

# Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System

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## INTRODUCTION

On December 16, 1974, Judge Marvin Frankel told an audience of the Association of the Bar of the City of New York that “our adversary system rates truth too low among the values that institutions of justice are meant to serve.”<sup>1</sup> The judge had become frustrated with the “trickery and obfuscation”<sup>2</sup> that he had witnessed during his nine years on the United States District Court for the Southern District of New York. He suggested that the adversary ideal should be modified to make truth “the paramount objective.”<sup>3</sup> To implement this suggestion, Frankel proposed tentative amendments to the American Bar Association’s (ABA) Code of Professional Responsibility.

Frankel’s amendments<sup>4</sup> would have required a lawyer to (1) disclose all relevant evidence and prospective witnesses, even when the lawyer does not intend to offer that evidence and those witnesses; (2) prevent or report any untrue statement by a client or witness, or

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<sup>1</sup> *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (31st Annual Benjamin N. Cardozo Lecture, Ass’n of the Bar of the City of New York, Dec. 16, 1974) [hereinafter *The Search for Truth*].

<sup>2</sup> *Id.* at 1059.

<sup>3</sup> *Id.* at 1055.

<sup>4</sup> See the Appendix for the full text of Frankel’s proposal.

any omission of material fact, that makes other statements misleading;<sup>5</sup> and (3) at trial, examine witnesses “with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate, intelligible, or fair than it otherwise would be.”<sup>6</sup>

Frankel was not the first person to address the tension between a lawyer’s duty to the client and to the court.<sup>7</sup> Nonetheless, his views became such an important reference point in modern debate over the adversary system that in 1996, the article version of his speech was ranked the seventy-sixth most cited law review article of all time.<sup>8</sup> Marvin Frankel, who died on March 3, 2002,<sup>9</sup> came to epitomize concern with the value of truth in the legal system and was for a time the country’s most prominent critic of the adversary system.<sup>10</sup>

This Article explores the influence of Frankel’s proposals both on discourse about the legal system as well as on actual legal practice. In the academy, as Part I of this Article will show, Frankel’s specific proposals never gained wide acceptance. The most heated debate concerning the duty of candor<sup>11</sup> has involved the question of whether

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<sup>5</sup> Frankel borrowed this language from the Securities and Exchange Commission’s Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974), which is quoted in the Appendix of this Article, *infra* note 272.

<sup>6</sup> *The Search for Truth*, *supra* note 1, at 1057–58.

<sup>7</sup> For an overview of the pre-Frankel debates, see 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING*, pt. III, at p. 26-6 (3d ed. 2001); A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 922–23.

<sup>8</sup> Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 767 (1996). The ranking may actually underestimate the number of citations to Frankel’s ideas because some authors may have cited only *Partisan Justice*, the 1980 book Frankel published that includes some of the same ideas as *The Search for Truth*. *See id.* at 762. On the other hand, Shapiro’s study is not a perfect measure of intellectual influence: “[A]n article might summarize a particular idea or issue effectively so that it becomes a convenient or reflexive cite long after it has ceased to influence scholars or even to be read.” *Id.* at 754.

<sup>9</sup> Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES, Mar. 5, 2002, at C15.

<sup>10</sup> *See, e.g.*, 2 HAZARD & HODES, *supra* note 7, § 29.22, at p. 29-39 (“The most unqualified defense of truth as the paramount goal is associated with Judge Marvin Frankel.”).

<sup>11</sup> This Article uses “duty of candor” to refer to the lawyer’s duty of candor to the court with respect to facts. It would also be possible to study the lawyer’s duty of candor to the court with respect to the law. *See, e.g.*, Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 724–26 (1997); Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833 (1982); Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303 (1995); Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate’s Duty and Opportunity*, 16 GA. L. REV. 821 (1982). However, this duty is

a criminal defense lawyer has a duty to disclose a client's perjury or other wrongdoing.<sup>12</sup> Frankel's proposals were far more radical than the already controversial requirement that a lawyer should inform the court of his client's wrongdoing, and his proposals were overshadowed by discussion of that more conservative proposal.<sup>13</sup> Frankel, however, succeeded in one respect. His specific proposals were meant to be tentative;<sup>14</sup> his larger purpose was to inspire the legal profession to talk more about the value of truth in an adversary system and about ways to promote that value. In this he succeeded, at least in the academy.

He was less successful in producing change in adversarial practice. As Part II will show, even though Frankel was a member of the commission that drafted the American Bar Association's 1983 *Model Rules of Professional Conduct*, and early drafts of the Rules essentially reflected his position, his views were gradually washed out of successive drafts until, with minor exceptions, the final version contained no trace of them.<sup>15</sup>

Part III will demonstrate, however, that a disclosure requirement similar to that proposed by Frankel landed in the Rules of Professional Conduct that New Jersey adopted in 1984.<sup>16</sup> Until now, New Jersey's extraordinary rule has not been literally enforced. Nonetheless, the New Jersey Supreme Court and New Jersey's disciplinary bodies appear to have become increasingly interested in recent years in using the rule to remind lawyers about the importance of candor. In a case decided in June 2004, the New Jersey Supreme Court presented its most extensive discussion of the rule to date and, for the first time ever, cited the very Frankel proposal that appears to be the rule's ancestor.<sup>17</sup> Thirty years after the publication of Frankel's article, this development raises the possibility that attorneys practicing in New Jersey will be held to a noticeably higher standard

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not as closely connected with the truth-seeking function of a trial. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (noting that what distinguishes the Continental system from the American adversary system is the lawyer's role in fact-gathering, not in developing legal theories). For the sake of putting reasonable boundaries on the scope of this Article, therefore, I will discuss only the duty of candor to the court with respect to facts.

<sup>12</sup> See discussion *infra* Part I.A.

<sup>13</sup> See discussion *infra* Part I.C.

<sup>14</sup> *The Search for Truth*, *supra* note 1, at 1031.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> N.J. RULES OF PROF'L CONDUCT R. 3.3(a)(5) (1984).

<sup>17</sup> See *In re Seelig*, 180 N.J. 234, 850 A.2d 477 (2004).

of candor than attorneys practicing in other jurisdictions.

The final section of this Article draws lessons from the experience of New Jersey and concludes that Frankel-type reforms are unlikely to succeed without pervasive changes in the attitudes and habits of the legal profession.<sup>18</sup>

Frankel's ideas appear also to be at least partly responsible for another development, but it is one beyond the scope of this Article. In 1993, the Federal Rules of Civil Procedure (FRCP) were amended to allow district courts to opt in to a regime requiring pretrial disclosure of all material that each party plans to use in support of its own claims and defenses.<sup>19</sup> In 2000, the FRCP were amended again to make that regime mandatory.<sup>20</sup> These amendments are traceable to the ideas expressed in two law review articles written by Wayne Brazil and William Schwarzer respectively,<sup>21</sup> who were both clearly influenced by Frankel.<sup>22</sup>

While these amendments to the FRCP help to reduce the adversarial character of civil discovery, they do not actually make lawyers responsible for the truth. The amended rules merely require that a party disclose what the adversary would ultimately learn anyway—namely, how the party intends to support its own claims and defenses. The rule does not impose, as Frankel's proposals would have, an affirmative obligation to disclose *unfavorable* material.<sup>23</sup>

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<sup>18</sup> See *infra* pp. 51–54.

<sup>19</sup> See FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

<sup>20</sup> See FED. R. CIV. P. 26(a)(1).

<sup>21</sup> The Advisory Committee's notes to the 1993 amendments to the FRCP specifically state that "[t]he concepts of imposing a duty of disclosure were set forth in" Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1348 (1978) and William Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721–23 (1989). See also Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush To Reform*, 27 GA. L. REV. 1, 15–17 (1992). Brazil eventually became a member of the Advisory Committee that proposed the 1993 rule. *Id.* at 17.

<sup>22</sup> Brazil's entire article, *supra* note 21, is framed as a response to Frankel, and Schwarzer's article was also influenced by Frankel's ideas. See Schwarzer, *supra* note 21, at 722 & n.58.

<sup>23</sup> Arizona and Nevada do impose such an obligation, but a lawyer in these states only needs to make unfavorable disclosures to opposing counsel; there is no affirmative duty of candor with respect to the court. Arizona requires attorneys to disclose "[t]he names and addresses of all persons whom the party believes may have knowledge or information relevant to the . . . action, and the nature of the knowledge or information each such individual is believed to possess." ARIZ. R. CIV. P. 26.1(a)(4). Arizona also requires attorneys to produce "[a] list of the documents . . . known by a party to exist whether or not in the party's possession,

Because these discovery rules do not impose such a duty, and the subject of pretrial disclosure has been extensively treated elsewhere,<sup>24</sup> this Article does not specifically discuss this topic. Of course, discovery battles are a major aspect of the adversary character of civil lawsuits, but the discussion in this Article is limited to ethics standards.

## I. WRESTLING WITH TRUTH IN AMERICAN LEGAL THOUGHT

### A. *The Major Arguments*

In 1966, Monroe Freedman published a famous article in which he argued that a criminal defense lawyer has a duty to (1) destroy a witness “whom you know to be telling the truth”; (2) “put a witness on the stand when you know he will commit perjury”; and (3) “give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury.”<sup>25</sup> Freedman’s article and the speech on which it was based<sup>26</sup>—which prompted then-Judge Warren Burger to suggest disbaring him<sup>27</sup>—triggered his career in legal ethics, and he eventually became the country’s most prominent academic champion of adversary values.<sup>28</sup>

Since Freedman’s article, much of the literature on the duty of candor in the adversary system—indeed, the literature on the adversary system itself—has focused on the question of whether a

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custody or control and which that party believes may be relevant to the subject matter of the action.” ARIZ. R. CIV. P. 26.1(a)(9). Nevada requires attorneys in pretrial discovery to “[e]xchange written lists of persons . . . believed to have knowledge of any facts relevant to the allegations of any pleading filed by any party to the action . . . .” NEV. R. CIV. P. 16.1(b)(5) (emphasis added).

<sup>24</sup> See, e.g., Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—‘Much Ado About Nothing?’*, 46 HASTINGS L.J. 679 (1995); Bell et al., *supra* note 21.

<sup>25</sup> Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966).

<sup>26</sup> See *id.*; Ronald D. Rotunda, Book Review, 89 HARV. L. REV. 622, 622 n.3 (1976) (reviewing MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975)).

<sup>26</sup> The speech was given to a small audience of the District of Columbia Bar Association. Freedman, *supra* note 25, at 1469 n.1.

<sup>27</sup> See *id.*; MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* viii (1975).

<sup>28</sup> See, e.g., 2 HAZARD & HODES, *supra* note 7, § 29.22, at p. 29-39 (“The most unqualified defense of loyalty to client interests is associated with Professor Monroe Freedman.”).

lawyer has a duty to disclose his client's perjury<sup>29</sup> and on the related issue of the extent of a lawyer's duty of confidentiality to his client.<sup>30</sup> Many of the articles on the perjury dilemma and the duty of confidentiality briefly cite Frankel's *The Search for Truth* (and his book *Partisan Justice*,<sup>31</sup> which grew out of the article) for the proposition that adversary combat may not be the most effective means of arriving at the truth.<sup>32</sup> Indeed, the tension between the lawyer's duty of confidentiality to the client and the lawyer's duty of candor to the court came to be known as the Freedman–Frankel debate.<sup>33</sup> Very few of these articles, however, advocate implementing Frankel's proposals or seriously address the issue of a lawyer's responsibility for truth in an adversarial system.<sup>34</sup>

Reflecting on this phenomenon two decades after the publication of *The Search for Truth*, Frankel told an ethics symposium audience that Freedman's three propositions, notwithstanding the controversy they had inspired, "are really either moot or immaterial. They have served as substitutes for, or diversions from, a broader and more fundamental question, namely, whether . . . criminal lawyers, supposedly to defend the rights of the innocent, should routinely [thwart] the search for truth . . ." <sup>35</sup> Frankel pointed

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<sup>29</sup> See, e.g., 2 *id.*:

The client perjury problem . . . puts the dilemma of the adversary system into sharp focus, for it is in this context that the clash between the truth-seeking function and the interests of clients becomes most intense. Much of the literature about the perjury problem is also literature about the role of lawyers in the adversary system, and vice versa. The vast literature about the confidentiality rule likewise intersects both of these issues.

<sup>30</sup> See 1 *id.* § 9.3, at pp. 9-10 to 9-14. For lists of some of the articles that appeared at around the same time as *The Search for Truth*, see 1 *id.* § 9.3, at pp. 9-10 to 9-13; 2 *id.* § 29.22, at pp. 29-39 to 29-40; Pye, *supra* note 7, at 924 n.17.

<sup>31</sup> MARVIN FRANKEL, *PARTISAN JUSTICE* (1980).

<sup>32</sup> See, e.g., R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 439 n.17 (1984); Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 949 (2002); Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 810–11 n.7 (1977); Ronald Evan Alper, Comment, *Proposed Client Perjury: A Criminal Defense Attorney's Alternatives*, 12 U. BALT. L. REV. 248, 249 n.9 (1983).

<sup>33</sup> See 2 HAZARD & HODES, *supra* note 7, § 29.22, at p. 29-40; see also Crystal, *supra* note 11, at 711.

<sup>34</sup> See generally sources cited *supra* note 32. One article in this area that does obliquely address the lawyer's responsibility for truth is Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997).

<sup>35</sup> Marvin E. Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. INST. STUD. LEGAL

out that Freedman had later repudiated his third proposition (that a lawyer has a duty to give legal advice that may help the client to commit perjury),<sup>36</sup> and that Freedman's second proposition (that a lawyer has a duty to put an untruthful witness on the stand) has been generally rejected.<sup>37</sup> Furthermore, Frankel argued, in real life a lawyer rarely has to decide whether to present untruthful testimony. The client-perjury problem is therefore mostly an academic one. The larger problem for Frankel was what to do about the various techniques that defense lawyers routinely use to conceal and distort the truth.<sup>38</sup>

In reality, Frankel probably made a mistake when he said that all three of Freedman's propositions are moot. If Frankel was correct that a defense lawyer rarely must decide between assisting perjury and betraying the client, whereas they do routinely use an arsenal of tricks to subvert the truth, then Freedman's first proposition—that a lawyer has a duty to discredit a truthful witness—should still be relevant. And yet, that issue has provoked far less discussion than the client perjury question.

