2023

A Rose by Any Other Name: A Lawyer's Ethical Duty When a Client Is Prosecuted Under a False Name

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by Randolph Braccialarghe[2]

"…que la [memoria] tengo tan mala, que muchas veces se me olvida cómo me llamo."[3]

On February 1, 1989, Florida attorney G.M.C. signed a Conditional Guilty Plea for Consent Judgment agreeing to a public reprimand.[4] The Florida Supreme Court approved the consent judgment and issued the public reprimand on April 6, 1989.[5]

What had attorney G.M.C. done to receive a public reprimand?[6] While representing a defendant in a felony criminal case, G.M.C. learned in August 1987 that his client had given a false name when arrested and had been charged under that alias, not the client's true name. Notwithstanding the knowledge that his client was perpetrating a fraud on the Court, attorney G.M.C. negotiated a plea agreement under the client's alias, thereby assisting his client in the fraud. When the plea agreement was presented to the presiding judge on September 25, 1987, G.M.C. again assisted his client's fraud on the Court by not disclosing his client's use of an alias.

Attorney G.M.C. once again did not disclose the alias on October 16, 1987, when G.M.C. appeared in court with his client for the sentencing. However, a probation officer sitting in the courtroom knew the defendant and told the judge the defendant's true name. The judge asked attorney G.M.C. why G.M.C. had not told the Court about the client's misrepresentation, and G.M.C. said that he thought he was duty-bound to protect what his client had told him in confidence; G.M.C. later told the Florida Bar that he was also confused about his responsibilities to his client.

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[1] O, be some other name!
What's in a name? That which we call a rose
By any other name would smell as sweet; – Romeo and Juliet, Act II, scene ii, lines 42-44

[2] Professor of Law, Nova Southeastern University, Shepard Broad College of Law.

[3] "…it [my memory] is so bad, that many times I forget my name."
– Sancho Panza in chapter XXV of Part 1 of *Don Quixote de la Mancha*.

[4] In his guilty plea, attorney G.M.C. admitted his conduct violated the following Rules of Professional Conduct: 4-1.2(d), 4-3.3(b), 4-8.4(c), and 4-8.4(d). Florida's Rules are based on the ABA Model Rules and are found in Chapter 4 of The Rules Regulating the Florida Bar, hence the prefix 4, e.g., 4-1.2.

[5] Case No. 73,829, 542 So. 2d 1335 (Table)

[6] The supreme court order was issued without listing any facts, so one must look to the Florida Bar case file, Florida Bar 88-50,414 (17G).

G.M.C.'s confusion was due to a conflict between two ethical duties that appeared to impose mutually inconsistent and contradictory duties on an attorney, Florida Rule of Professional Conduct 4-1.6 and Rule 4-3.3.

The first rule, 4-1.6, involves client confidentiality. G.M.C.'s client had told him that he had given a false name to the police officer who had arrested him. In other words, in addition to the felony with which the client had been arrested and charged, the client had confessed to having violated at least two statutes with criminal penalties for which he had not been charged and of which neither the police, nor the prosecutor, nor the court was aware.[7] Disclosure by the attorney could result in the client being sentenced to jail. The default provision of both ABA Model Rule 1.6 and Florida Rule 4-1.6 requires an attorney to keep confidential his client's confidences, even where, as here, the revelation was that the client had committed a crime.[8] So in this situation, adherence to 1.6 and 4-1.6 appeared to require a criminal defense lawyer not to disclose that his client had given a false name to the police officer who had arrested him?[9] G.M.C. chose to abide by this rule.

The second rule, 4-3.3, regards an attorney's duty of candor to the tribunal. Because G.M.C.'s client had

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[7] FLA. STAT. 837.055 (2016). (1) Whoever knowingly and willfully gives false information to a law enforcement officer who is conducting a missing person investigation or a felony criminal investigation with the intent to mislead the officer or impede the investigation commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

FLA. STAT. 901.36 (2016). Prohibition against giving false name or false identification by person arrested or lawfully detained; penalties; court orders. (1) It is unlawful for a person who has been arrested or lawfully detained by a law enforcement officer to give a false name, or otherwise falsely identify himself or herself in any way, to the law enforcement officer or any county jail personnel. Except as provided in subsection (2), any person who violates this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

FLA. STAT. 775.082 (2016). (4) A person who has been convicted of a designated misdemeanor may be sentenced as follows: (a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year.

FLA. STAT. 775.083 (2016). Fines. (1) Fines for designated crimes and for noncriminal violations shall not exceed: (d) $1,000, when the conviction is of a misdemeanor of the first degree.

[8] **Florida Rule 4-1.6 - Confidentiality of Information:** (a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

ABA Model Rule 1.6: Confidentiality of Information (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

[9] Following the rules of standard English grammar, where the antecedent is of unspecified gender, the masculine pronoun will be used in its synecdochal capacity as a gender-neutral pronoun.

given a false name to the policeman who arrested him, the client had been charged under that false name. By pleading to the charge under the false name, the client was perpetrating a fraud on the court. Once G.M.C. filed his notice of appearance and subsequent pleadings, G.M.C. was aiding the client's fraud on the court. At first the fraud was unwitting on G.M.C.'s part, but once the client told G.M.C. of the false name, G.M.C. became an active and knowing participant in the client's fraud on the court. The applicable Florida Rule is 4-3.3, which while somewhat modified, is Florida's analog to ABA Model Rule 3.3. Both Florida's version and the ABA version require an attorney to disclose his client's fraud on the court.[10]

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[10] **Florida Rule 4-3.3 - Candor Toward the Tribunal: (a)** False Evidence; Duty to Disclose. A lawyer shall not knowingly: **(1)** make a false statement of material fact or law to a tribunal; **(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client**; [emphasis added]

(b) Extent of Lawyer's Duties. **The duties** stated in subdivision (a) continue beyond the conclusion of the proceeding and **apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.** [emphasis added]

(c) Ex Parte Proceedings. In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) Extent of Lawyer's Duties. The duties stated in this rule continue beyond the conclusion of the proceeding and **apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.** [emphasis added]

ABA Model Rule 3.3: Candor to the Tribunal (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or **fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer**; [emphasis added]

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(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.** [emphasis added]

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and **apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.** [emphasis added]

G.M.C.'s confusion was due to the seeming inconsistencies of these two rules – one that appeared to prohibit the disclosure and the other which required disclosure.

