walked in," and that the PD's name was Mark Palmer. The officer proceeded to brief "Palmer" on the events, with the suspect listening over the telephone. The officer introduced Pautler to him as a PD. Pautler then took the telephone and engaged the suspect in conversation. The suspect made certain demands in exchange for his surrender, including that "his lawyer" would be present when he was arrested. To this request, Pautler answered, "Right, I'll be present." The suspect eventually surrendered, but Pautler made no effort to correct his misrepresentations. The Colorado Supreme Court suspended Pautler, rejecting his arguments of justification, duress, and choice of evils. The Court

also declined to adopt an "imminent public harm" exception to the ethics rules prohibiting use of deception. Specifically, the Court stated, "Pautler … suggests that because peace officers may employ lethal force when pursuing a fleeting, dangerous felon, it would be absurd to sanction an officer who instead uses artifice, simply because that officer is also a licensed attorney. We disagree. The Rules of Professional Conduct apply to anyone licensed to practice law in Colorado. The Rules speak to the 'role' of attorneys in society; however, we do not understand such language as permitting attorneys to move in and out of ethical obligations according to their daily activities… The obligations concomitance with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals… Until a sufficiently compelling scenario presents itself and convinces us our interpretation … 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."

People v. Smith (Colorado 1989) Law enforcement officials contacted Lawyer and informed him that they were aware that he used cocaine and that they believed he was an active participant in drug-selling operations. The officers demanded his cooperation in investigating the conduct of third parties and threatened to file criminal charges against him if he did not assist their investigations. Lawyer agreed to perform undercover activities for the Colorado Bureau of Investigation (CBI). CBI representatives requested that Lawyer record telephone conversations secretly. After obtaining assurances from a member of the attorney general's office that such conduct would not violate the Code of Professional Responsibility, Lawyer agreed. He did so in part because of a concern that criminal charges might be filed against him if he did not agree. He placed several phone calls to a former client requesting to purchase cocaine and did purchase cocaine from that person. During that transaction, he wore a body microphone to permit CBI agents to monitor the conversation. The former client was arrested and charged with the sale of cocaine to Lawyer. Eventually, disciplinary charges were lodged against Lawyer. He was charged with the illegal purchase and use of cocaine and with surreptitiously recording conversations with his former client at request of police. Lawyer argued that his conduct should be deemed an exception to the ethical rules because he was acting under the direction of and pursuant to the advice of law enforcement officials. The Court found that Lawyer had engaged in the misconduct as charged and suspended him for two years. The Court stated, "It may well be that important public policy considerations permit executive officials to rely upon techniques involving fraud and misrepresentation to obtain information about criminal conduct. … [S]ome jurisdictions have expressly recognized as a prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others. The respondent, however, was a private attorney, not a prosecuting attorney. We do not agree that … policy considerations permit private counsel to deal dishonestly and deceitfully with clients, former clients and others. To hold

otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings."

In the Matter of Wood (Wisconsin 1995) For a number of years, Wood represented a client who was also a social friend. One of Wood's employees used the client's automobile in the course of his employment. When the vehicle was returned, it was not operating properly and there was a question as to who was responsible for the damage. Wood paid for the towing and for a rental car for the client's use while the vehicle was being repaired. Thereafter, a dispute arose between Wood and the client regarding who should pay for the damage, the towing and the car rental expenses. Wood commenced a small claims action against the client seeking damages of $783.75. Wood sought to obtain a copy of the declaration page of the client's auto insurance policy in force at the time his vehicle was damaged. Although that document could have been subpoenaed, Wood retained a private investigator, who telephoned the insurer and identified himself as the client. At the investigator's request, the insurer sent a copy of the declaration page of the policy by fax to a telephone number she believed was the client's but, in fact, was that of Wood's law office. Wood was suspended sixty days, in part, for his dishonest conduct.

Gidatex vs. Campaniello (New York 1999) In a federal civil trademark infringement/unfair competition case, lawyers for the plaintiff hired investigators to pose as customers to secretly tape record sales employees at the defendant's store. Trial court denied defendant's motion to exclude the resulting evidence on grounds that the practice was unethical, holding that ethics rules should not govern situations where a party using undercover agents to legitimately investigate unfair business practices. "As for [the] prohibition against attorney 'misrepresentations', hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as 'is the quality the same?' or 'so there is no place to get their furniture?'

Midwest Motor Sports vs. Arctic Cat Sales (8th Circuit 2003) In a franchise dispute, attorneys for the franchisee successfully excluded evidence obtained by private investigator posing as a customer who secretly tape-recorded discussions with franchisee's sales representative and president. Court of Appeals also upheld the trial court's sanctions order. "The duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here. ... Such

tactics fall squarely within Model Rule 8.4(c)'s prohibition of “conduct involving dishonesty, fraud, deceit or misrepresentation.” Arctic Cat contends that it only retained Mohr after traditional means of discovery had failed. Arctic Cat's attorneys may have become frustrated with their opposing counsel's refusal to cooperate, but that frustration does not justify a self-help remedy. It is for this very reason that our system has in place formal procedures, such as a motion to compel, that counsel could have used instead of resorting to self-help remedies that violate the ethical rules.”