The most notable article to address the discrediting of truthful witnesses came from Harry Subin in 1987.<sup>39</sup> Subin agreed with Frankel's critique of the adversary system and of criminal defense lawyers' techniques for subverting truth, especially the use of cross-examination to discredit witnesses whom the lawyer knows to be telling the truth.<sup>40</sup> A former criminal defense attorney, Subin attempted to refute Freedman's views with some care.<sup>41</sup> Subin did not

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ETHICS 25, 26 (1996).

<sup>36</sup> *Id.* at 27 (citing FREEDMAN, *supra* note 27, at 59–76).

<sup>37</sup> The Model Rules of Professional Conduct and Model Code of Professional Responsibility do not countenance the presentation of perjurious testimony. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4), (6), (7) (1981).

<sup>38</sup> Frankel, *Clients' Perjury and Lawyers' Options*, *supra* note 35, at 28–29, 37.

<sup>39</sup> Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987). For another consideration of defense tactics, including undermining truthful witnesses, that appeared at about the same time, see Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988). Schwartz argues that *Nix v. Whiteside*, 475 U.S. 157 (1986)—with Chief Justice Burger's description of "the very nature of a trial as a search for truth," *id.* at 166—suggests that defense tactics that make false statements or testimony look true and true statements or testimony look false are "highly suspect, if not clearly improper." Schwartz, *supra*, at 1138.

<sup>40</sup> Subin, *The Criminal Lawyer's "Different Mission"*, *supra* note 39, at 128, 135–36.

<sup>41</sup> *Id.* at 129–49.

directly discuss Frankel's proposals; instead, he made his own. Subin suggested a rule that would prohibit a criminal defense attorney who knows the truth of a fact in the state's case from "attempt[ing] to refute that fact through the introduction of evidence, impeachment of evidence, or argument."<sup>42</sup> This proposed rule differs from Frankel's original proposals in that it does not impose a duty to (1) disclose material information; (2) refrain from presenting misleading statements; or (3) elicit the whole truth from witnesses. That is, the Subin rule merely prohibits making the true look false; it does not prohibit making the false look true.

Subin's article, which provoked a thoughtful response by John Mitchell<sup>43</sup> and a rejoinder by Subin himself,<sup>44</sup> has proved, like *The Search for Truth*, to be influential for its general critique rather than for its specific proposal.<sup>45</sup> One of the few people who supported Subin's proposed rule was Frankel. In the 1996 presentation excerpted above, Frankel did not mention his own proposals of two decades earlier, but he concluded that Subin's rule would be the best one for the adversary system as we know it today.<sup>46</sup>

Murray L. Schwartz has pointed out that the standard justifications of truth-defeating tactics "appeal to the role of the defense attorney in a criminal trial."<sup>47</sup> These rationales do not apply to the civil trial, because, Schwartz argued, the paramount purpose of

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<sup>42</sup> *Id.* at 149.

<sup>43</sup> John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339 (1987); *see also infra* note 62.

<sup>44</sup> Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1987).

<sup>45</sup> *See, e.g.*, W. William Hodes, *The Lawyers: Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1085 n.26 (1996); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1027 & n.87 (1990); Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055, 1062 (2000); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 371 & n.37 (2004); *see also* Frankel, *Clients' Perjury and Lawyers' Options*, *supra* note 35, at 27 ("[E]ight whole years after the way was lighted, we seem no closer to accepting Professor Subin's sound conclusion than we were when he stated it. The notion that criminal defense lawyers, of all people, owe a duty not to obstruct the search for the truth remains a heresy, both in theory and in practice.").

<sup>46</sup> Frankel, *Clients' Perjury and Lawyers' Options*, *supra* note 35, at 26.

<sup>47</sup> *See* Murray L. Schwartz, *The Zeal of the Civil Advocate*, in DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150, 157 (1983) [hereinafter *THE GOOD LAWYER*].



a civil trial is to accurately reconstruct what happened, not to avoid error in one direction. Schwartz contended that civil litigators should therefore be governed by rules that are more truth-serving and that Frankel's proposal would be "[a] good start in that direction."<sup>48</sup>

Aside from these contributions, a large number of articles have debated, often with reference to Frankel's publications, the merits of the American adversary system and whether it does enough to promote truth.<sup>49</sup> Most of those critics, however, focus only on criminal justice, and few have engaged Frankel's proposal.<sup>50</sup>

### B. Debating Frankel's Proposal

Writers who have seriously engaged Frankel's proposals have argued that (1) in an adversary system, other values take precedence over truth; (2) an adversary process designed to reach the truth necessarily sometimes obscures truth; (3) Frankel's proposals would weaken the attorney-client relationship and discourage effective representation; and (4) Frankel's proposals are impracticable.

One strand of argument against Frankel's proposals rejects the idea that truth should be accorded a higher priority in an adversary trial. This position has been argued most forcefully by Monroe Freedman, but others have made similar points.<sup>51</sup> Freedman, in a response that was published alongside Frankel's article,<sup>52</sup> argued that the American legal system serves other values, like the promotion of

<sup>48</sup> *Id.* at 158–60.

<sup>49</sup> See, e.g., David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469 (1992); The Honorable Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271 (1987); Charles Pulaski, Jr., *Criminal Trials: A "Search for Truth" or Something Else?*, 16 CRIM. L. BULL. 41 (1980); Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855 (1994); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992).

<sup>50</sup> See generally sources cited *supra* note 49.

<sup>51</sup> See, e.g., Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 651 (1986) (arguing that the adversary system is not a search for truth, but rather "a competition to win" that is supposed to promote goals of substantive law). For a penetrating explanation of what is wrong with Saltzburg's account of the adversary system—namely, that Saltzburg is simply redefining theory so that it approximates practice, and that correctly applying substantive law depends on accurate fact-finding—see Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799, 839–42.

<sup>52</sup> Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975).

individual dignity, in addition to truth. Serving individual dignity, Freedman contended, might sometimes require subordinating—and hence, distorting—truth. One example is the constitutional privilege against self-incrimination.<sup>53</sup> Freedman quoted United States Supreme Court justices who have supported defense attorneys' obligation to defend clients vigorously, regardless of whether they are guilty.<sup>54</sup> None of the quoted passages explain why this duty exists or what makes it more important than truth, but Freedman offered the following explanation: "Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes which ensure regard for the dignity of the individual be followed, irrespective of their impact on the determination of truth."<sup>55</sup>

Freedman's response to Frankel essentially ended there, although as a logical matter, his answer was not complete. Freedman did not explain why dignity requires processes that distort the truth. That is, even if dignity is of paramount concern, and the only way to serve dignity is through process, it is not clear why that process must override the truth. Freedman does not explain why dignity would be at risk under procedures designed to promote rather than subordinate truth.

Others have completed this line of reasoning by arguing that an attorney's loyalty has a value and that Frankel's proposals would interfere with that loyalty by creating a duty to further the other side's case. For example, in *Lawyers' Ethics in an Adversary System*, Freedman argued<sup>56</sup> that dignity requires the right to an advocate; that an advocate can only be effective if the client confides in him; and that the client will not confide in the lawyer unless the lawyer can promise

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<sup>53</sup> *Id.* at 1063–65.

<sup>54</sup> *See, e.g., id.* at 1064 (“[A]s part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.”) (quoting *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part)). Freedman also quotes Justice Harlan's dissenting opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966): “[T]he lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding.” Freedman, *supra* note 52, at 1064 (quoting *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting)).

<sup>55</sup> *Id.* at 1065.

<sup>56</sup> FREEDMAN, *supra* note 27, at 4–8. This book's first chapter appears to have been the source of certain portions of Freedman's response to Frankel. Freedman actually presented a version of this argument in his 1966 article, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, *supra* note 25, but a reference to the book is helpful because its text literally picks up where the response to Frankel left off.

absolute confidence.<sup>57</sup> In addition, Albert Alschuler argued that Frankel's proposals would divide the lawyer's duty to his client—a duty that has non-instrumental value because it promotes a sense of fair treatment.<sup>58</sup> Similarly, H. Richard Uviller, in a response published alongside Frankel's article, worried that making lawyers responsible for the truth would create an "affirmative duty of betrayal."<sup>59</sup> Such a duty would violate the individualistic values embodied in criminal procedure.<sup>60</sup>

A second strand of argument against the proposition that lawyers should be responsible for the truth is that an adversary system designed to arrive at the truth will sometimes obscure the truth. Uviller contended that defense counsel cannot necessarily know or recognize the truth and that Frankel "proceeds from the assumption that the shining Truth is known or knowable by all diligent lawyers acting in good faith."<sup>61</sup> According to Uviller, defense counsel might not know or recognize "the truth" because cases are tried not on "the truth," but on evidence, which is rarely unambiguous.<sup>62</sup> A defense

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<sup>57</sup> For an effective critique of this argument, see Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 47, at 123, 144.

<sup>58</sup> Albert Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 350–55 (1981). In response, Frankel asserted that the concept of a hallowed duty of loyalty is nothing more than a self-serving romantic vision. He explained that the duty as it exists now really stems from an amoral commercial relationship. To illustrate this point, Frankel pointed out that the duty of prosecutors to remain truthful overrides their loyalty to the complaining witness, towards whom they have a certain obligation and, typically, feelings of affinity. The only significant difference, Frankel said, between a defense attorney and a prosecutor, is that the prosecutor is not being paid by the complaining witness. The reality, argued Frankel, is that in letting confidentiality to the client trump the truth, the lawyer may be serving the client's interest, but the lawyer is probably disserving someone else's interest at the same time. Frankel contended that an honest balancing of goods argues in favor of a duty to tell the truth. Marvin Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 52 U. COLO. L. REV. 51, 54–56, 61–62 (1982). As for the problem of the prosecutor's divided duty, Frankel used the example of fiduciaries—like corporate officers and directors—who have complex, divided duties: "[T]he learned professionals who formulated such difficult obligations are not incapable of simultaneously serving clients and not lying to courts." *Id.* at 62–63.

<sup>59</sup> H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1073–74 (1975).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1077.

<sup>62</sup> *Id.* at 1076–79; see also Mitchell, *supra* note 43, at 345 (responding to Subin's proposal that a defense lawyer should not attempt to impeach facts that he knows are true by arguing that "in a trial there are no such things as facts. There is only information, lack of information, and chains of inferences therefrom").

should not be shaped by the defense lawyer's personal evaluation of the true state of affairs, for it is not the defense lawyer's job to evaluate credibility.<sup>63</sup>

Even when a defense lawyer knows to a certainty which facts are true and which are not, there is still an interest, Uviller suggests, in holding the state to its burden of proof. The adversary system is designed to prevent the conviction of innocent persons at the expense of acquitting some guilty ones. This goal is served by having a defense lawyer relentlessly challenge the state's case, even when the defense lawyer knows that the case has merit.<sup>64</sup>

Uviller also argued that there is a difference between "ultimate and . . . instrumental facts."<sup>65</sup> He used the example of a lawyer defending a man whom the lawyer believes committed the robbery with which he is charged. If the defense attorney believes that a witness' testimony is false, "[a]ttacking that witness serves the instrumental truth but may defeat the ultimate truth."<sup>66</sup> A defender of Frankel's proposition, according to Uviller, must choose between prohibiting truth-defeating tactics and allowing defense counsel to keep all evidence truthful.<sup>67</sup> Uviller's position, however, appears to be flawed. Frankel did not claim that a lawyer must countenance untruthful means in the service of truthful ends. Frankel's proposal would not have prevented a lawyer from attacking a false witness, even if the result were to prevent the emergence of the ultimate truth.

Another response to Frankel's proposal was instrumental: Making lawyers affirmatively responsible for the truth would have undesirable side effects. Albert Alschuler, for example, suggests that protecting confidentiality does not impair the search for truth because the purpose of confidentiality is to induce disclosures to the attorney that the client would not make (and therefore, no one would know) in the absence of the protection. Under Frankel's proposals, therefore, a client would refrain from revealing material

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<sup>63</sup> Uviller, *supra* note 59, at 1077.

<sup>64</sup> *Id.* at 1078-79. Mitchell made a similar point by arguing that because factual guilt is not at issue in a criminal trial, raising alternative possibilities and casting doubt on the prosecution's case is not presenting a "false case," but rather introducing "reasonable doubts." Mitchell, *supra* note 43, at 346.

<sup>65</sup> Uviller, *supra* note 59, at 1077.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1077-78.

adverse facts.<sup>68</sup> Uviller argued that in the commercial context, impairing confidence might be undesirable because the lawyer often obtains complete disclosure from the client, and the lawyer can use the disclosures to steer the client away from unlawful activities.<sup>69</sup> William T. Pizzi has argued that if a lawyer were required to disclose adverse information, the lawyer might strategically avoid obtaining full knowledge.<sup>70</sup> A defender of Frankel's proposals might respond that under those proposals, a lawyer would be prohibited from avoiding full knowledge so as to be able to tell half-truths to the court.

Finally, critics have argued that Frankel's proposals are impracticable and that a lawyer simply could not function in the American system under the duties Frankel proposed. Stephen Saltzburg, for example, argued that lawyers always emphasize and deemphasize facts to make their version of a case as persuasive as possible. To require them to do otherwise—as Frankel's duties not to make misleading statements and to elicit the whole truth when examining witnesses would have entailed—“simply would not work.”<sup>71</sup> Similarly, Pizzi has argued that the defects of the adversary system are

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<sup>68</sup> Alschuler, *supra* note 58, at 350, 352. In response to this argument, Frankel asserted that not all clients want to lie or conceal the truth, and those that do want to lie or conceal the truth can do so without legal help. However, Frankel wrote, untruthful clients will lie to their lawyers, as they often do anyway. Finally, Frankel claimed that even if both lawyers and clients are such scoundrels that a duty to tell the truth will not result in more accurate fact-finding, at least such a duty will prevent lawyers from being accomplices to villainy. Frankel, *The Search for Truth Continued*, *supra* note 58, at 57–59, 63.

It is worth mentioning that neither Frankel, Freedman, nor Alschuler (or anyone else for that matter) had convincing answers to the fundamental question of whether empirically, confidentiality rules produce outcomes that are more or less accurate. See Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1163 (1985). The results of one limited empirical investigation suggest that Frankel had the better argument. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); see also Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994); cf. Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 315, 401–13 (1991) (proposing an analytical framework for determining the effect of confidentiality rules on information sharing).

<sup>69</sup> Uviller, *supra* note 59, at 1072.

<sup>70</sup> William T. Pizzi, *Judge Frankel and the Adversary System*, 52 U. COLO. L. REV. 357, 365 (1981). Presumably, a lawyer might also be chilled from conducting additional investigations in search of evidence beneficial to the client because the investigations could turn up information that is damaging to the client.