So, how to resolve this dilemma? What is the lawyer's ethical obligation if he discovers that his client is being prosecuted under the false name the client had previously given to the police? Is a lawyer's ethical obligation different if the lawyer has already undertaken the representation and entered an appearance on behalf of a new client? May or must the lawyer reveal that his client is using an alias? Would revealing the alias, thus subjecting the client to prosecution for additional crimes, violate ABA Model Rule 1.6 or Florida Rule 4-1.6? Would failure to reveal that the client is using an alias subject the lawyer to discipline for violating ABA Model Rule 3.3 or Florida Rule 4-3.3 by assisting the client in committing a fraud on the court?

This paper will discuss the lawyer's ethical obligations under these circumstances and will examine the reported cases of the several states where the courts have addressed this issue. Since a discussion of the ethical rules of all of the states would be too cumbersome, this paper will focus on the ABA Model Rules of Professional Conduct (RPC) and Florida's Rules Regulating the Florida Bar. (Florida).

While each state bar no doubt has had its own struggles in addressing this issue, this paper will then review the tortured attempts by the Florida Bar's Professional Ethics Committee and the Florida Bar's Board of Governors to apply the rules and the case law as they apply to a lawyer's obligation to correct a client's attempt to mislead the court by using an alias.

THE ETHICS – FROM CANONS (1936) TO CODE (1970) TO RULES (1987)

THE CODE OF ETHICS AND FLORIDA'S CANONS OF PROFESSIONAL ETHICS - 1936

Florida has had a rule requiring disclosure of a client's attempt to perpetrate a fraud on the tribunal at least as far back as 1936, when the Supreme Court of Florida adopted a code of ethics for lawyers.[11] The code was based on the ABA Canons of Professional Ethics, from which its language was taken almost verbatim.[12] In 1955, Florida's Supreme Court used the identical language of the 1936 code when it adopted Florida's Canons of

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[11] In re Canons of Professional Ethics, 125 Fla. 501 (1936).

[12] The ABA Canons had been adopted in 1908 and would be replaced in 1970 by the ABA Model Code of Professional Responsibility.

Professional Ethics, also called the Code of Ethics.[13]

Following the lead of the ABA Canons of Professional Ethics, Florida's Canons of Professional Ethics made clear that in defending a client accused of a crime, the lawyer was bound to use only "fair and honorable means."[14]

In reminding lawyers of their duty to society and our system of justice, Canon 15 stated:

> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duty than does the false claim, often sent up by the unscrupulous in defense of questionable transactions, then it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. . . . But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bonds of the law. The office of attorney does not permit, much less does it demand of him for any client, a violation of law or any matter of fraud or chicane. He must obey his own conscience and not that of his client.[15] [*emphasis added*]

Canon 22, entitled Candor and Fairness, pointed out that lawyers "were charged with the duty of aiding administration of justice" and that it was "unprofessional and dishonorable to deal other than candidly with the facts…in the presentation of causes."[16] Similarly, Canon 29 stated that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." Canon 31 instructed a lawyer that he could not escape his responsibility "by urging as an excuse that he is only following his client's instructions." A lawyer's duty to society while representing his client was perhaps expressed no more broadly than in Canon 32.[17] Canon 37 reminded a lawyer that there were limits

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[13] See Integration Rule of the Florida Bar, Art. 10, FLA. STAT. (1957).

[14] Canon 5.

[15] Canon 15.

[16] Canon 22.

[17] No client. . . is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are. . . or deception or betrayal of the public. . . . Correspondingly, he advances the honor of his profession and the best interest of his client when he renders service or gives advice tending to impress upon the client and

on his duty to preserve client confidences.[18]

The canon that dealt most directly with the situation similar to the one where a lawyer discovers that his client is using an alias was Canon 41:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.[19]

Appended to Florida's Canons of Professional Ethics were 33 additional rules, Rules Governing the Conduct of Attorneys in Florida, which proscribed a specific conduct and began with the phrase "No person heretofore or hereafter admitted to practice law in Florida, shall…." Rule 24 proscribed "Knowingly or willfully make any false representation of fact to any judge, court, or jury to induce a favorable action or ruling by either"; and Rule 27 required a lawyer to refrain from being "guilty of any deceit or willful misconduct in his profession."

FLORIDA'S CODE OF PROFESSIONAL RESPONSIBILITY - 1970

Florida's Canons of Professional Ethics were replaced in 1970 with Florida's Code of Professional Responsibility. Florida's Code of Professional Responsibility was modeled after the American Bar Association's Model Code of Professional Responsibility. Even though Florida's code was modeled after the ABA code, there were some differences. Whereas the ABA code *permitted* a lawyer to reveal the intention of his client to commit a crime,[20] Florida's code *required*

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his undertaking exact compliance with the strictest principles or moral law. He must also observe and advise his client to observe the statute law. . . above all a lawyer will find his highest honor in a deserved reputation to private trust and to public duty, as an honest man and as a patriotic and moral citizen.

[18] The announced intention of a client to commit a crime is not included within the confidences which [a lawyer] is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

[19] Canon 41.

[20] ABA Model Code of Professional Responsibility DR 4-101(C)(1970). A lawyer *may reveal*: (3) the intention of his client to commit a crime and the information necessary to prevent the crime. [emphasis added]

a lawyer to reveal his client's intention to commit a crime.[21]

Florida's Code of Professional Responsibility section DR 7-102 prohibited assisting a client to commit a fraud on the court and required a lawyer to reveal a fraud that the client had already perpetrated on the court.[22] DR 7-102 both proscribed assisting a client in fraudulent conduct and *required* the lawyer to reveal the fraud to the tribunal.[23]

So both of the predecessor rules to Florida's Rule of Professional Conduct 4-3.3, Canon 41 of Florida's Canons of Professional Ethics and DR 7-102 of Florida's Code of Professional Responsibility, required a lawyer to both refrain from assisting his client in committing a fraud and to disclose the fraud if his client had perpetrated a fraud on a tribunal.