<sup>71</sup> Saltzburg, *supra* note 51, at 682.

not due to the ethical failings of lawyers, but rather inhere in the structure of the American trial. Using ethical rules to curb excesses is unlikely to succeed because the incentives of the adversary system place great pressures on the rules of professional conduct.<sup>72</sup> As for Frankel's duty to disclose all relevant evidence, Saltzburg argued that a lawyer does not know his adversary's strategy and therefore is not able to judge what is relevant in advance.<sup>73</sup>

The arguments presented so far are the major ones the academy has leveled against Frankel's proposals over the years. The criticisms voiced by the bar when it was confronted with the actual possibility of having to abide by the Frankel proposals are discussed in Part II.

### C. Frankel's Proposal Today

Frankel's proposal is still standard reading in legal ethics textbooks,<sup>74</sup> but almost no one seems to be seriously endorsing it.<sup>75</sup> A

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<sup>72</sup> Pizzi, *supra* note 70, at 363–65. Pizzi suggested that it would be more effective to change the structure of trials in ways that would blend elements of the continental trial procedure—for example, (1) letting judges control questioning of witnesses, with lawyers filling in gaps; (2) replacing opening and closing statements with an outline of the case from the bench; and (3) permitting witnesses to ask questions of each other. *Id.* at 365–66. Pizzi has adhered to the view that the defects of the American trial are attributable to defects in structure, not defects in ethics. See WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 221–33 (1999). *But see id.* at 223. (“No other system permits the kind of behavior from advocates that is not only tolerated in American courtrooms, but considered completely normal and ethical.”).

<sup>73</sup> Saltzburg, *supra* note 51, at 683. Frankel once anticipated this argument. His response was that “[i]n the general run of cases . . . we are indeed able to know as lawyers what our adversaries would be delighted to have from us in the way of evidence.” In fact, it is through knowing what evidence an adversary would find useful that lawyers are effective at withholding information. Frankel also pointed out that the prosecutor's duty to disclose exculpatory evidence is defined in terms of what evidence would help the defendant. Frankel, *The Search for Truth Continued*, *supra* note 58, at 56.

<sup>74</sup> See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 404–09, 417–18 (6th ed. 2002); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 231–41 (3d ed. 1994); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 180–82 (2d ed. 1998).

<sup>75</sup> Two articles that have done so in the past fifteen years are Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) and W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895 (1996). Gaetke argued that lawyers should either stop referring to themselves as officers of the court or give meaning to that characterization, and he approvingly cited Frankel's proposals as one way lawyers could do so. Gaetke, *supra*, at 88–90. Wendel proposed, for purposes of discovery only, a set of principles that included the following: (1) “With respect to matters of fact, the lawyer's primary obligation is to the discovery of truth rather than to the advancement of the client's interest, unless some clear countervailing interest

recent article arguing that prosecutors should be placed under an affirmative duty to promote the truth did not mention Frankel's proposals.<sup>76</sup> Another article, suggesting that the Model Rules be amended to require lawyers to disclose relevant information about "procedural matters," also failed to cite Frankel.<sup>77</sup> In 2000, after a three-year deliberative process, the ABA approved changes that slightly expand the duty of candor to the tribunal,<sup>78</sup> but without citation to Frankel.

Several factors could explain why Frankel's proposals are no longer the subject of serious discussion. For one thing, Frankel's proposals may have struck most people as quixotic (in the case of the duty not to make misleading statements) or unworkable (in the case of the duty to disclose all relevant evidence). Moreover, the process that resulted in the adoption of the Model Rules of Professional Conduct in 1983 showed that reforming the profession through changes in ethics rules was something of a hopeless cause. In 1985, Deborah Rhode referred to "the bar's demonstrated parochialism in enacting and enforcing ethical standards."<sup>79</sup> As Part II will show, the bar proved in the late 1970s and 1980s that it was not ready to allow anything even close to Frankel's proposal to be adopted.

Another possible reason why reform-minded commentators are not discussing Frankel's proposals is that they are interested in the possibility of deep structural and institutional reform. Critics of the adversary system appear to be more interested in the possibility of borrowing elements from the continental systems than in modifying the ethics requirements in the American system.<sup>80</sup> In recent books,

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is recognized[]"; and (2) "It is a breach of the lawyer's duty as an officer of the court to fail to disclose information that would assist the tribunal in determining the case on its merits." Wendel, *supra*, at 935.

<sup>76</sup> Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

<sup>77</sup> William H. Fortune, *A Proposal to Require Lawyers to Disclose Information About Procedural Matters*, 87 KY. L.J. 1099 (1998).

<sup>78</sup> See *infra* text accompanying notes 128–33.

<sup>79</sup> Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 641 (1985).

<sup>80</sup> See, e.g., PIZZI, TRIALS WITHOUT TRUTH, *supra* note 72; Albert W. Alshuler, *Lawyers and Truth-Telling*, 26 HARV. J. L. & PUB. POL'Y 189, 189 (2003) (commenting that the approach of critics, exemplified by John Langbein, who "would give judges greater independent responsibility for truth-seeking," seems more promising than the approach of critics, exemplified by Frankel, who "would give lawyers greater responsibility for truth-telling"); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997);

two prominent and articulate proponents of reform in the legal profession have supported Frankel's proposals, but also implied that those proposals are unlikely to be enacted without fundamental changes in attitudes, regulatory systems, and incentive structures.<sup>81</sup> Those same commentators present Frankel's concerns as simply one branch of a larger problem.<sup>82</sup>

## II. FRANKEL'S PROPOSAL AND CONTEMPORARY LEGAL ETHICS

The 1983 Model Rules of Professional Conduct grew out of a post-Watergate attempt to reform legal ethics.<sup>83</sup> In 1977, the president of the American Bar Association, William B. Spann, Jr., appointed Omaha lawyer Robert Kutak to chair a commission

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Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95 (1996). Strier considered all of the rules and tactics that defeat truth in jury trials, and then proposed a wide variety of specific reforms, including (1) modifying exclusionary rules; (2) changing the composition of juries, i.e., improving the overall caliber of jurors, eliminating peremptory challenges, using specially qualified juries, and using mixed courts; (3) limiting witness coaching; and (4) giving judges more control over the proceedings. *Id.* at 162, 166–72, 175–78, 179–80. Strier supported his arguments with data from surveys of judges and jurors as to their attitudes about some of these reforms. *Id.* at 100. Strier did not, however, engage or even mention Frankel's proposals. *See generally id.*

<sup>81</sup> Carrie Menkel-Meadow has proposed, among other additions, a Frankel-style change to the ethics codes: "Lawyers should not misrepresent or conceal a relevant fact or legal principle to another person (including opposing counsel, parties, judicial officers, third-party neutrals, or other individuals who might rely on such statements)." Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 136 (Deborah L. Rhode ed., 2000). Menkel-Meadow then writes, "I have no expectation that such 'golden rules' of lawyer behavior would ever be adopted by any regulatory or bar disciplinary body." *Id.* Likewise, Rhode writes:

In the long run . . . major improvement in adversarial practices will require major changes in bar ethical codes, enforcement patterns, and incentive structures. . . . If American lawyers viewed the adversary process more as a search for truth and less as a sporting event, then such requirements would not appear unjust. . . . The prospects for that agenda will depend on securing greater commitment from those within the profession and greater pressure from those outside it.

DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 93–95 (2000).

<sup>82</sup> Menkel-Meadow, *supra* note 81, at 130; Rhode, *supra* note 81, at 105.

<sup>83</sup> For a good overview of the process that produced the Model Rules, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 60–63 (student ed. 1986). For a fascinating account of the politics behind the process, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).



charged with a comprehensive review of legal ethics.<sup>84</sup> Spann apparently “wanted a critical and outward-looking drafting committee in order to counteract the narrower and more traditional views that would prevail in the [ABA’s] House of Delegates.”<sup>85</sup> One of the people appointed to the commission was Judge Marvin Frankel.<sup>86</sup> Over the next six years, the Kutak Commission<sup>87</sup> produced a series of drafts, each less reformist than the one before. As this section will show, early drafts reflected Frankel’s views, but those views were gradually washed out of later versions. Although the lawyer’s duty of candor has been broadened in recent years, prevailing legal ethics standards are still far from what Frankel envisioned.

The 1979 draft of the Model Rules of Professional Conduct<sup>88</sup> was the Kutak Commission’s earliest and most reformist. The rule on candor to the tribunal prohibited any “knowing misrepresentation of fact” (“misrepresentation” presumably includes misleading statements in addition to false ones).<sup>89</sup> The rule also prohibited a lawyer from offering “without suitable explanation evidence that the lawyer knows is substantially misleading,” and it required the lawyer to disclose any fact, even if adverse, when the disclosure was necessary to correct a misapprehension, or when the fact “would probably have a substantial effect on the determination of a material issue of fact.”<sup>90</sup> Some of the provisions did not apply to criminal defense lawyers.<sup>91</sup> This rule would have compelled the disclosure of virtually all material facts.

The stated purpose of the provisions dealing with the disclosure of adverse facts was to address the limited circumstances in which an adversary should have presented a decisive fact, but did not do so. That is, the rule was designed to correct situations in which the

<sup>84</sup> Schneyer, *supra* note 83, at 677.

<sup>85</sup> *Id.* at 694–95.

<sup>86</sup> *Id.* at 693.

<sup>87</sup> The official name of the Kutak Commission was the Commission on Evaluation of Professional Standards. See *Chair’s Introduction to MODEL RULES OF PROF’L CONDUCT*, at [http://www.abanet.org/cpr/mrpc/chair\\_intro.html](http://www.abanet.org/cpr/mrpc/chair_intro.html) (Sept. 1983).

<sup>88</sup> See *Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES, Aug. 27, 1979, at 26–47 [hereinafter MODEL RULES OF PROF’L CONDUCT (leaked draft 1979)].

<sup>89</sup> MODEL RULES OF PROF’L CONDUCT R. 3.2(a)(2) (leaked draft 1979), published in LEGAL TIMES, *supra* note 88, at 36. For the full text of the draft rule, see the Appendix of this Article. This draft, and subsequent ones, also contained enhanced duties of candor with respect to adverse law, see *id.* R. 3.2(a)(5), but those changes are outside the scope of this Article.

<sup>90</sup> *Id.* R. 3.2(a)(3)(iii).

<sup>91</sup> See *id.* R. 3.2.

adversary system—whose ability to reach truth is premised on the belief that competing adversaries will ferret out all relevant facts—”manifestly has suffered breakdown.”<sup>92</sup> The 1979 Draft rule resembled the proposal made several years earlier in *The Search for Truth*, and, like certain other reforms in the draft, the rule was almost certainly driven by Frankel himself.<sup>93</sup>

The 1979 Draft was self-consciously bold. The official comment to the draft rule regarding the duty of candor seems to echo Frankel’s skepticism of adversarial zeal. The comment begins with the pronouncement that “[t]he duty to represent a client vigorously, and therein to maintain confidences of the client, is qualified by the advocate’s duty of candor to the tribunal.”<sup>94</sup> The prevailing standard on disclosure of adverse facts, the comment says, “relieves the careful advocate from responsibility for miscarried justice resulting from the inadequacies of an opponent [and has resulted] both in individual injustice and in the disrepute into which the adjudicative process has fallen: It is time the rule was changed.”<sup>95</sup>

The Commission never did officially release the 1979 Draft. Rather, at a program held to promote the Commission’s efforts, Kutak showed the draft to Monroe Freedman. Freedman was outraged at the diminished confidentiality protections. He denounced the draft and apparently leaked it to the press.<sup>96</sup> The bar was also outraged, both at the secrecy with which the draft had been developed and at specific provisions, especially the proposed duty of candor and the proposed limit on the confidentiality of attorney–

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<sup>92</sup> *Id.* cmt.

<sup>93</sup> The records of the Kutak Commission’s early meetings reveal that Frankel’s concerns occupied a substantial amount of the Commission’s attention. One of the most hotly debated issues for the Commission was whether a duty to reveal client fraud should trump the duty of confidentiality. In fact, the journals summarizing the discussions at the Commission’s preliminary meetings reveal that among the Commission members themselves, this question was known as the “Frankel problem.” See Journals of the ABA Special Committee on the Evaluation of Professional Standards, Aspen, 1977, at 29 [hereinafter Kutak Comm’n Journals]. The “Frankel Problem” was first in a list of problems with the Model Code prepared by one Commission member. *Id.* At Frankel’s urging, the Commission debated broadening a lawyer’s duty of candor to the court. Frankel proposed that “the duty of the prosecution to disclose material evidence ought to be extended to defense counsel as well, subject only to applicable laws of privilege which are not matters of ethics.” Kutak Comm’n Journals, *supra*, N.Y., Dec. 1977, at 31.

<sup>94</sup> MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. (leaked draft 1979), *published in* LEGAL TIMES, *supra* note 88, at 36.

<sup>95</sup> *Id.*

<sup>96</sup> Schneyer, *supra* note 83, at 702.

client communications.<sup>97</sup> The Kutak Commission watered down some of its reforms before releasing for comment its first public draft, known as the “Discussion Draft” of 1980.<sup>98</sup>

For the Frankel-inspired duty of candor, the Discussion Draft entailed something of a retreat.<sup>99</sup> This draft dropped the requirement that a lawyer disclose a fact that “would probably have a substantial effect on the determination of a material issue of fact.”<sup>100</sup> By contrast, the Discussion Draft retained the requirement that a lawyer disclose adverse facts when “necessary to correct a manifest misapprehension resulting from a previous representation the lawyer has made to the tribunal.”<sup>101</sup> The comment following the duty of candor provision was similar to the comment in the 1979 rule, but

<sup>97</sup> See *Ethics Draft Ignites Uproar*, NAT’L L.J., Aug. 27, 1979, at 1, cited in Schneyer, *supra* note 83, at 702.

<sup>98</sup> See generally MODEL RULES OF PROF’L CONDUCT (Discussion Draft 1980). There were other drafts besides the 1980 Discussion Draft, of which the most widely published was the Proposed Final Draft of 1981, and each draft elicited comments. See COMM’N ON EVALUATION OF PROF’L STANDARDS, AM. BAR ASS’N, WORKING DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT 1 (March 21, 1981); COMM’N ON EVALUATION OF PROF’L STANDARDS, AM. BAR ASS’N, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT (May 30, 1981) [hereinafter MODEL RULES OF PROF’L CONDUCT (Proposed Final Draft 1981)].