FLORIDA RULES OF PROFESSIONAL CONDUCT - 1987

While 4-3.3 is the main Rule of Professional Conduct that governs attorney conduct when a client intends to commit or has committed a fraud on the court, other rules are also relevant.

Rule 4-1.2 (d) requires an attorney neither counsel nor assist a client to commit a fraud, which the attorney would violate by knowingly announcing his appearance on behalf of a client using an alias.[24] Rule 3.4 (c) states that a lawyer shall not knowingly disobey an obligation under

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[21] Fla. Code of Professional Responsibility DR 4-101(D)(2)(1970). A lawyer *shall reveal*: [t]he intention of his client to commit a crime and the information necessary to prevent the crime. [emphasis added]

Florida was to maintain this difference when it adopted Rule of Professional Conduct 4-1.6, Florida's analogue to ABA Model Rule of Professional Conduct 1.6. As it had under Florida's Code of Professional Responsibility, the version the Florida Supreme Court adopted of RPC 4-1.6 *required* a lawyer to disclose his client's intention to commit a crime and that did not limit the type of crime in any way.

[22] Fla. Code of Professional Responsibility DR 7-102(1970). Representing a Client Within the Bounds of the Law
(A) In his representation of a client, a lawyer shall not:
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(7) Counsel or assist his client in conduct the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

[23] Fla. Code of Professional Responsibility DR 7-102(B)(1970). A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he SHALL reveal the fraud to the effected person or tribunal. [emphasis added]
(2) A person other than his client has perpetrated a fraud upon the tribunal shall promptly reveal the fraud to the tribunal.

[24] **Rule 4-1.2(d)** - Criminal or Fraudulent Conduct
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or

the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Under this rule, an attorney is required, at minimum, to disclose that the client is using an alias. Rule 4-4.1 (a) states that in representing a client, a lawyer shall not make a false statement of material fact to a third person, which the attorney would violate by announcing his appearance on behalf of a client using an alias which the client has disclosed to the lawyer.[25] Rule 4-4.1 (b) states an attorney shall not fail to disclose a material fact to a third person to avoid assisting a criminal or fraudulent act by a client, which would be violated by an attorney's remaining silent.[26] Rule 4-8.4 (c) requires a lawyer not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 4-8.4 (d) admonishes a lawyer to not engage in conduct prejudicial to the administration of justice.

ABA MODEL RULE 3.3 and FLORIDA RULE OF PROFESSIONAL CONDUCT 4-3.3

Both ABA Model Rule 3.3(a)(1) and Florida Rule of Professional Conduct 4-3.3(a)(1) prohibit a lawyer from making a false statement of material fact to a tribunal, and both ABA Model Rule 3.3(a) and Florida Rule 4-3.3(a)(2) require a lawyer to disclose when his client has committed a fraud upon the tribunal. Both Rule 4-3.3(b) and Rule 4-1.6 recognize that a client's past or completed act may have future consequences and, accordingly, require disclosure

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reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Rule 3-4(c) - knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Rule 4-4.1 - 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Rule 4-8.4 – Misconduct: A lawyer shall not **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; **(d)** engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

[25] As is discussed below, case law has found a client's name to be material.

[26] The caveat "unless disclosure is prohibited by rule 4-1.6" does not apply in this case, as Rule 4-3.3 (b) makes clear.

under some circumstances. This disclosure is required even if it involves attorney-client confidence which would otherwise be protected under Rule 4-1.6.

The Comments to both the ABA Model Rules and Florida's Rules further reinforce the duty to disclose a fraud. When Florida enacted its version of the ABA Model Rules, Florida's Comments to 4-3.3 used, with one or two minor exceptions, virtually identical language. Over the years, Florida has amended its Comments so that while the meaning is the same, the wording is different. Comment paragraphs 3, 7, 10, 11, and 12 of ABA Model Rule 3.3 all explain a lawyer's duty to disclose fraud on the tribunal.[27] The paragraphs of Florida's Comments to 4-3.3 which discuss a Florida attorney's obligations to disclose a fraud on the tribunal

[27] The pertinent sections of the Comment paragraphs of ABA Model Rule 3.3 are:

[3] … There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation….

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases….

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's 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. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, **even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6**. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. [emphasis added]

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

are 4, 8, 10, 11, and then 13 – 26 which are complete sui generis.[28]

[28] The pertinent sections of the Comment paragraphs of Florida Rule 4-3.3 those paragraphs are:

[4] … There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation….

[8] The duties stated in this rule apply to all lawyers, including defense counsel in criminal cases.

[10] The rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially if circumstances permit. In any case, the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable….

[13] A lawyer may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal. If a lawyer knows that the client intends to commit perjury, the lawyer's first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

[14] The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and caselaw.

[15] Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

[16] Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.

[17] Rule 4-8.4(a) prohibits the lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.

[18] Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

[19] Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

One difference between ABA Model Rule 3.3 and Florida's analog is that an attorney's duty to disclose fraud under 3.3 continues to the conclusion of the proceeding, while Florida Rule 4-3.3(d) requires a lawyer to disclose a fraud on the tribunal even if he discovers it after a proceeding has been concluded. In other words, a Florida lawyer's duty to disclose a fraud on the tribunal never terminates.[29]

FUTURE CONSEQUENCES OF A CLIENT'S UNDISCLOSED FALSE NAME

A client's act of lying to the police about his own identity has very real future consequences, consequences which without doubt were intended by the client. Giving an alias to the police increases the likelihood that they

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[20] Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

[21] Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.

[22] This rule, 4-3.3(a)(2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a)(4) prohibits a lawyer from offering false evidence and requires the lawyer to take reasonable remedial measures when false material evidence has been offered.

[23] Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

[24] To permit or assist a client or other witness to testify falsely is prohibited by section 837.02, Florida Statutes (1991), which makes perjury in an official proceeding a felony, and by section 777.011, Florida Statutes (1991), which proscribes aiding, abetting, or counseling commission of a felony.