<sup>99</sup> The Kutak Commission also retreated on the duty of confidentiality. The most dramatic changes from the leaked draft to the Discussion Draft appear to be that where the leaked draft would have required disclosure when necessary “to prevent the client from committing an act that would seriously endanger the life or safety of a person, result in wrongful detention or incarceration of a person or wrongful destruction of substantial property, or corrupt judicial or governmental procedure,” MODEL RULES OF PROF’L CONDUCT R. 1.5(b)(1) (leaked draft 1979), published in LEGAL TIMES, *supra* note 88, at 28, the Discussion Draft would have required disclosure “to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person.” MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (Discussion Draft 1980).

This provision and others were further narrowed in subsequent drafts. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (Proposed Final Draft 1981) (“A lawyer may reveal [information relating to the representation of a client] to the extent the lawyer believes necessary . . . to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another[.]”); MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (1983) (“A lawyer may reveal [information relating to the representation of a client] to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm[.]”).

<sup>100</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1 (Discussion Draft 1980). The full relevant text is reprinted in the Appendix of this Article.

<sup>101</sup> *Id.* R. 3.1(d)(ii).

the consciously critical tone of the 1979 Draft had been moderated.<sup>102</sup>

The Discussion Draft received widespread attention in the press (where the reforms met with approval),<sup>103</sup> bar journals,<sup>104</sup> and academia.<sup>105</sup> The Kutak Commission solicited comments on the Discussion Draft from a wide cross section of the bar.<sup>106</sup> In general, the bar reacted negatively to the Discussion Draft.<sup>107</sup> Some of the most common complaints concerned the organization of the new rules, proposed mandatory pro bono requirements, and the diminished confidentiality protections.<sup>108</sup>

Some lawyers were concerned that the new duties of candor and confidentiality, by compromising the attorney–client relationship, would impair a lawyer’s ability to function effectively in the adversary system.<sup>109</sup> The New Jersey Bar Association complained that Rule 3.1(a)(3) of the Discussion Draft, which prohibited offering “substantially misleading” evidence, “plays havoc with the adversary system” by requiring the advocate “to function as an extension of the

<sup>102</sup> *Id.* R. 3.1 cmt.

<sup>103</sup> Schneyer, *supra* note 83, at 696–97.

<sup>104</sup> See generally, e.g., Symposium, *Proposed New ABA Code*, 54 CONN. B. J. 259 (1980); Carol Grant, *Attorney–Client Privilege and the Proposed Model Code of Professional Responsibility*, 6 NAT’L J. CRIM. DEFENSE 163 (1980).

<sup>105</sup> See generally, e.g., Review Symposium, *The Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 921; Robert J. Kutak, *The Rules of Professional Conduct in an Era of Change*, 29 EMORY L.J. 889 (1980); James H. Stark, *The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948 (1980).

<sup>106</sup> See MODEL RULES OF PROF’L CONDUCT preface (Discussion Draft 1980).

<sup>107</sup> See generally COMPILATION OF COMMENTS ON THE MODEL RULES OF PROFESSIONAL CONDUCT (Geoffrey C. Hazard, Jr., ed., 1980) [hereinafter HAZARD, COMMENTS].

<sup>108</sup> See MODEL RULES OF PROF’L CONDUCT ii–vi (Proposed Final Draft 1981).

<sup>109</sup> For example, the ABA’s Standing Committee on Legal Aid and Indigent Defendants wrote:

Taken as a whole, the Model Rules . . . reflect a retreat from the traditional view of a lawyer’s role as confidant and zealous representative of the client. The traditional view of the lawyer’s role has generally been accepted as beneficial not only to the client but to the judicial system and society as well. The protection afforded to clients’ confidences under the present Code increases the likelihood that a client will exhibit candor toward the lawyer and will consult with counsel. This enables the lawyer to act more effectively in meeting obligations to the client, the court and the community. . . . [G]reatly enlarging the circumstances in which disclosure of information regarding a client is permitted, or mandating such disclosure, may very well reduce candor and further erode the effectiveness and credibility of our legal system.

3 HAZARD, COMMENTS, *supra* note 107, § O-40, at 27–28 (response of ABA Standing Committee on Legal Aid and Indigent Defendants).

court in a truth-seeking role.”<sup>110</sup> The Association argued that this provision could have the same effect as the recently dropped requirement that a lawyer volunteer adverse evidence because the withholding of such evidence often has a misleading effect. “The requirement for candor on the part of the lawyer,” the Association argued, “must be tempered by the need for preserving the integrity of the adversary system.”<sup>111</sup>

The New Jersey Bar Association also expressed concern over the requirement<sup>112</sup> that a lawyer take affirmative steps to address the prior presentation of false evidence. The Association suggested that the rule be limited so as to require disclosure only when the false evidence amounts to a fraud on another person or the court, writing that it “recognizes the intent of this Rule and does not argue with its purposes but feels that the Proposed Rule constitutes too great an erosion of the lawyer–client relationship.”<sup>113</sup> The bar associations critical of the proposed rules on confidentiality and candor generally made arguments nearly identical to those voiced by the critics of Frankel’s original proposal.<sup>114</sup>

Not all bar associations were hostile toward the proposed rule. The Association of the Bar of the City of New York said, “it approves of the concept” of Rule 3.1(a)—including the prohibition on offering misleading evidence—and criticized only the drafting.<sup>115</sup> Likewise, the Omaha Bar Association<sup>116</sup> indicated that it accepted the rule,<sup>117</sup> as did the Arkansas Bar Association, which stated that it “strongly supports . . . this rule requiring candor toward a tribunal,”<sup>118</sup> with one

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<sup>110</sup> 1 HAZARD, COMMENTS, *supra* note 107, Comments on Rule 3.1, at 3 (response of Special Committee of the New Jersey Bar Ass’n).

<sup>111</sup> 1 *Id.*

<sup>112</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1(b) (Discussion Draft 1980).

<sup>113</sup> 1 HAZARD, COMMENTS, *supra* note 107, Comments on Rule 3.1, at 4 (response of Special Committee of the New Jersey Bar Ass’n).

<sup>114</sup> See *supra* text accompanying notes 68–70.

<sup>115</sup> 1 HAZARD, COMMENTS, *supra* note 107, Comments on Rule 3.1, at 12–14 (response of Committee on Professional & Judicial Ethics of the Ass’n of the Bar of the City of New York).

<sup>116</sup> It bears mention that Robert Kutak was one of the most prominent members of the Omaha Bar. For a professional biography of Robert Kutak, see [http://www.kutakrock.com/index.cfm?fuseaction=DspLinkDetail&link\\_id=82&site\\_id=0&cat=0](http://www.kutakrock.com/index.cfm?fuseaction=DspLinkDetail&link_id=82&site_id=0&cat=0) (Jan. 24, 2005).

<sup>117</sup> 3 HAZARD, COMMENTS, *supra* note 107, § O-54, at 4 (response of Omaha Bar Ass’n). 3 *id.* at 4–5.

<sup>118</sup> 3 *id.*, § O-57, at 4 (response of Arkansas Bar Ass’n).

minor exception.<sup>119</sup>

The controversy provoked by the Discussion Draft led to the "Proposed Final Draft" of May 30, 1981, which retreated almost entirely from the original Frankel-influenced position. The affirmative duty to disclose adverse facts to the tribunal may not have generated as much controversy as some of the other proposals in the Discussion Draft,<sup>120</sup> but the Kutak Commission was under intense pressure, and it compromised most of its reforms.

The duty of candor provision in the 1981 Draft only prohibited lawyers from (1) making false statements of fact; (2) failing to disclose facts in a case in which silence is equivalent to a material misrepresentation; (3) failing to disclose facts necessary to prevent a fraud on the tribunal; and (4) offering false evidence. Additionally, under the 1981 Draft, a lawyer who later learns that previously presented evidence was false must take "reasonable remedial measures."<sup>121</sup> Comparing the Discussion Draft to the 1981 Draft, the 1981 version disposed of (1) the rule prohibiting a lawyer from presenting "substantially misleading" evidence; (2) the requirement that a lawyer disclose facts, even if adverse, when necessary to correct a manifest misapprehension resulting from a previous representation by the lawyer; and (3) the specification that "reasonable remedial measures" to rectify the consequences of false evidence may include disclosing a client's confidence or the fact that a client is implicated in the falsification. In addition, the 1981 Draft limited the remedial obligation to cases in which the false evidence is material.

The final version of the rules presented to and approved by the ABA's House of Delegates in 1983 contained even fewer constraints. The prohibition on making false statements of fact was limited to "material" facts, and the Rules dropped the last remnant of the Frankel duties from the 1981 Draft—the requirement that a lawyer affirmatively disclose facts when failing to do so would constitute a material misrepresentation.<sup>122</sup> The bar was apparently unwilling to

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<sup>119</sup> The exception was a section of the rule that permitted attorneys to disclose adverse evidence to the opposite party. The Arkansas Bar Association objected to that section on the grounds that the provision would conflict with the discovery provisions of the Federal Rules of Civil Procedure. 3 *id.*

<sup>120</sup> The most controversial proposals were those pertaining to pro bono requirements, diminished confidentiality protections, and the enhanced duty to disclose adverse law to the court. See generally HAZARD, COMMENTS, *supra* note 107.

<sup>121</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (Proposed Final Draft 1981). (See the Appendix of this Article for the text of the draft rule).

<sup>122</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

accept ethics rules that proscribed any conduct short of fraud or fabrication. The comments to the rules, however, did observe that “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”<sup>123</sup>

Frankel’s ideas did survive in one minor respect.<sup>124</sup> Starting with the initial leaked draft, the Kutak Commission had included provisions that would put a lawyer in an *ex parte* proceeding under two of the duties Frankel proposed in *The Search for Truth*—to disclose all material evidence, and not to mislead the tribunal.<sup>125</sup> The rationale was that with only one advocate, the normal fact-finding process, in which the truth emerges from a clash of adversaries, could not possibly function.<sup>126</sup> Those provisions survived the drafting process, and today the rules require a lawyer in an *ex parte* proceeding to “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.”<sup>127</sup>

Recently, the pendulum of the main duty of candor rule has begun to swing in the direction of more truthfulness. The rule was broadened by amendments approved in 2000 after a three-year comprehensive review of the Model Rules.<sup>128</sup> Under the new rule, a lawyer may not make *any* false statement of fact (the prohibition is no longer limited to material facts), and a lawyer must now correct a previous false statement of material fact.<sup>129</sup> The requirement that a lawyer remedy the effects of presenting false evidence now applies not just to evidence offered by the lawyer, but also to evidence

<sup>123</sup> *Id.* R. 3.3 cmt.

<sup>124</sup> The point that this provision reflects Frankel’s influence is made in Schneyer, *supra* note 83, at 700 n.136.

<sup>125</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.8 (leaked draft 1979), *published in* LEGAL TIMES, *supra* note 88, at 39; MODEL RULES OF PROF’L CONDUCT R. 3.5 (Discussion Draft 1980); MODEL RULES OF PROF’L CONDUCT R. 3.3 (Proposed Final Draft 1981).

<sup>126</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. (2002).

<sup>127</sup> *Id.* R. 3.3(d); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 (2000) (on Advocacy in Ex Parte Proceedings). It would be interesting to research whether, in states that have adopted this requirement, it has made a difference either in the case law or in general practice.

<sup>128</sup> A complete overview and analysis of the history of the ethical duty of candor would require substantial additional research that is beyond the scope of this Article, including an examination of the legislative history of the 2000 amendments and the commentary from the bar and the academy. However, based on the research that has been conducted for this Article, the Frankel proposals were no longer a reference point for the 2000 proposals. See *supra* text accompanying notes 74–82.

<sup>129</sup> MODEL RULES OF PROF’L RESPONSIBILITY R. 3.3(a)(1) (2002).

offered by the lawyer's client or a witness.<sup>130</sup> The rule also specifies that a necessary remedy for the presentation of false evidence may be disclosure that the evidence was false<sup>131</sup> (language to that effect had been dropped from the Discussion Draft<sup>132</sup>). Similarly, the rule requiring affirmative disclosure of adverse facts when necessary to avoid assisting in the commission of a criminal or fraudulent act has been broadened to require that a lawyer take "reasonable remedial measures" whenever the lawyer knows that a client intends to engage, has engaged, or is currently engaging in "criminal or fraudulent conduct related to the proceeding."<sup>133</sup>

Standards of legal ethics are still a far cry from those Frankel envisioned. The text of the *Restatement (Third) of the Law Governing Lawyers*, which was adopted in 1998, largely tracks the Model Rules.<sup>134</sup> Like the Model Rules, the *Restatement* studiously avoids prescribing an affirmative duty to help the tribunal reach the truth. Misleading statements are not explicitly prohibited, and there is no affirmative duty to disclose a fact that the other side failed to bring to the court's attention.<sup>135</sup> Although the comment to the duty of candor rule in the Model Rules states that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation,"<sup>136</sup> the *Restatement* explicitly permits omissions that are arguably misleading.<sup>137</sup>

<sup>130</sup> *Id.* R. 3.3(a)(3).

<sup>131</sup> *Id.*

<sup>132</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.1(b) (Discussion Draft 1980).

<sup>133</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002). By contrast, the new rules exempt criminal defense lawyers from the provision that formerly allowed all lawyers to refuse to offer evidence that they reasonably believe is false. *Id.* R. 3.3(a)(4).

<sup>134</sup> Compare RESTATEMENT, *supra* note 127, §§ 112, 120 (on, respectively, Advocacy in Ex Parte and Other Proceedings, and False Testimony or Evidence), with MODEL RULES OF PROF'L CONDUCT R. 3.3 (1998) (on the Duty of Candor), and MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) (same). The reporter's notes to section 120 of the *Restatement* mention the unique New Jersey rule, together with a citation to *The Search for Truth*.

<sup>135</sup> See RESTATEMENT, *supra* note 127, § 120.

<sup>136</sup> MODEL RULES OF PROF'L RESPONSIBILITY R. 3.3 cmt. (2002). This understanding was reflected in the 1981 draft's explicit requirement that a lawyer shall not "fail to disclose a fact in circumstances where the failure to make the disclosure is the equivalent of a lawyer's making a material misrepresentation." MODEL RULES OF PROF'L RESPONSIBILITY R. 3.3(a) (Proposed Final Draft 1981). The fact that this requirement was moved out of the text of the rule and into the comment suggests that the framers of the Model Rules were reluctant to prohibit misleading omissions categorically.

<sup>137</sup> The section on false statements of fact includes an illustration in which a



The lack of attention to the value of truth in contemporary ethics standards is also reflected in the provisions governing the questioning of witnesses. The Kutak Commission did not devote much attention to the issue of whether lawyers should be allowed to question witnesses in a way that misleads the trier of fact.<sup>138</sup> The *Restatement*, as well as the annotations to the Model Rule on “Respect for Rights of Third Persons,”<sup>139</sup> imply that the truthfulness of the impression created by the questioning is simply not an operative constraint. Both authorities do little more than cite Subin’s article<sup>140</sup> and the ABA’s Standards for Criminal Justice.<sup>141</sup>

The ABA Standards, which have been changed many times over the past thirty years, do not impose a high standard of truthfulness, nor are they worded strongly. Under the current version, “[a] prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.”<sup>142</sup> A prosecutor who strongly believes—yet does not know for certain—that a witness is testifying truthfully is

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defense lawyer knows that a contract signed by his client and the plaintiff’s decedent was superceded by a materially revised version. In the illustration, the defense lawyer elicits testimony from the defendant about “the contract that you and Plaintiff’s decedent signed,” presents the original contract to the defendant, asks “Is this the contract that you and Plaintiff’s decedent signed?,” and receives an affirmative reply from the defendant. This constitutes a violation of the *Restatement’s* prohibition against materially false evidence. By contrast, the defense lawyer will have violated no provision in the *Restatement* if the lawyer does not first elicit the testimony, and the plaintiff’s lawyer, unaware that the revised agreement was in writing, solicits oral testimony from a third party to which the defense lawyer successfully objects under the statute of frauds. The defendant lawyer obtains a directed judgment for his client with no violation. RESTATEMENT, *supra* note 127, § 120 cmt. d, illus. 1-2. A defense lawyer under a Frankel duty presumably would be required to disclose the existence of the written document.

<sup>138</sup> See generally Kutak Comm’n Journals, *supra* note 93. At one point in the Commission’s early discussions, an unnamed member, possibly Frankel, suggested that the draft rule on fairness to an opposing party and counsel “also proscribe[s] attempts to induce witnesses to give untruthful or misleading evidence,” but this suggestion does not appear to have occupied much discussion. *Id.*, S.F., Dec. 1978, at 9.

<sup>139</sup> MODEL RULES OF PROF’L CONDUCT R. 4.4 (2002).

<sup>140</sup> See *supra* note 39.

<sup>141</sup> CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROF’L CONDUCT 426–27 (4th. ed. 1999); RESTATEMENT, *supra* note 127, § 106 cmt. c, reporter’s note.

<sup>142</sup> AM. BAR ASS’N, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-5.7(b) (Prosecution Function) (1992), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 1149 (2001-2002 ed., John S. Dzienkowski ed., 2001).

presumably free to discredit that witness.<sup>143</sup> For defense lawyers, the corresponding provision imposes no obligation to the truth whatsoever: “Defense counsel’s belief or knowledge that the witness is telling the truth does not preclude cross-examination.”<sup>144</sup> The ABA Standards also provide that prosecutors and defense attorneys should not “ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.”<sup>145</sup>

### III. NEW JERSEY’S EXPERIENCE WITH RULE 3.3(A) (5)

#### A. Overview

A number of states have adopted the Model Rules, but some state supreme courts have made changes to them—typically diminishing to varying degrees the confidentiality protections that the bar fought so hard to add to the Kutak Commission drafts.<sup>146</sup> One state, New Jersey (the first state to adopt the Model Rules), inserted an affirmative duty to disclose adverse facts.<sup>147</sup> New Jersey’s duty of candor rule tracked the 1983 Model Rule almost exactly, with one major exception: Rule 3.3(a)(5) of the New Jersey Rules of Professional Conduct required that a lawyer not knowingly “fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.” This provision had no equivalent in the Model Rules.

This unique requirement brought New Jersey, on paper at least, closer than any American jurisdiction ever has been to implementing the original Frankel proposals. A leading ethics treatise, Hazard and Hodes, *The Law of Lawyering*, characterized this requirement as “a radical proposition indeed [that] begins to carry out [a] direct attack on the adversary system.”<sup>148</sup> Rule 3.3(a)(5), treated literally, would go even further than the Kutak Commission’s Discussion Draft

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<sup>143</sup> *Cf. id.* (“The prosecutor’s belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination.”).

<sup>144</sup> *Id.*, Standard 4-7.6(b) (Defense Function), reprinted in PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 142, at 1164.

<sup>145</sup> *Id.* Standards 3-5.7(b), 4-7.6(d).

<sup>146</sup> *See, e.g.*, Schneyer, *supra* note 83, at 713.

<sup>147</sup> I have not researched whether, in the states besides New Jersey that adopted the Model Rules, there was any discussion of inserting Frankel-type duties.

<sup>148</sup> 2 GEOFFREY A. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § AP4:104, at 1264 (2d ed. 1990).

(although not necessarily further than the leaked draft of 1979), because it effectively makes the attorney responsible for a misapprehension on the part of the tribunal that the attorney could have prevented.<sup>149</sup> For example, if one lawyer fails to conduct adequate discovery, and the opposing lawyer learns of a material witness who could establish a particular fact, the second lawyer must disclose the existence of the witness, even though that lawyer might have won the case otherwise.<sup>150</sup> A statement that is literally true but misleading because factually incomplete would likewise appear to violate the rule. Hazard and Hodes describe such a regime as “a ‘processing’ system, in which lawyers on each side put the other side through its paces, but cooperate in an effort to reach a ‘correct’ and ‘fair’ result.”<sup>151</sup>

In 2003, the Supreme Court of New Jersey responded to dissatisfaction with the rule by weakening it.<sup>152</sup> The new rule prohibits a lawyer from “fail[ing] to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege<sup>153</sup> or is otherwise prohibited by law.”<sup>154</sup> That is, a lawyer in New Jersey is no longer required to disclose a material fact simply because the tribunal “*may* tend to be misled” by that omission. The duty is only triggered if the omission is *reasonably certain* to mislead. Additionally, the rule does not require disclosure if the disclosure would violate a privilege or other law.

This section recounts the history of New Jersey Rule 3.3(a)(5)’s adoption, presents perspectives about it from the academy and the practicing bar, and discusses its application.<sup>155</sup> Initially, Rule

<sup>149</sup> The Discussion Draft’s affirmative disclosure requirement only applied to a situation in which the court’s misapprehension was the result of a previous statement the attorney had made. MODEL RULES OF PROF’L CONDUCT R. 3.1(d)(ii) (Discussion Draft 1980).

<sup>150</sup> 2 HAZARD & HODES, *supra* note 148, § AP4:104, at 1264 n.4.

<sup>151</sup> *Id.* at 1265.

<sup>152</sup> The New Jersey Constitution gives the New Jersey Supreme Court exclusive rule-making authority for the state’s constitutional courts. N.J. CONST. art. VI, § 2, para. 3; *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950).

<sup>153</sup> This phrasing seems infelicitous. As a matter of semantics, a privilege does not protect a disclosure, but rather, it protects a *fact* from being disclosed.

<sup>154</sup> N.J. RULES OF PROF’L CONDUCT R. 3.3(a)(5) (2004).

<sup>155</sup> This Article primarily deals with the first version of Rule 3.3(a)(5). The new version of this rule only became effective January 1, 2004, and at the time this Article was prepared, the new version had not been applied in any reported cases.

3.3(a)(5) was used not to change the nature of adversarial combat, but to discipline attorneys who commit manifest abuses—conduct that judges would likely find objectionable under the more permissive rules of other jurisdictions. In recent years, however, New Jersey courts have used the rule to support various pronouncements from the judiciary that lawyers are expected to be truthful. The most significant such pronouncement came in the recent *Seelig* case,<sup>156</sup> in which the New Jersey Supreme Court appeared to be putting lawyers on direct notice that they will be held to a higher standard of candor than they would be in other jurisdictions.

*B. The History of Rule 3.3(a)(5)*

Rule 3.3(a)(5), along with other significant departures from the Model Rules,<sup>157</sup> was adopted solely on the initiative of the New Jersey Supreme Court. The Court had convened a special committee chaired by Judge Dickinson R. Debevoise to study the Model Rules and recommend whether to adopt them in New Jersey.<sup>158</sup> The Debevoise Committee recommended adopting the Model Rule on the duty of candor as written; the committee said nothing about extending the duty of candor to include affirmative disclosure requirements.<sup>159</sup> But Chief Justice Wilentz was known to be concerned about public confidence in the legal profession,<sup>160</sup> and his Court made a number of changes to the Debevoise Committee's recommendations—all of which were intended to strengthen a lawyer's obligation to the public, arguably at the expense of the duty to the client.<sup>161</sup>

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<sup>156</sup> 180 N.J. 234, 850 A.2d 477 (2004).

<sup>157</sup> Another major change was to the confidentiality provisions. The ABA rules permitted disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). The rule adopted by the New Jersey Supreme Court requires mandatory disclosure to prevent a client "from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another" or is likely to "perpetrate a fraud upon a tribunal." N.J. RULES OF PROF'L CONDUCT 1.6 (2002) (emphasis added to show departure from Model Rules).

<sup>158</sup> See Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, N.J. LAW J., July 28, 1983, supp. at 1, 112 N.J.L.J. 93, supp. at 1.

<sup>159</sup> *Id.* at 13.

<sup>160</sup> Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 389 (1997).

<sup>161</sup> See generally *id.* In a statement that accompanied the new rules, Chief Justice

The inspiration for Rule 3.3(a)(5) is not entirely clear. The comment that accompanies the rule states that the additional provision applies to “facts that are at issue in the case as well as facts relating to the management of the case,” and declares, with citations to supporting cases, that “an attorney has an obligation to be candid and act with good faith toward the tribunal.”<sup>162</sup> As members of a reform-minded court, the justices would presumably have been familiar with the Kutak Commission’s earlier drafts, aware of the debates surrounding those drafts, and interested in the reformist proposals that the larger ABA rejected. However, I have been unable to find evidence confirming that the Court was consciously following the Kutak Commission drafts that reflected Frankel’s views.<sup>163</sup>

Rule 3.3(a)(5) has been controversial from its inception. One outspoken commentator has said that the provision

perhaps more than any other, illustrates the modification of the adversary system so as to render it more consistent with the value of truth. . . . The rule seems to conflict with the basic premise that an advocate must present a client’s cause in its best light. It has long been recognized that the lawyer has no duty to reveal adverse facts or to come forward with adverse witnesses. . . . The basic assumption is that the truth will emerge out of the clash of adversarial presentation of the evidence.<sup>164</sup>

This critic has complained as well that the rule poses constitutional problems in the criminal setting.<sup>165</sup>

The practicing New Jersey bar has also expressed concern. When the New Jersey Rules of Professional Conduct were first publicized, Raymond Trombadore, then Vice President of the New

Wilentz stated: “[W]e believe that these new [New Jersey] Rules of Professional Conduct represent sound principles that protect the public and the integrity of the legal profession and maintain New Jersey’s position as a leader in setting and upholding high professional standards.” Press Release, Administrative Office of the Courts: State of New Jersey, Rules of Professional Conduct (July 19, 1984) (*cited in* Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 94–95 nn.50 & 51 (1994)).

<sup>162</sup> N.J. RULES OF PROF’L CONDUCT R. 3.3 cmt. (2002).

<sup>163</sup> There are no records of the Court’s deliberations. Retired Justice Stewart Pollock was an Associate Justice of the Supreme Court at the time, and he cannot recall the discussions about this issue, but he points out that the members of the Court would have seen the earlier ABA drafts. Telephone Interview with Stewart Pollock, Of Counsel, Riker, Danzig, Scherer, Hyland & Perretti (Jan. 4, 2003).

<sup>164</sup> Michael P. Ambrosio, *The “New” New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 SETON HALL LEGIS. J. 121, 138 (1987).

<sup>165</sup> *Id.* at 138–39.

Jersey State Bar Association, wrote to the Supreme Court that Rule 3.3(a)(5) had generated “near universal concern” and tried to convince the Court not to implement it.<sup>166</sup> Several years later, Trombadore, even though he was by then the chair of the New Jersey Supreme Court Disciplinary Review Board, nonetheless told an ethics symposium that the language of Rule 3.3(a)(5)

is so broad and so sweeping that it essentially destroys whatever confidentiality exists between lawyer and client, because it is totally unlimited. . . . I am satisfied, just from my knowledge of practice, that the rule is violated, grossly violated, by every lawyer who does trial work, because no lawyer can represent a client and comply with that rule. . . . Obviously, everything unfavorable to the client would have to be disclosed, because, without it the tribunal might be misled.<sup>167</sup>

Similarly, until the rule’s language was changed in 2003, the leading handbook on ethics issues in New Jersey complained that the literal meaning of the rule “is so far afield from accepted notions of advocacy . . . that the precise letter of the rule is rarely honored other than in the breach.”<sup>168</sup>

The controversy has continued to this day. In 2001, the New Jersey Supreme Court appointed a commission to study the New Jersey rules in light of the ABA’s 2000 amendments to the Model Rules.<sup>169</sup> The members of this Commission, which was chaired by retired New Jersey Supreme Court Justice Stewart Pollock, were aware that New Jersey’s rule is unique, but they were not aware of the original Frankel proposals and they did not discuss the similarity between Rule 3.3(a)(5) and certain provisions in the early Kutak Commission drafts that reflected Frankel’s views.<sup>170</sup> The Pollock Commission debated extensively what to say about Rule 3.3(a)(5) and decided by a close vote to recommend keeping the rule, but to recognize in its report “the tension that the rule places on the

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<sup>166</sup> Letter from Raymond R. Trombadore, First Vice President, New Jersey State Bar Ass’n, to the Supreme Court of New Jersey 2 (Aug. 9, 1984) (*cited in* Levin, *supra* note 161, at 95 n.52).

<sup>167</sup> Raymond R. Trombadore, *The New Jersey Rules of Professional Conduct: A Recipe for Good Lawyering*, 18 SETON HALL L. REV. 606, 610 (1988).

<sup>168</sup> KEVIN H. MICHELS, NEW JERSEY ATTORNEY ETHICS 605 (Gann 2003).

<sup>169</sup> See REPORT OF THE NEW JERSEY SUPREME COURT COMMISSION ON THE RULES OF PROFESSIONAL CONDUCT 1, *available at* <http://www.judiciary.state.nj.us/notices/reports/2002finalreport.pdf> (last visited Jan. 24, 2005).