[25] Florida caselaw prohibits lawyers from presenting false testimony or evidence. *Kneale v. Williams*, 30 So. 2d 284 (Fla. 1947), states that perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to communication between an attorney and a client with respect to transactions constituting the making of a false claim or the perpetration of a fraud. *Dodd v. The Florida Bar*, 118 So. 2d 17 (Fla. 1960), reminds us that "the courts are . . . dependent on members of the bar to . . . present the true facts of each cause . . . to enable the judge or the jury to [decide the facts] to which the law may be applied. When an attorney . . . allows false testimony . . . [the attorney] . . . makes it impossible for the scales [of justice] to balance." See *The Fla. Bar v. Agar*, 394 So. 2d 405 (Fla. 1981), and *The Fla. Bar v. Simons*, 391 So. 2d 684 (Fla. 1980).

[26] The United States Supreme Court in *Nix v. Whiteside*, 475 U.S. 157 (1986), answered in the negative the constitutional issue of whether it is ineffective assistance of counsel for an attorney to threaten disclosure of a client's (a criminal defendant's) intention to testify falsely.

[29] See footnote 10, *supra*.

or a neutral magistrate will not learn the client's true criminal history and, consequently, would be more likely to release him. This mistake by the police and the courts would make it harder to find a client who chooses not to appear in court and face charges resulting from any actions which led to his arrest. Additionally, a person who has an outstanding warrant or a long criminal record may not want the court to know of that warrant or criminal record, as these facts would be taken into consideration by the court in determining bail, admissibility of trial evidence (F.R.E. 90.610), or sentencing.[30]

REPRESENTATION INVOLVES ACTIVE ASSISTANCE OF A CLIENT'S DECEPTION

While one could debate whether by merely remaining silent and passive a lawyer would be assisting the client's fraud, the reality is that it is not possible for a lawyer to remain silent or passive in representing a client. A lawyer assists the client in his fraudulent use of a false identity every time the lawyer acknowledges to the court that the lawyer represents the client.

By merely remaining silent, a lawyer would be assisting the client's fraudulent act even if it were possible for a lawyer to represent a client without doing or saying anything in court or filing any pleading or motion. The client's stepping forward when his case (State v. "false name") is called is a fraud on the court by the client, and the attorney assists in the deception by accompanying the client who steps forward when his case (State v. "false name") is called.[31]

However, it is not possible to represent a client without doing something. A lawyer assists the client in his fraudulent use of a false identity every time the lawyer acknowledges to the court that the lawyer represents the client. Moreover, since the caption of every defensive motion, pleading or response will be

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[30] **90.610 - Conviction of certain crimes as impeachment.**
(1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(**a**) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.
(**b**) Evidence of juvenile adjudications are inadmissible under this subsection.
(2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.
(3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

[31] Rule 4-4.1 (b) states that: "In the course of representing a client a lawyer shall not knowingly: … fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

State v. "false name", the lawyer will be assisting his client's fraud merely by filing any motion or pleading, including a notice of appearance. Even by moving to withdraw, the attorney continues to assist the client's deception if the attorney's motion to withdraw includes the caption of the case and the alias (invented by the client for the purpose of fooling both the police and the court), without more.

These are all actions by the attorney, actions which help the client maintain his undisclosed and fraudulent alias.

BAR DISCIPLINE FOR FAILURE TO DISCLOSE A CLIENT'S USE OF A FALSE NAME

The Florida Supreme Court has never found any legitimate public policy or purpose to be served by permitting an attorney to assist his client's fraud on a tribunal, nor has the court extended the attorney-client privilege to cover a client's identity once the client is before a tribunal. Quite the opposite, the court has required attorneys to be candid with tribunals and to also require their clients to be candid.

Although not precisely on point, several cases speak to various aspects of this issue. While there is more to the case, Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), in part involved disbarment of an attorney who failed to disclose a witness's use of a false name (the case also involved the attorney's tolerating and maybe actually encouraging the witness's false testimony). Goene v. State, 577 So.2d 1306, 1309 (Fla. 1991), involved a defendant who committed a fraud on the trial court by falsely stating his identity. Once the defendant's true identity was discovered, the Florida Supreme Court affirmed the trial court's re-sentencing of the defendant, reasoning that "to hold otherwise in circumstances such as the one now before this Court would encourage and reward a defendant's use of aliases...."

Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001), involved an Assistant United States Attorney who intentionally listed a witness' name on the government's witness list as Gracie Greggs. The witness, Adria Jackson, was a confidential informant who had used the alias Gracie Greggs. A.U.S.A. Cox called Ms. Jackson to the stand, asked "Are you Gracie Greggs?" and proceeded to question her. The Florida Supreme Court suspended Cox from practice of law for one year, and required her to be on probation for one year and complete 15 hours of continuing legal education in ethics, in the event that she would be able to prove rehabilitation and be reinstated.

BAR DISCIPLINE FOR MISREPRESENTATION AND FRAUD

In addition to the false name cases, the Florida Supreme Court has found suspension to be the appropriate discipline for fraud. Even in cases where dishonesty, misrepresentation, fraud, or deceit

do not involve a misrepresentation or fraud on the court, the position of the Florida Supreme Court is that the appropriate discipline is suspension.[32] Schultz involved an attorney who was suspended for 90 days for stopping payment on a check to a travel agent. Siegel involved a suspension of an attorney who misrepresented facts in order to secure financing for the purchase of a law office. Adler involved the backdating of instruments in order to obtain tax deductions and Vernell involved the altering of a negotiable instrument by adding the attorney's name as payee to a settlement check. The Supreme Court has also held that "An attorney can be disciplined for failing to completely disclose essential matters in business transactions with non-clients."[33]

USE OF A FALSE NAME IS MATERIAL

State v. Marlow, 501 So.2d 136, 138 (Fla. 2d DCA 1987), involved a defendant who had given a false name at a police station and then answered to that false name when he was brought before the court. In finding the giving of the false name to be material, the court reasoned that "[o]ne of the primary purposes of arraignment is to identify the accused," and recognized that knowing the defendant's name "would be material to efforts to check for possible prior criminal records."

NO CONSTITUTIONAL RIGHT TO WITHHOLD IDENTITY

The Florida Supreme Court in State v. Ecker, 311 So.2d 104 (Fla. 1975), ruled on the constitutionality of Florida's loitering statute. The court upheld as constitutional "a requirement that an individual identify himself under circumstances where public safety is threatened." Id. at 110.

> The issue of identification and the issue of explanation are separate and distinct. Under circumstances where public safety is threatened, we find no constitutional violation in requiring credible and reliable identification.[34]

It would be ironic for the highest order to permit a policeman to ask a potential trespasser's name, but to rule that a judge may not ask an accused's identity before granting bail. Whether to ensure that no

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[32] Florida Bar v. Schultz, 712 So. 2d 386, 388, citing Florida Bar v. Siegel, 511 So. 2d 995 (Fla. 1987); Florida Bar v. Adler, 505 So. 2d 1334 (Fla. 1987); Florida Bar v. Vernell, 502 So. 2d 1228 (Fla. 1987); Florida Bar v. Fogarty, 485 So. 2d 416 (Fla. 1986).

[33] Florida Bar v. Schultz, citing Florida Bar v. Adams, 453 So. 2d 818 (Fla. 1984).

[34] State v. Ecker, 311 So.2d 104 at 109 (Fla. 1975)

outstanding warrants have been issued before granting bail or to permit police agencies and the public to check criminal backgrounds in hiring or doing background checks on daycare workers or police applicants, the true identity of those convicted is a matter of public safety.

In arriving at its decision, the Florida Supreme Court in Ecker relied on California v. Byers, 402 U.S. 424, 427-428 (1971). The United States Supreme Court in Byers upheld the right of the State of California to require a driver of an automobile to stop and give his name after an accident. Byers discusses at some length disclosures which are required by various laws, and which are constitutional in spite of the fact that compelling these disclosures may result in criminal prosecution.

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.
> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution-often a very real one-for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for

by statutes like the one challenged here.[35]

The Court found that:

> Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles.[36]

The California Supreme Court had found that a California statute that required a driver to notify another driver of his name and address violated the Fifth Amendment. The United States Supreme Court overturned this interpretation, reasoning that:

> Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.[37]

By the same reasoning, there can be no constitutional right to use an alias to mislead a tribunal.[38]

OPEN REFUSAL

One Florida case suggests that, at least under some circumstances, a defendant may have a Fifth Amendment right to not disclose his name. St. George v. State, 564 So. 2d 152 (Fla. 5th DCA 1990). Shortly after his arrest, the defendant told authorities that his name was not Gregory St. George but refused to reveal his real name. The appellate court upheld the defendant's right to not give his name, finding to do otherwise would violate the defendant's Fifth Amendment rights. However, the defendant's refusal to give his real name in St. George was an open refusal and not an attempt to deceive the court. (The court in St. George ignored the discussion in

[35] California v. Byers, 402 U.S. 424, 427-428 (1971)

[36] Id. at 432.

[37] Id. at 434.

[38] A criminal defendant has no constitutional right to testify falsely. Nix v. Whiteside, 475 U.S. 157 (1986).

Marlow and U.S. v. Palscencia-Orozco, 768 F.2d 1074, 1076-1077 (9th Cir. 1985) which cited the administrative reasons why a court needs to know the name of an accused.[39] St. George also failed to apply the balancing test from Byers and misinterprets the test found in Fisher v. U.S., 425 U.S. 391 (1976).)[40]

OTHER STATES REQUIRE DISCLOSURE OF A CLIENT'S FALSE NAME

OHIO

Other states have likewise been hesitant to afford protection for the use of a false name in court. In Office of Disciplinary Counsel v. Heffernan, 569 N.E.2d 1027 (Ohio 1991), the Ohio Supreme Court held that once the attorney learned that his client (charged with a traffic violation) had used a false name in court, he had a duty to advise the court. Office of Disciplinary Counsel v. Hazelkorn, 480 N.E.2d 1116 (Ohio 1985), involved an attorney whose client had given a false name when arrested. Knowing

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[39] "By giving a false name to the magistrate, a fact that could not be readily verified, Appellant effectively prevented the magistrate from gathering the facts necessary for the proper exercise of its discretion in sentencing him. Appellant concealed his criminal record and misled the magistrate about his true status. Such a misrepresentation constitutes an indictable offense under section 1503."
U.S. v. Palscencia-Orozco, 768 F.2d 1074, *1077.

[40] In Fisher, the court explains that in order for a 5th Amendment violation to occur, there must be a compelled testimony that is self-incriminating, thus compelled disclosure of private information is insufficient to meet this standard… Below are some quotes from the case that I feel explain this test the Court uses in finding what disclosures are sufficient in constituting a violation of one's 5th amendment rights.

"It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy… But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *399

"We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy … We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information." United States v. Nobles, 422 U.S. 225, 233 n. 7 (1975). *401

"It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." *408

Fisher v. United States, 425 U.S. 391

of the false identity, the attorney represented the client at a bond hearing under the false identity. The court disciplined the attorney for not disclosing the client's deception. The court pointed out that the use of the client's real name would have resulted in the revelation of his extensive record thus making it unlikely that the court would have accepted a no-contest plea and sentenced the client to pay a fine.

CALIFORNIA

The California Supreme Court suspended an attorney (and affirmed his conviction as an accessory) for providing financial assistance to a client and arranging bail for that client, a fugitive using a false name. In re Young, 776 P.2d 1021 (Cal. 1989).

LOUISIANA

The Louisiana Supreme Court suspended an attorney (for 6 months, with all but 30 days deferred) for deliberately filing a false bankruptcy pleading. In re Lightfoot, 85 So. 3d 56 (LA 2012). The attorney admitted that he counseled his clients to use fictitious names on their bankruptcy petition and counseled them to secure a temporary post office box and to list that on the petition.

MINNESOTA

State v. Casby, 348 N.W.2d 736 (Minn. 1984), involved an attorney who was disciplined for not revealing her client's true name. The client had given his brother's name to the police and continued the deception at both the pre-trial hearing and at the change of plea.