<sup>170</sup> Telephone Interview with Stewart Pollock, *supra* note 163.

attorney–client relationship.”<sup>171</sup>

In a telephone conversation, Justice Pollock<sup>172</sup> acknowledged that there are valid arguments that an attorney’s overriding duty of candor to the court could chill a client’s willingness to confide in an attorney; that the tensions between this duty and the lawyer’s duty to the client are especially strong in the criminal context; and that in the civil context, sanctions for discovery abuses presumably target much of the same conduct. Justice Pollock nonetheless supported the rule because he believed that “as a normative statement, it’s a good idea to remind lawyers that they should not mislead the court.”<sup>173</sup>

Once again, the New Jersey Supreme Court departed from the recommendations of its appointed committee, but this time the Court acted to narrow, rather than broaden, the rule.<sup>174</sup> The Court invited public comments on the Pollock Commission’s report, and the New Jersey Bar Association recommended deleting the Rule:

[T]he very nature of the rule makes compliance difficult. As noted in the [Pollock] Commission’s report[,] the rule strains the attorney–client relationship by placing a duty on a lawyer to disclose information that may be adverse to the client’s interest. Further, how is a lawyer to know when a judge “may be misled” by a failure to disclose? What if a judge is simply confused, does the rule require a lawyer to bring every potentially material fact to the court’s attention, even information forgotten or ignored by an adversary? Just how far must a lawyer go?<sup>175</sup>

The Court took these concerns seriously. In amending the rules, it noted that the New Jersey State Bar Association had recommended removing the rule “because the very nature of the rule makes compliance difficult.” The Court went on to say that “[i]n light of the concerns of the Bar” and the disagreements within the Pollock Commission, it had decided to amend Rule 3.3(a)(5) “to clarify its

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<sup>171</sup> REPORT OF THE NEW JERSEY SUPREME COURT COMMISSION ON THE RULES OF PROFESSIONAL CONDUCT, *supra* note 169, at 12–13.

<sup>172</sup> Justice Pollock authored a concurring opinion in 1998 on the subject of the tension between a lawyer’s duty to his client and his duty of candor to the tribunal. *See infra* notes 214–32 and accompanying text.

<sup>173</sup> Telephone Interview with Stewart Pollock, *supra* note 163.

<sup>174</sup> *See supra* text accompanying notes 153–54.

<sup>175</sup> N.J. STATE BAR ASS’N, RESPONSE TO THE REPORTS OF THE SUPREME COURT’S COMMISSION ON THE RULES OF PROFESSIONAL CONDUCT AND AD HOC COMMITTEE ON BAR ADMISSIONS 11–12 (Apr. 2003) (on file with author).

scope.”<sup>176</sup>

*C. The Impact of Rule 3.3(a)(5)*

It is unclear to what extent Rule 3.3(a)(5) matters in the everyday lives of most New Jersey lawyers. In its twenty years of existence, the rule has been mentioned in only about thirty-five published decisions,<sup>177</sup> approximately half of which simply report a disciplinary order.<sup>178</sup> As of late 2002, a prominent practitioner who defends lawyers charged with ethics violations was aware of the rule but had never represented anyone charged with violating it.<sup>179</sup> Of course, the existence of the rule since 1984 could have led New Jersey lawyers to change their conduct in ways not reflected in the cases. But many lawyers may not even be aware of the rule. One leading ethics specialist who gives continuing legal education presentations on legal ethics finds that members of his audience are often surprised and concerned when they learn of the rule.<sup>180</sup> But consciousness of the rule is likely to increase. The recent *Seelig* case is an extended treatment of Rule 3.3(a)(5), and it reads like a wake-up call to the profession on the subject of attorney candor.

For a long time after the rule's adoption, New Jersey courts and disciplinary bodies appeared to be reluctant to enforce Rule 3.3(a)(5). A member of New Jersey's Disciplinary Review Board has reportedly stated that “the Board had avoided sanctioning lawyers based on alleged violations of . . . [Rule 3.3(a)(5)] because of

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<sup>176</sup> Supreme Court of New Jersey, Administrative Determination in Response to the Report and Recommendation of the Supreme Court Commission on the Rules of Professional Conduct, N.J. LAW J., Sept. 22, 2003, at 59, 65, 173 N.J.L.J. 1131, 1137.

<sup>177</sup> This estimate includes all cases available in the LEXIS and Westlaw databases as of September 10, 2004.

<sup>178</sup> Disciplinary proceedings that resulted only in an admonition by the Disciplinary Review Board (DRB) would not be reported. If the DRB recommends any other sanction, the disciplinary order must be reviewed by the state Supreme Court and would therefore be reported. See OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF N.J., 2003 STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 14–15 (Aug. 6, 2004), available at [http://www.judiciary.state.nj.us/oea/annual\\_report03.pdf](http://www.judiciary.state.nj.us/oea/annual_report03.pdf).

<sup>179</sup> Telephone Interview with Albert C. Jeffers, Of Counsel, Celli & Schlossberg (Dec. 2002). Mr. Jeffers also guessed that among plaintiffs' and defense lawyers in the personal injury and property damage area, “that rule may be frequently honored in the breach.” *Id.*

<sup>180</sup> Telephone Interview with Kevin H. Michels, Partner, Michels & Hockenjos (Sept. 7, 2004). Mr. Michels is the author of the leading treatise on New Jersey ethics, MICHELS, *supra* note 168.



fundamental bar disagreement with the rule.”<sup>181</sup> The reported decisions of the Board bear out this purported reluctance, but they also suggest that the Board in recent years has become more aggressive in its use of the rule. As of September 10, 2004, the Board had only found a violation of Rule 3.3(a)(5) in approximately twenty-three cases,<sup>182</sup> but more than half of those decisions were rendered in 2000 or later.<sup>183</sup> Moreover, the earlier cases finding a violation of Rule 3.3(a)(5) usually found violations of other rules as well, suggesting that the conduct was sanctionable under a more traditional ethics regime.<sup>184</sup> In the past several years, however, the Board has several times relied exclusively on Rule 3.3<sup>185</sup> and even, in three decisions reported in 2002,<sup>186</sup> purely on Rule 3.3(a)(5).

A state ethics advisory opinion from 1990 provides further evidence of New Jersey’s initial reluctance to strictly enforce Rule 3.3(a)(5).<sup>187</sup> The opinion addressed whether an attorney was obligated to disclose that his mentally ill patient had been hospitalized when the terms of the patient’s right of visitation with his daughter depended on his medical condition. The Advisory

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<sup>181</sup> Levin, *supra* note 161, at 149 n.303. The article did not clearly attribute the quote or provide a specific context for it.

<sup>182</sup> The number may be slightly higher because sometimes the New Jersey Supreme Court only mentions a violation of “RPC 3.3(a)” without specifying the relevant subsection. *See, e.g., In re Vella*, 180 N.J. 170, 170, 850 A.2d 439, 439 (2004); *In re Uchendu*, 177 N.J. 509, 509, 830 A.2d 501, 501 (2003); *In re Girdler*, 171 N.J. 146, 146, 792 A.2d 1243, 1243 (2002).

<sup>183</sup> Whenever the Board decides that a lawyer should be disciplined, the case goes to the Supreme Court of New Jersey. *See* 2003 STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT, *supra* note 178, at 14–15. Usually, the Supreme Court affirms the Board’s decision in a brief published order that states only the name of the lawyer, the rules the lawyer has violated, and the sanctions imposed. *See, e.g., In re Malat*, 175 N.J. 554, 817 A.2d 316 (2003); *In re Santiago*, 175 N.J. 499, 816 A.2d 152 (2003). Occasionally, the Supreme Court publishes a full opinion. *See, e.g., In re Norton*, 128 N.J. 520, 608 A.2d 328 (1992); *In re Whitmore*, 117 N.J. 472, 569 A.2d 252 (1990).

<sup>184</sup> For example, *In re Telson*, 138 N.J. 47, 648 A.2d 703 (1994), which happens to include a one-sentence description of the offense, involved a lawyer who was found to have altered a court document and later lied about the alteration. *Id.* at 47, 648 A.2d at 703. Rule 3.3(a)(5) is not needed to punish this sort of outright fraud.

<sup>185</sup> *See Malat*, 175 N.J. at 554, 817 A.2d at 316; *Santiago*, 175 N.J. at 499, 816 A.2d at 152. These cases also cite Rule 8.4, but Rule 8.4 should not be treated as a separate rule because unlike Rule 3.3, it is a vague catch-all that does not set forth specific norms of conduct.

<sup>186</sup> *In re George*, 174 N.J. 537, 810 A.2d 60 (2002); *In re Witman*, 174 N.J. 338, 805 A.2d 455 (2002); *In re McGivney*, 171 N.J. 34, 791 A.2d 215 (2002). Two of these cases also cite Rule 8.4, but again, it should not be treated as a separate rule.

<sup>187</sup> N.J. Advisory Comm. on Prof’l Ethics, Op. 643 (1990), N.J. LAW J., May 24, 1990, at 2, 24, 125 N.J.L.J. 1358, 1380.

Committee on Professional Ethics noted that requiring disclosure in these circumstances “would have especially harsh consequences.”<sup>188</sup> The Committee recommended that a lawyer balance the client’s interests rather than literally observe Rule 3.3(a)(5), and stated that “[a] decision that a fact is really material, or that a tribunal will actually be misled in the absence of disclosure, is not to be made lightly or easily, especially where, as here, there are serious negative implications of disclosure, chilling essential communications to an attorney.”<sup>189</sup>

*D. Cases Involving Rule 3.3(a)(5)*

In most of the opinions that have implicated Rule 3.3(a)(5), New Jersey courts did not appear, as a practical matter, to be demanding a greater level of candor than courts in other jurisdictions.<sup>190</sup> Courts in other jurisdictions, both before and after the Model Rules were adopted, have disciplined or criticized lawyers for blatantly misleading omissions in addition to fraudulent commissions. Until very recently, Rule 3.3(a)(5) appeared to have been used almost exclusively to censure attorneys for failing to disclose information in circumstances which, under the conventional rules, would constitute a misrepresentation anyway. However, with *Seelig* and a few other recent cases, the New Jersey Supreme Court appears to be willing to criticize or punish lawyers for conduct that might very well have been permissible in other jurisdictions.

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<sup>188</sup> *Id.* at 24, 125 N.J.L.J. at 1380.

<sup>189</sup> *Id.*

<sup>190</sup> The set of relevant cases includes the following: (a) six disciplinary cases in which the New Jersey Supreme Court published an opinion based in part on Rule 3.3(a)(5); b) two solely-authored concurring opinions of the New Jersey Supreme Court that used Rule 3.3(a)(5) to emphasize the importance of candor, *see Kosmowski v. Atl. City Med. Ctr.*, 175 N.J. 568, 576–77, 818 A.2d 319, 324 (2003) (LaVecchia, J., concurring) and *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 463–64, 713 A.2d 411, 424–25 (1998) (Pollock, J., concurring); (c) a case, later almost completely adopted by the New Jersey Supreme Court, in which the intermediate appellate court used Rule 3.3(a)(5) to support a novel discovery requirement, *McKenney v. Jersey City Med. Ctr.*, 330 N.J. Super. 568, 586–88, 750 A.2d 189, 199 (App. Div. 2000), *rev'd on other grounds*, 167 N.J. 359, 771 A.2d 1153 (2001); and (d) five cases in the federal district court in New Jersey and New Jersey’s intermediate appellate court that referred to Rule 3.3(a)(5). Excluded from this set of relevant cases are most of the Supreme Court decisions that only summarily affirm the Disciplinary Review Board, opinions in which the misrepresentation in question concerned an application for bar admission or an attorney’s qualifications to practice before a court, and opinions in which the reference to Rule 3.3(a)(5) is cursory.

The most relevant category of cases in this context is disciplinary proceedings involving a violation of Rule 3.3(a)(5). New Jersey courts have twice used Rule 3.3(a)(5) to sanction lawyers for failing to disclose the death of a client.<sup>191</sup> Courts in other jurisdictions have criticized similar conduct, even though those courts could not cite a local equivalent of New Jersey Rule 3.3(a)(5).<sup>192</sup> In fact, in 1995, the ABA issued an advisory opinion stating that when a client dies in the middle of settlement negotiations, the attorney has a duty to disclose that fact both to the court and to opposing counsel in the first communication to either.<sup>193</sup> The ABA opinion relied on one of the non-New Jersey cases as persuasive authority for its conclusion that the failure to disclose the death of a client to the court is equivalent to an affirmative misrepresentation within the meanings of Rule 3.3(a)(1) and Rule 4.1(a) of the Model Rules.<sup>194</sup> The opinion reasoned that since the death of a client means that the lawyer either no longer has a client, or has a different client as a result of the client's death, a failure to disclose the death "is tantamount to making a false statement of material fact."<sup>195</sup> The committee found it significant that the comments to Rules 3.3 and 4.1 state that under some circumstances, the failure to disclose a fact is the equivalent of an affirmative misrepresentation.<sup>196</sup>

In two other cases, New Jersey attorneys were disciplined for failing to report that property which the attorney had previously

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<sup>191</sup> *In re Vella*, 180 N.J. 170, 850 A.2d 439 (2003); *In re Forrest*, 158 N.J. 428, 434–35, 730 A.2d 340, 343–44 (1999). *Vella* contains only an order, not an opinion, but the decision clearly arises out of Ms. Vella's failure to inform the court and the opposing party of her client's death in the case of *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 153–54, 797 A.2d 206, 212 (App. Div. 2002). At the end of the *Kingsdorf* opinion, the court noted, along with a citation to *Forrest*, that it was referring the opinion to the Office of Attorney Ethics for possible proceedings against Ms. Vella. *Id.* at 160 n.3, 797 A.2d at 215 n.3.

<sup>192</sup> *See, e.g., Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 511–12 (E.D. Mich. 1983); *Toledo Bar Ass'n v. Fell*, 364 N.E.2d 872, 873–74 (Ohio 1977).

<sup>193</sup> ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (Sept. 18, 1995), reprinted in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT: ETHICS OPINIONS 1991–1995, at 1001:313 (1996).