MARYLAND

Even Maryland, whose version of Rule 3.3 differs from Florida's in that it does not always require disclosure of client perjury and which does not require an attorney to reveal the client's use of a false name in obtaining a bond, disciplined an attorney who misrepresented the identity of the client to an agent conducting a pre-sentence investigation in Attorney Grievance Commission of Maryland v. Rohrback, 591 A.2d 488 (Md. 1991).

WISCONSIN

The Wisconsin Supreme Court disciplined an attorney that knew his client used his own brother's identity for a traffic violation. In re Sieg, 183 Wis. 2d 704 (1994). The court ruled that the attorney violated the rules by failing

to disclose the client's fraud to the court when he discovered it. The attorney did not meet with the client to prepare an affidavit admitting to the false identification until after the attorney learned that the brother had discovered the use of his name and disavowed any such approval.

SUMMARY – A LAWYER MUST DISCLOSE A CLIENT'S USE OF A FALSE NAME

One reason often given for the attorney-client privilege is to permit the client to tell the facts of his case in all candor to his attorney, so that his attorney may then represent him ably and not have the client's case hurt as a result of the attorney's ignorance. While one can readily think of a dozen ways of how permitting clients to give false names to courts would assist the clients, one cannot think of a single legitimate purpose for condoning, let alone assisting this type of fraud.

Rule 4-3.3, Florida's analog to ABA Model Rule 3.3, prohibits an attorney's representing a client who is proceeding under a false name and requires disclosure to the court if the attorney learns he has unwittingly assisted his client's fraudulent use of a false name in judicial proceedings. This is the interpretation of 4-3.3 adopted not only in Florida but also in the other jurisdictions that have confronted this issue.

THE FLORIDA BAR'S TORTURED HISTORY TRYING TO EXPLAIN THE RULES

The first time this issue came to the attention of the Professional Ethics Committee of the Florida Bar was in 1990. The P.E.C. is tasked with answering queries and drafting advisory opinions to assist lawyers who have ethical dilemmas.[41] In the first instance, a lawyer who has a question about how to proceed when confronted by an ethical dilemma, calls or writes the ethics staff of the Florida Bar, and the Ethics Staff's response is based on prior case law and ethics opinions. If there is no case law or opinion on point, or if the caller disagrees with the advice given by the Ethics Staff, the caller's question is presented to the P.E.C.

That is what happened in May 1990 when, in response to a Florida Bar News article about the public reprimand that was discussed at the beginning of this article, lawyers wrote the Bar asking for guidance lest they

[41] "This committee is charged with the duty of answering ethics inquiries from members of the Bar concerning the inquirer's own proposed conduct. The committee reviews informal advisory opinions issued by Florida Bar ethics department attorneys. Additionally, the committee publishes formal advisory opinions to guide bar members in interpreting and applying the ethics rules. A formal opinion is published in accordance with Board of Governors approved procedures as a proposed advisory opinion to which Bar members may submit comments." The Florida Bar, Standing Committees: Professional Ethics, About the Bar, (Jul, 1, 2016), http://www.floridabar.org/divexe/bd/cmstanding.nsf/2021e58ed0c7505585256e45004b060d/d1075074a605336185256c5b00554814?OpenDocument/.

also be disciplined. They wanted to know how a lawyer should resolve the conflict between his duty under Rule 4-1.6 to keep confidential his client's confidences and his duty of candor to the tribunal under Rule 4-3.3 when a lawyer learns that his client had given a false name to the police and was being prosecuted under the false name.[42] On the one hand, giving a false name to the police was a completed act that could potentially form the basis for a separate prosecution if the lawyer revealed to the court what the client had told him. On the other hand, the lawyer did not want to risk his law license by helping the client commit a fraud on the tribunal.

Rather than answer the question directly, the P.E.C. and the Florida Bar Board of Governors tried to finesse the question and issued Opinion 90-6 which correctly noted that the police were not a tribunal, and therefore the duty of candor under 4-3.3 did not apply, while also pointing out that the client should not be permitted to testify under the false name, as that would be a fraud on the court. While not completely responsive to the inquiry, at least that much of Opinion 90-6 was correct.

Unfortunately, Opinion 90-6 went on to say that the inquiring attorney did not have a duty to disclose to the court the fact that the client was being prosecuted under a false name. Not only did this conclusion have no support in the Rules Regulating the Florida Bar or the case law, it was inconsistent with both.

In addition to being contrary to the law and the Rules Regulating the Florida Bar, Opinion 90-6 also cavalierly disregarded the many affirmative steps a criminal defense lawyer must take in the representation of a criminal defendant, all of which would involve the lawyer in assisting the client in perpetrating a fraud on the court.[43]

1993 – THE P.E.C. TAKES ANOTHER LOOK AT OPINION 90-6

In an attempt to remedy the defect that there was not only any support for ethics opinion 90-6 but that it was also inconsistent with the Rules of Professional Conduct, in 1993 at the request of the P.E.C., the Board of Governors successfully petitioned the Florida Supreme Court to add an explanatory paragraph to the Comments of Rule 4-3.3. The explanatory paragraph stated that the duty of candor under 4-3.3 was not triggered by a client's

[42] In other words, the specific fact pattern that resulted in the Broward County attorney getting a public reprimand from the Florida Supreme Court on April 6, 1989. See footnote 6, supra.

[43] In every instance when a defense attorney files or responds to a pleading or even verbally acknowledges in court his presence on behalf of a client, the attorney must use the client's name to let the court know on whose behalf the attorney appears. In the case of the client who is using an alias, if the attorney uses that alias without alerting the court that it is an alias, the attorney is assisting the client's continuing fraud on the court.

having given a false name to the police, as the police were not a tribunal.[44] This paragraph did not alter a lawyer's duty under 4-3.3, nor did it give guidance to a lawyer of how to behave if the lawyer knew the client was using a false name. If anything, the 1993 paragraph clouded the issue for the otherwise uninformed lawyer who might read the Comments for guidance.