<sup>194</sup> *Id.* at 1001:315 (citing *Virzi*, 571 F. Supp. at 512).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (citing MODEL RULES OF PROF'L RESPONSIBILITY R. 3.3 cmt. (1983) ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.") and MODEL RULES OF PROF'L RESPONSIBILITY R. 4.1 cmt. (2002) ("Misrepresentations can also occur by failure to act.")). *See also supra* note 136 and accompanying text.

represented as belonging to one person had since been transferred to another person. In one of these cases, an attorney was disciplined for not revealing—at his own divorce proceeding—that he had transferred to his mother a piece of real property that he had listed as an asset in papers previously submitted to the court.<sup>197</sup> The other New Jersey case<sup>198</sup> was actually decided before the adoption of Rule 3.3(a)(5), but was later cited in support of the adoption of that rule.<sup>199</sup> In this case, an attorney was disciplined under the disciplinary rules when he failed to disclose that he had transferred property that was the subject of a settlement.<sup>200</sup>

Other jurisdictions have imposed sanctions for comparable conduct. In a 1985 Arizona case, a lawyer was disciplined under Arizona's version of the old Model Code of Professional Responsibility for making misleading statements and presenting misleading testimony regarding the existence of one of his client's assets in the client's divorce proceeding.<sup>201</sup> Similarly, in 1975, a lawyer representing the executor of an estate was disciplined under California's statutes on professional conduct for failing to disclose that the devisee of the estate had written a letter waiving, in favor of the decedent's disinherited daughter, the devisee's interest in the estate. At the time, the lawyer was both prosecuting an action to challenge the daughter's joint ownership of the major asset in the estate, and also defending against a will contest launched by the daughter.<sup>202</sup> The letter effectively rendered both proceedings unnecessary.

One possible reason why the New Jersey disciplinary cases discussed above seem similar to cases in other jurisdictions is that the omissions in the New Jersey cases violate the established principle that an attorney should notify the court when a representation previously made to the court is no longer correct. In fact, the 2002—but not the 1983—ABA Model Rules of Professional Conduct specify that a lawyer has a duty to “correct a false statement of material fact

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<sup>197</sup> *In re Kernan*, 118 N.J. 361, 362–63, 571 A.2d 1282, 1282–83 (1990).

<sup>198</sup> *In re Nigohosian*, 88 N.J. 308, 442 A.2d 1007 (1980).

<sup>199</sup> See N.J. RULES OF PROF'L CONDUCT R. 3.3 cmt. (1984).

<sup>200</sup> *Nigohosian*, 88 N.J. at 309–12, 442 A.2d at 1007–09. The specific provisions cited were DR 1-102(A)(4), (5). *Id.* at 314, 442 A.2d at 1010.

<sup>201</sup> *In re Ireland*, 706 P.2d 352, 354 (Ariz. 1985). The disciplinary rule cited was Arizona Code of Professional Responsibility DR 7-102; the court was not specific as to which provisions had been violated. See *id.*

<sup>202</sup> *Sullins v. State Bar of Cal.*, 542 P.2d 631, 632–35 (Cal. 1975).

or law previously made to the tribunal by the lawyer” as well as a duty to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal” when a lawyer has offered material evidence and later comes to know of its falsity.<sup>203</sup> In the four New Jersey decisions discussed above, an explicit or implicit representation that the lawyer had made—the existence of a client or the existence of a piece of property in a certain party’s hands—was now false.

The other New Jersey Supreme Court opinions finding a violation of Rule 3.3(a)(5) would also likely have come out the same way in a different jurisdiction. In one case, a New Jersey attorney was found to have violated Rule 3.3(a)(5) when he failed to disclose that he had borrowed over \$30,000 of a client’s trust funds.<sup>204</sup> This behavior was such a fundamental ethical violation that the failure to disclose it is almost beside the point. In two other cases, New Jersey prosecutors were disciplined for failing to disclose to the court that a police officer had corrupt motives for not testifying against a defendant.<sup>205</sup> New Jersey is not alone in punishing this sort of collusive behavior. An Arizona court found a violation of the local version of Model Rules 3.3(a)(1), 8.4(c), and 8.4(d) when a lawyer failed to disclose that he had reached a collusive agreement with defense counsel to dismiss the action against one of the defendants.<sup>206</sup>

Finally, courts in New Jersey have occasionally used Rule 3.3(a)(5) in cases other than disciplinary proceedings to criticize attorneys or to support a holding. For example, the Appellate Division of the New Jersey Superior Court suggested that an attorney had violated the duty of candor when, in suing for unpaid fees, the lawyer did not reveal that there had already been an arbitration concerning those fees.<sup>207</sup> This case, along with a pre-Model Rules disciplinary opinion that also involved a failure to disclose a settlement,<sup>208</sup> is analogous to a case in Arizona in which the court

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<sup>203</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1), (2) (2002).

<sup>204</sup> *In re Gifis*, 156 N.J. 323, 347, 361, 717 A.2d 406, 419, 427 (1998).

<sup>205</sup> *In re Norton*, 128 N.J. 520, 522–39, 608 A.2d 328, 329–38 (1992) (disciplining the defense attorney as well as the prosecutor); *In re Whitmore*, 117 N.J. 472, 472–78, 569 A.2d 252, 253–56 (1990).

<sup>206</sup> *In re Alcorn*, 41 P.3d 600, 602–05, 614 (Ariz. 2002).

<sup>207</sup> *Horowitz v. Weishoff*, 318 N.J. Super. 196, 203–04, 723 A.2d 121, 125 (App. Div. 1999). The court cited only R. 3.3 of the New Jersey Rules. The court did not specify which provision the attorney had violated, but the only applicable provision is R. 3.3(a)(5).

<sup>208</sup> *In re Stein*, 97 N.J. 550, 551–52, 560–62, 483 A.2d 109, 109–10, 114–15 (1984)

used Arizona's version of Model Rule 3.3(a) to sanction a lawyer who had failed to disclose a settlement agreement to a settlement judge.<sup>209</sup> Likewise, in a 1997 West Virginia case, an attorney who failed to disclose at trial that two defendants had reached a settlement agreement was found to have violated "the general duty of candor."<sup>210</sup>

The New Jersey cases discussed so far are mostly conservative in two ways. First, they do not mark a sharp departure from earlier case law. As already discussed, it is likely that if they had arisen in another jurisdiction, they would have come out the same way. In addition, almost all of these cases concern a failure to disclose facts relating to the *management* of the case, not facts actually at issue in the case.<sup>211</sup> When it first adopted Rule 3.3(a)(5), the New Jersey Supreme Court had stated that the provision applies to "facts that are at issue in the case as well as facts relating to the management of the case."<sup>212</sup> And yet almost none of these cases deal with a lawyer who fails to disclose a fact relating to the substance of a dispute.<sup>213</sup> The death of a client, the existence of a prior arbitration or settlement, and the reasons for a police officer's failure to testify all go not to the truth for which a trial is supposed to be a search, but to the parameters within which that search occurs. It is as if the New Jersey courts insisted on knowing who the players are and why they are fighting, but did not want to intervene in the game itself. Like a boxing referee, the courts stepped in only when absolutely necessary.

#### E. A New Direction, Possibly

Four recent opinions from the New Jersey Supreme Court concerning Rule 3.3(a)(5) and the duty of candor are much bolder and are unique enough that they might have been decided

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(disciplining lawyer for not disclosing the existence of a civil settlement that probably influenced a victim's decision to withdraw a criminal charge in the same matter). The respondent was charged with violating DR 1-102(A)(4), (5), and (6). *Id.* at 562, 483 A.2d at 115.

<sup>209</sup> *In re Fee*, 898 P.2d 975, 976-78 (Ariz. 1995).

<sup>210</sup> *Gum v. Dudley*, 505 S.E.2d 391, 400 (W. Va. 1997).

<sup>211</sup> An exception is *In re Kernan*, 118 N.J. 361, 571 A.2d 1282 (1990), in which the lawyer did not tell the court that he had transferred an asset to his mother during his own divorce proceeding. *Id.* at 362-63, 571 A.2d at 1282-83. As discussed above, this case was also based on the familiar principle that a lawyer has a duty to correct a representation that later turns out to be incorrect. *See supra* text accompanying notes 197, 203. The Court was probably also concerned that the conduct resembled a fraudulent conveyance.

<sup>212</sup> N.J. RULES OF PROF'L CONDUCT R. 3.3 cmt. (2002).

<sup>213</sup> For this observation I am indebted to MICHELS, *supra* note 168, at 633.

differently in another jurisdiction. Two of the opinions recognize a duty to make the court and opposing counsel aware of material facts at issue in the case. In different ways, each opinion seems to aspire to a regime of the type Frankel envisioned. This quartet of opinions may augur the beginning of an era in which the standard of attorney candor in New Jersey is noticeably higher than in other jurisdictions.

The first of these opinions was a concurring opinion authored in 1998 by Justice Pollock.<sup>214</sup> *Kernan v. One Washington Park Urban Renewal Associates*<sup>215</sup> was a slip-and-fall case in which the lawyers for the owner of property concealed their client's bankruptcy status as part of the "trial strategy." Because the plaintiff did not know that the owner of the property was in bankruptcy, she wasted time and resources proceeding against the owner instead of the bankruptcy trustee. The owner was not in control of the property and the defense lawyers knew the owner would therefore not be found liable.<sup>216</sup> The answer included as a defense that "the alleged damages were caused by other persons over whom this defendant had no control," and, in response to interrogatories about the owner of the building, the defense lawyers stated that it was in the care of a "Court appointed Manager."<sup>217</sup> The plaintiff's lawyer not only failed to use this hint, but also waited until nine days before trial to take the deposition, at which the lawyer finally learned of the bankruptcy status. At that point, the lawyer believed (wrongly) that it was too late to name the trustee in bankruptcy as a defendant.<sup>218</sup>

Justice Pollock used the occasion to comment on "the obligations of lawyers to each other and to the judicial system."<sup>219</sup> The justice was dismayed at the costs to the plaintiff, the courts, and the public that could have been saved had the defense lawyers simply disclosed their client's bankruptcy status in their answer to the complaint.<sup>220</sup> Justice Pollock concluded that various rules and codes of conduct, among them Rule 3.3(a)(5), "require what common courtesy and candor suggest, that pleadings and answers to

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<sup>214</sup> After retiring from the Court, Justice Pollock chaired the Commission that recommended keeping Rule 3.3(a)(5) at the same time that it signaled to the Court that the rule creates tensions. *See supra* text accompanying notes 169–71.

<sup>215</sup> 154 N.J. 437, 713 A.2d 411 (1998).

<sup>216</sup> *See id.* at 459–63, 713 A.2d at 422–24 (Pollock, J., concurring).

<sup>217</sup> *Id.* at 443–44, 713 A.2d at 414.

<sup>218</sup> *Id.* at 456, 713 A.2d at 420.

<sup>219</sup> *Id.* at 463, 713 A.2d at 424 (Pollock, J., concurring).

<sup>220</sup> *See id.* at 462, 713 A.2d at 424 (Pollock, J., concurring).

interrogatories should not contain half-truths intended to mislead both adversaries and the court.”<sup>221</sup> Justice Pollock drew support from two out-of-state cases<sup>222</sup> and went on to state that “[s]henanigans have no place in a law suit. Modern litigation is too time consuming and expensive for courts to tolerate discovery abuses. For over fifty years, courts have endeavored to transform civil litigation from a battle royal into a search for truth.”<sup>223</sup>

This opinion is striking. For one thing, it uses strong language to criticize conduct that, under prevailing standards of ethics, is far from an obvious violation. Second, the opinion calls on lawyers to disclose adverse *facts* at issue in a case. The defense lawyers in *Kernan* did not go out of their way to help the plaintiff’s lawyer, but they probably believed that it was not their duty to do so. The Court’s opinion did not even discuss the issue of candor, apart from stating in a single sentence that defense counsel “should have informed plaintiff that [the defendant] was in bankruptcy and that a trustee had been appointed.”<sup>224</sup> If the defense lawyers’ lack of candor was such an obvious violation, the Court should have had more to say. But only one other justice signed on to Justice Pollock’s opinion.<sup>225</sup> Furthermore, one of the two out-of-state cases that Justice Pollock quoted specifically stated that the disclosure at issue in that case might not have been required by any “canon of ethics or legal obligation.”<sup>226</sup> The other out-of-state case concerned the failure to

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<sup>221</sup> *Kernan*, 154 N.J. at 464–65, 713 A.2d at 425 (Pollock, J., concurring).

<sup>222</sup> *Id.* 465–66, 713 A.2d at 425–26 (Pollock, J., concurring) (citing *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (setting aside settlement of a personal injury action because defense counsel did not disclose that defense’s doctor had discovered an internal injury arising out of the accident that plaintiff did not know about) and *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich. 1983)). Compare *Spaulding* with *Southern Trenching, Inc. v. Diago*, 600 So. 2d 1166 (Fla. Dist. Ct. App. 1992) (reversing a jury verdict in a personal injury action because the plaintiff “deliberately concealed” the fact that he had also been injured in a later, unrelated accident and “thus falsely misled the court and jury that his damages could have been caused only by the defendant’s negligence”). The *Southern Trenching* court was particularly offended that the trial judge, in denying the defendant’s post-trial motion, “actually saw fit to praise the plaintiff’s disingenuousness.” 600 So. 2d at 1167 n.3. The trial judge had written, “Plaintiff did not tell either expert of the [later] accident because, in his own words, ‘They never asked me! I was told not to volunteer.’ *Would that all witnesses would be so direct!*” *Id.*

<sup>223</sup> *Kernan*, 154 N.J. at 467, 713 A.2d at 426 (Pollock, J., concurring).

<sup>224</sup> *Id.* at 462, 713 A.2d at 424 (Pollock, J., concurring).

<sup>225</sup> See *id.* at 467, 713 A.2d at 427 (Justice Coleman joining the concurring opinion of Justice Pollock).

<sup>226</sup> *Id.* at 465, 713 A.2d at 425 (Pollock, J., concurring) (citing *Spaulding*, 116



disclose the death of a client,<sup>227</sup> which, as discussed above,<sup>228</sup> is widely regarded as a serious violation. Finally, Justice Pollock's opinion acknowledged that "[m]ore egregious examples of discovery abuse may exist."<sup>229</sup>

All of these circumstances suggest that Justice Pollock—who after retiring from the bench argued for the retention of Rule 3.3(a)(5) because he believed that it serves as a useful normative reminder<sup>230</sup>—was deliberately using the case to send a message about the importance of candor.<sup>231</sup> In light of current ethical standards, the strength of his admonition appears to be out of proportion to the obfuscation that prompted it. It was not clear whether Justice Pollock was trying to work towards curbing extreme abuses or, more dramatically, changing the level of candor generally considered acceptable in New Jersey. In any case, the opinion has been cited in each of the other three recent Supreme Court opinions admonishing lawyers about the importance of candor.<sup>232</sup>

Another concurring opinion of the New Jersey Supreme Court was notable because it specifically discussed Rule 3.3(a)(5), even though the statements at issue were flatly false and therefore a violation of the more conventional rules. *Kosmowski v. Atlantic City Medical Center*<sup>233</sup> involved an attorney who attempted to postpone a trial by stating that his expert witness, a neurosurgeon, was unavailable. The plaintiffs' lawyer declared, "The problem is, Judge, I found out on Friday that Dr. Doyle, the plaintiffs' expert, is in Europe. And is not going to be available for two weeks."<sup>234</sup> It was true

N.W.2d 704).