In other words, the paragraph that was added to Rule 4-3.3 Comments in 1993 was misleading and subject to misinterpretation. The criminal defense lawyer whose client had given a false name to the police did not have a dilemma regarding the police officer; the dilemma regarded the lawyer's obligation to the court. Once the defense lawyer submitted a pleading or appeared in court, the lawyer was bound by Rule 4-3.3, which requires a lawyer to be candid with the court and to neither mislead nor permit the client to mislead the court. Rule 4-3.3 requires a lawyer to disclose any misstatement or deception by the client, and even if the lawyer had learned of the deception from what both the lawyer and the client thought was an otherwise confidential communication. In other words, by its very terms, Rule 4-3.3 "trumped" Rule 4-1.6.[45]

While no doubt many Florida criminal defense attorneys understood this even in 1993, a surprisingly large number – which apparently included a majority of the members of the P.E.C. in 1993 – either had not read or did not understand Rule 4-3.3.[46]

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[44] "Although the offering of perjured testimony or false evidence is considered a fraud on the tribunal, these situations are distinguishable from that of a client who, upon being arrested, provides false identification to a law enforcement officer. The client's past act of lying to a law enforcement officer does not constitute a fraud on the tribunal, and thus does not trigger the disclosure obligation under this rule, because a false statement to an arresting officer is unsworn and occurs prior to the institution of a court proceeding. If the client testifies, the lawyer must attempt to have the client respond to any questions truthfully or by asserting an applicable privilege. Any false statements by the client in the course of the court proceeding will trigger the duties under this rule." In Re Amendments to the Rules Regulating the Florida Bar. Fla. No. SC08-1890. (Fla. Nov. 19, 2009).

[45] **Rule 4-3.3 - Candor Toward the Tribunal: (b)** Extent of Lawyer's Duties. The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

[46] Shockingly, in June 2008, lawyers who claimed to have practiced criminal defense for a number of years pleaded with the P.E.C. not to adopt and re-issue an opinion (the new version of 90-6) which, consistent with Rule 4-3.3, required them to refrain from assisting their clients in committing a fraud on the tribunal. Some even went so far as to allege that they would no longer be able to practice criminal defense work if such a comment were adopted. When questioned by a member of the P.E.C., one of the lawyers said that in his own practice he had avoided disclosing a client's fraud to the tribunal.

That many lawyers either had not read, did not understand, or chose to ignore the duty of candor which Rule 4-3.3 imposes on every member of the Florida Bar became evident when both the Florida Association of Criminal Defense Lawyers and the Florida Public Defenders Association opposed issuing new Opinion 90-6 on the mistaken ground that Rule 4-3.3 did not require them to disclose to a court their client's fraud on the court. The representatives of the Florida Public Defenders Association even argued that it was not a fraud on the court to assist one's client in proceeding under a name that only he and his lawyer knew to be false.

THE FLORIDA BAR'S ETHICS 2000 REVIEW PANEL

The impetus for the P.E.C.'s review of Opinion 90-6 and the paragraph added in 1993 to the comments on 4-3.3 was a study of the Model Rules of Professional Conduct undertaken by the American Bar Association.[47] On September 5, 2001, Florida Bar President Terrence Russell appointed a panel to review the recommendations of the ABA Ethics Commission 2000 and to compare the recommended changes to the Rules Regulating the Florida Bar.[48] The purpose of the panel's recommendations was to provide guidance to the Board of Governors and the bar's representatives before the vote in the ABA House of Delegates.[49]

After the ABA House of Delegates voted to adopt changes to the MRPC, Florida Bar President Tod Aronovitz appointed a successor panel, The Special Committee to Review the ABA Model Rules 2002, to recommend whether Florida should adopt any of the changes adopted by the ABA.[50] The Florida Supreme Court adopted most of the changes which the Special Committee had

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At the December 11, 2008 meeting of the Board of Governors Board Review Committee on Professional Ethics, a past president of the FACDL argued that if the Board were to require criminal defense lawyers to reveal to the court when their clients were using an alias, the Board would also have to require divorce lawyers to disclose to the court when their clients were hiding assets in a divorce proceeding! That this was already an existing duty for divorce lawyers was news to the FACDL's past president.

[47] The ABA Ethics Commission 2000 reviewed and suggested changes and updates to the Model Rules of Professional Conduct.

[48] The Ethics 2000 Review Panel has been created to study the recommendations of the American Bar Association Ethics Commission 2000. The panel's charge is to analyze the ABA recommendations, and compare them with existing Rules Regulating the Florida Bar. The primary concern in analyzing the ABA Ethics Commission 2000 recommendations should be protecting the public and maintaining the core values of the legal profession." – from The Report of the Special Committee to Review the ABA Model Rules 2002.

[49] The panel understood its primary purpose as reviewing the changes to the ABA Model Rules by the ABA "Ethics 2000" Commission to make recommendations to The Florida Bar Board of Governors to assist the bar's representatives in the ABA House of Delegates scheduled to vote on the proposed changes in February 2002. The panel reviewed each model rule, noted substantive changes, compared the model rule with Florida's comparable rule, recommended whether the changes should be adopted, and made suggestions for alternative language to a few of the model rules." *Ibid.*

[50] After the vote by the ABA House of Delegates in February 2002, President Tod Aronovitz appointed a successor committee, the Special Committee to Review the ABA Model Rules 2002, charging the special committee with the following mission statement:

The Special Committee to Review the ABA Model Rules 2002 has been created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from

recommended to the Florida Board of Governors, and which they, in turn, petitioned the Florida Supreme Court to adopt. One exception regarded Rule 4-3.3.[51]

2007 – THE P.E.C. TAKES ANOTHER LOOK AT 90-6

On March 17, 2007 , the Professional Ethics Committee of the Florida Bar (P.E.C.) voted unanimously to withdraw Florida Ethics Opinion 90-6, which advised that an attorney had no duty to inform the court that a client had given a false name to the police. On January 18, 2008, the P.E.C. voted without objection to reissue 90-6 to say that an attorney could not represent a client who had given a false name to the police unless the attorney informed the court that the client was using an alias, for to do otherwise would assist the client in perpetrating a fraud on the tribunal.[52] The P.E.C.'s recommendation was forwarded to the Florida Board of Governors Professional Ethics

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recommendations of the American Bar Association Ethics Commission 2000. Building on the work of the Ethics 2000 Review panel, this committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes. The primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct should be protecting the public and maintaining the core values of the legal profession." *Ibid.*

[51] Due to possible contradictions in the proposed amendments for **rule 4-3.3** (Candor Toward the Tribunal), the Court does not adopt the proposal. The Court directs the Bar to further study the proposal for **rule 4-3.3**.

In re Amendments to the Rules Regulating the Fla. Bar, 933 So. 2d 417

[52] Notice: Proposed ethics advisory opinions, Draft Proposed Advisory Opinion 90-6 (Reconsideration) to be considered, The Florida Bar News, The Florida Bar, (August 1 2007), http://www.floridabar.org/divcom/jn/jnnews01.nsf/Articles/820C8848CEA7C84B852573210059F648/.

Based on the above rules, the Committee is of the opinion that if the lawyer knows that the client is proceeding under a false identity, the mere act of filing pleadings under the false name used by the client or responding to the alias when called at a docket sounding, e.g., involve a misrepresentation to the court in which the lawyer cannot participate. By filing under the false name or responding to the false name, the lawyer essentially represents that the client is that person.

If the lawyer learns that the client has given a false name at the outset of the representation, before the lawyer has become involved in the case, the lawyer must decline to represent the client on the basis of the false identity unless the client agrees to make appropriate disclosure regarding use of the false identity. See Rules 4-1.2(d), 4-1.4, 4-1.16(a), 4-3.3 (a)(2) and (b), and 4-8.4, Rules of Professional Conduct.

If the lawyer learns of the false identity after representation has begun, the lawyer should inform the client that the lawyer cannot assist the client in misleading the court regarding the client's identity, and the lawyer should attempt to persuade the client to disclose the misrepresentation. Rules 4-1.2(d), 4-1.4, 4-1.6 (b)(1), 4-3.3 (a)(2) and (b), and 4-8.4, Rules of Professional Conduct.

If the lawyer is unsuccessful in persuading the client, then lawyer must disclose the client's misrepresentation to the court. Rules 4-1.6 (b)(1), and 4-3.3 (a)(2) and (b), Rules of Professional Conduct.

Board Review Committee who agreed and recommended adoption by the Board of Governors. One of the main opponents of the change was a criminal defense lawyer member of the Board of Governors, and he successfully persuaded the Board of Governors to reject in part the changes proposed by the P.E.C. and the Board Review Committee and issue in its place a watered-down version. [53]

The lawyer's disclosure may create a conflict between the lawyer and the client and thus could require the lawyer to move to withdraw. Rules 4-1.7(a), and 1.16 (a), Rules of Professional Conduct.

If the lawyer moves to withdraw but the court declines to permit withdrawal, the lawyer must continue the representation. Rule 4-1.16(c), Rules of Professional Conduct. In any event, the lawyer must make the appropriate disclosure to the court. As stated in the Comment to Rule 4-3.3, it is up to the court to determine the appropriate course regarding the information that has been disclosed.

[53] Professional Ethics of the Florida Bar, Opinion 90-6 (Reconsideration), Member Services, The Florida Bar, (May 29, 2009), http://www.floridabar.org/tfb/TFBETOpin.nsf/62bb7067e0dd3c3a852575e500681ad7/047ecd245d5acba9852575c80047db75!OpenDocument/.

The mere act of filing pleadings under the false name used by the client or responding to the alias when called at a docket sounding does not involve misrepresentation to the court. However, the lawyer cannot permit the client to lie and therefore, if asked, the client must give his or her true name or invoke a privilege in refusing to respond.

The Board will address the following scenarios: 1) the lawyer learns in the initial consultation before the lawyer accepts representation that a criminal defendant is being charged and proceeding under a false name; and 2) the lawyer learns after representation begins that a criminal defendant client is being charged and proceeding under a false name.

If the lawyer learns that the client has given a false name at the outset of the representation, before the lawyer has accepted representation of the criminal defendant in the case, the lawyer must decline to represent the client on the basis of the false name unless the prospective client agrees to disclose to the court that the client is proceeding under a false name. See Rules 4-1.2(d), 4-1.4, 4-1.16(a), 4-3.3 (a)(2) and (b), 4-3.4(c), 4-4.1, and 4-8.4, Rules of Professional Conduct.

If the lawyer learns of the false name after representation has begun, the lawyer should inform the client that the lawyer cannot assist the client in misleading the court regarding the client's identity, and the lawyer should attempt to persuade the client to disclose that the client is proceeding under a false name. Rules 4-1.2(d), 4-1.4, 4-1.6(b)(1), 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct. If the client refuses to disclose the information and insists that the client will maintain the false name throughout the case, the lawyer must move to withdraw from the client's representation. Rules 4-1.2(d), 4-1.4, 4-1.16(a), 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct. The lawyer must counsel the client not to commit perjury. Rules 4-1.2(d), 4-1.14, 4-3.3(a)(2) and (b), 4-3.4(c), and 4-8.4, Rules of Professional Conduct.

If the court declines to permit withdrawal, the lawyer must continue the representation. Rule 4-1.16(c), Rules of Professional Conduct. The lawyer may not inform the court of the false name except when the client affirmatively lies to the court concerning his or her true name.

All of the above scenarios presuppose that there is nothing in the court file to indicate that the client has been

And there it remains until the next time the P.E.C. is again tasked with addressing the issue of a lawyer whose client is being prosecuted under a false name.

CONCLUSION

A lawyer's duty to disclose a client's use of a false name to commit a fraud on the court is clear under the Constitution, state statutes, case law, and the Rules of Professional Conduct. It only remains a semi-mystery to the members of the Florida Bar's Board of Governors and the Florida Supreme Court.

charged and is proceeding under a false name. If the client has been charged as a "John Doe" or "Jane Doe" and clearly is openly refusing to disclose his or her identity, there is no misrepresentation to the court and the above rules are not applicable. See Rule 4-3.4(c). Under this circumstance, the lawyer need not specifically disclose to the court that the client is proceeding under a false name. Rule 4-3.3, Rules of Professional Conduct. Additionally, if the court file clearly indicates that the client is known by multiple names, then the court is on notice that the client may be proceeding under a false name and no remedial measures by the criminal defense lawyer are required.