<sup>227</sup> *Id.* at 465, 713 A.2d at 425–26 (Pollock, J., concurring) (citing *Virzi*, 571 F. Supp. 507).

<sup>228</sup> See *supra* text accompanying notes 191–96.

<sup>229</sup> *Kernan*, 154 N.J. at 467, 713 A.2d at 426 (Pollock, J., concurring).

<sup>230</sup> See *supra* text accompanying note 173.

<sup>231</sup> Justice Pollock later said, in a speech based on his *Kernan* opinion published in the *New Jersey Law Journal*, that "[w]hat caught my eye [in the case] was the tension between the duty of the defense lawyer to his client, on the one hand, and, on the other, to the plaintiff and the court." He also said that the *Kernan* case "started me thinking" about that tension. Stewart Pollock, *Duty to Client vs. Duty to Court: The Rules of Professionalism Direct Lawyers to Conduct Themselves with Dignity and Fairness*, N.J. LAW J., Oct. 12, 1998, at 23, 154 N.J.L.J. 115.

<sup>232</sup> *In re Seelig*, 180 N.J. 234, 850 A.2d 477 (2004); *Kosmowski v. Atlantic City Med. Ctr.*, 175 N.J. 568, 818 A.2d 319 (2003); *McKenney v. Jersey City Med. Ctr.*, 167 N.J. 359, 771 A.2d 1153 (2001).

<sup>233</sup> 175 N.J. 568, 818 A.2d 319 (2003).

<sup>234</sup> *Id.* at 573, 818 A.2d at 322.

that on Friday Dr. Doyle's wife told the lawyer that Dr. Doyle was in Europe. However, that very morning the attorney had spoken with Dr. Doyle by telephone and learned that he had returned from Europe, though would not be available to testify until the latter portion of the next week.<sup>235</sup> The trial judge, unaware of the reality, dismissed the complaint with prejudice.<sup>236</sup> The Supreme Court's opinion addressed whether the dismissal was proper in light of the attorney's lack of candor.<sup>237</sup>

Justice LaVecchia wrote a brief concurrence. The justice's main point was that "[a]s adopted in New Jersey, Rule of Professional Conduct (RPC) 3.3 imposes on attorneys a 'stringent' burden of disclosure," a burden that—and here Justice LaVecchia quoted Justice Pollock's *Kernan* opinion—is greater than the one imposed by the ABA version.<sup>238</sup> The opinion dealt mostly with Rule 3.3(a)(5) and implied that the plaintiffs' lawyer could have been sanctioned under the ethics rules.<sup>239</sup>

However, Justice LaVecchia did not need to use Rule 3.3(a)(5) to make her point. The plaintiffs' lawyer made a false statement of material fact and therefore clearly violated, in New Jersey or any other jurisdiction, Rule 3.3(a)(1) or an equivalent. The lawyer had stated, "I found out on Friday that Dr. Doyle, the plaintiffs' expert, is in Europe."<sup>240</sup> Since Dr. Doyle's lawyer knew that Dr. Doyle was no longer in Europe, the statement was false.<sup>241</sup> The fact that Justice LaVecchia was willing to rest criticism of an attorney's conduct on a rule not even necessary for that criticism suggests an increasing awareness of the rule and a willingness to interpret it more broadly.

Another New Jersey Supreme Court opinion enunciated a novel rule regarding the duty to disclose during discovery.<sup>242</sup> The holding was supported in part using Rule 3.3(a)(5).<sup>243</sup> *McKenney v. Jersey City*

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<sup>235</sup> *Id.* at 572, 818 A.2d at 321–22.

<sup>236</sup> *Id.* at 573, 818 A.2d at 322.

<sup>237</sup> *See id.* at 570, 573, 818 A.2d at 320, 322.

<sup>238</sup> *Id.* at 576–77, 818 A.2d at 324 (LaVecchia, J., concurring).

<sup>239</sup> *Kosmowski*, 175 N.J. at 576–78, 818 A.2d at 324–25 (LaVecchia, J., concurring).

<sup>240</sup> *Id.* at 573, 818 A.2d at 322 (emphasis added).

<sup>241</sup> It would have been technically accurate, though highly misleading, if the lawyer had said, "On Friday I was told Dr. Doyle is in Europe. And he is not going to be available until the end of next week."

<sup>242</sup> *McKenney v. Jersey City Med. Ctr.*, 167 N.J. 359, 771 A.2d 1153 (2001) [hereinafter *McKenney II*], *rev'g* 330 N.J. Super. 568, 750 A.2d 189 (App. Div. 2000) [hereinafter *McKenney I*].

<sup>243</sup> The Supreme Court opinion does not directly mention Rule 3.3(a)(5), but the

*Medical Center* involved witnesses whose testimony at trial was inconsistent with their deposition testimony.<sup>244</sup> The plaintiff's counsel was caught off-guard, and the Supreme Court found that "defense counsel had a continuing obligation to disclose to the trial court and counsel for plaintiffs any anticipated material changes in a defendant's or a material witness's deposition testimony."<sup>245</sup> The Court acknowledged that New Jersey's rules of civil procedure do not specify any such duty. Nonetheless, the Court held that such a duty follows inevitably from the rules' purpose of eliminating surprise.<sup>246</sup> The Appellate Division had written, in language adopted by the Supreme Court, "We thus take this opportunity to make explicit what is plainly implicit in our discovery practice."<sup>247</sup>

The oxymoronic "plainly implicit" is a clue that neither court wanted to acknowledge how dramatic a departure this holding actually was from mainstream discovery requirements. In federal practice, for example, there is an ongoing duty to supplement or correct prior disclosures with respect to every discovery device but depositions.<sup>248</sup> In *McKenney*, the Appellate Division was distorting the federal rule when it wrote, in language quoted by the Supreme Court, "Although the Advisory Committee's notes indicate that the provision establishing a continuing duty to disclose does not apply to deposition testimony, the express language of the Rule is not so limited."<sup>249</sup> In fact, the language of the federal rule *is* so limited.<sup>250</sup> The point of the Advisory Committee note is to indicate that the wording of the new rule, which expressly mentions every discovery device except for the deposition, was intended to exclude deposition

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Appellate Division opinion stated, albeit in a footnote, that the Rules of Professional Conduct, including Rule 3.3(a)(5), support its position, *McKenney I*, 330 N.J. Super. at 588 n.1, 750 A.2d at 199 n.1, and the Supreme Court adopted the Appellate Division's opinion. The Supreme Court stated, "We agree with the Appellate Division's . . . legal analysis concerning a lawyer's duty of disclosure in such circumstances," and then quoted the entire relevant section of the Appellate Division opinion, except for the footnotes. *McKenney II*, 167 N.J. at 370-71, 771 A.2d at 1159-60.

<sup>244</sup> *McKenney II*, 167 N.J. at 366-67, 771 A.2d at 1157.

<sup>245</sup> *Id.* at 371, 771 A.2d at 1160.

<sup>246</sup> *Id.* at 370, 373, 771 A.2d at 1159, 1161.

<sup>247</sup> *Id.* at 370, 771 A.2d at 1159 (quoting *McKenney I*, 330 N.J. Super. at 588, 750 A.2d at 200).

<sup>248</sup> FED. R. CIV. P. 26(e)(2).

<sup>249</sup> *McKenney II*, 167 N.J. at 371, 771 A.2d at 1160 (quoting *McKenney I*, 330 N.J. Super. at 589, 750 A.2d at 200).

<sup>250</sup> See FED. R. CIV. P. 26(e)(2).

testimony.<sup>251</sup>

With *McKenney*, the New Jersey Supreme Court appears to be trying to make lawyers cooperate in the search for truth. *McKenney* effectively makes a lawyer responsible for ensuring that the adversary and the court are fully apprised of the substantive facts at issue in a case. In that respect, *McKenney*—which was authored by Justice Coleman (the only justice to join Justice Pollock’s *Kernan* opinion)—resembles Justice Pollock’s opinion in *Kernan*, which *McKenney* cites.<sup>252</sup> Both opinions arguably contemplate a modification of the adversary system in the direction that Frankel envisioned.

The final New Jersey Supreme Court opinion implicating the duty of candor is *In re Seelig*.<sup>253</sup> This recent decision, handed down in June of 2004, is probably the most remarkable one of the set. In 1998, Jack Seelig was representing Jeffrey Poje, who had caused a deadly automobile accident. Poje was arrested, and the county prosecutor charged him with manslaughter and death by automobile. Later, the township police department issued summonses to Poje for motor vehicle offenses arising out of the same accident. At the municipal court hearing on the motor vehicle offenses, Jack Seelig, without informing the judge of the pending indictable offenses, had Poje plead guilty to the motor vehicle offenses. The result, as Seelig well knew, was that under New Jersey law, there was now a double-jeopardy bar to prosecuting Poje on the more serious pending charges. The judge did not make the inquiries that he was required to make as he accepted the plea, nor did he notify the county prosecutor as he was supposed to, in order to give the prosecutor a chance to have the municipal proceedings stayed.<sup>254</sup>

Seelig was charged with a violation of Rule 3.3(a)(5) for failing to bring the pending indictable charges to the attention of the municipal judge.<sup>255</sup> Seelig’s case divided a district ethics committee,<sup>256</sup>

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<sup>251</sup> See FED. R. CIV. P. 26 advisory committee’s notes (1994) (stating that the 1993 version of the rule clarifies that the ongoing duty to supplement does not “ordinarily” apply to deposition testimony). For the point that the Court’s description of the federal rule is wrong, I am indebted to William S. Gyves, *The Duty to Disclose Inaccurate Deposition Testimony: Appellate Division Ruling Puts New Jersey Law at Odds with Federal Rules of Civil Procedure*, N.J. LAW J., Sept. 4, 2000, at 28, 32, 161 N.J.L.J. 1048, 1052.

<sup>252</sup> 167 N.J. at 371–72, 771 A.2d at 1160–61.

<sup>253</sup> 180 N.J. 234, 850 A.2d 477 (2004).

<sup>254</sup> *Id.* at 237–41, 850 A.2d at 479–81.

<sup>255</sup> *Id.* at 237, 850 A.2d at 479.

<sup>256</sup> In 2001 the Committee voted 2–1 to dismiss the ethics complaint. The

as well as the Disciplinary Review Board,<sup>257</sup> but the Supreme Court was unanimous. Writing for the Court, the chief justice recounted the history of Rule 3.3(a)(5)<sup>258</sup> and reflected on “the double character of an attorney’s duty.”<sup>259</sup> The Court made the remarkable pronouncement that Rule 3.3(a)(5) “is a paradigm for [a] shift” from “the client’s interest to the legal system and the public interest.”<sup>260</sup> And, after reviewing the key Rule 3.3(a)(5) disciplinary cases, as well as Justice Pollock’s *Kernan* opinion, the Court cited, for the first time, the proposal that Marvin Frankel published in 1975—the Rule’s likely indirect ancestor.<sup>261</sup>

Indeed, the Court’s analysis of Seelig’s conduct probably would have pleased Frankel. The Supreme Court acknowledged that in Poje’s case, the system had broken down in that the judge and prosecutors had failed to fulfill their responsibilities. However, the Court insisted that Seelig had a duty to correct this breakdown.<sup>262</sup> The ethics rules “compel a lawyer to act affirmatively against his or her client’s interests even when the primary responsibility for informing the court does not (or may not) lie with the lawyer.”<sup>263</sup> The Court refrained from punishing Seelig because the issue was novel, and he had acted in good faith.<sup>264</sup> Justice LaVecchia (the author of the *Kosmowski* concurrence) wrote separately to argue that Seelig should have been disciplined.<sup>265</sup>

*Seelig* gives teeth to Rule 3.3(a)(5). The outcome would likely not have been the same in a jurisdiction with a traditional duty of candor rule. A 1994 advisory opinion of the Texas Bar’s ethics committee found that at sentencing, a defense lawyer who knows that the defendant has prior convictions may remain silent when the judge incorrectly states that the defendant has no prior conviction,

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dissenter was the lone non-lawyer on the three-member panel. Mary P. Gallagher, *Ethics Panel Clears Lawyer Charged with Lack of Candor to Tribunal*, N.J. LAW J., Aug. 20, 2001, at 4, 165 N.J.L.J. 704.

<sup>257</sup> In June 2002 the Board decided by a vote of 4–3 that Seelig had violated Rule 3.3(a)(5), but five votes would have been required to actually discipline Seelig. 180 N.J. at 241–45, 850 A.2d at 482–84.

<sup>258</sup> *Id.* at 245–49, 850 A.2d at 484–86.

<sup>259</sup> *Id.* at 248, 850 A.2d at 486 (internal quotation marks omitted).

<sup>260</sup> *Id.* at 249, 850 A.2d at 487.

<sup>261</sup> *Id.* at 250, 850 A.2d at 487.

<sup>262</sup> *Id.* at 252–53, 850 A.2d at 488–89.

<sup>263</sup> *Seelig*, 180 N.J. at 253, 850 A.2d at 489.

<sup>264</sup> *Id.* at 256–58, 850 A.2d at 491–92.

<sup>265</sup> *Id.* at 258–59, 850 A.2d at 492 (LaVecchia, J., concurring and dissenting).

even when the judge asks the district attorney, “Right?”<sup>266</sup> According to that opinion, it is not the defense lawyer’s duty to make the court aware of every piece of information that could increase the defendant’s punishment. The New Jersey Supreme Court in *Seelig* essentially found otherwise. The Court in *Seelig* would probably have been even less likely to agree with a 1991 Maryland court that held that a lawyer did not violate ethical rules when he failed to disclose to police and at the arraignment that his client was operating under a false identity.<sup>267</sup>

These recent opinions appear to signal a desire on the part of the New Jersey Supreme Court to modify the adversary ethos. It is true that the Supreme Court recently acted to weaken Rule 3.3(a)(5), but these changes may have simply been an attempt to make the rule more acceptable to the profession so as to encourage compliance with it. (The Supreme Court nearly stated as much.<sup>268</sup>) All of the cases discussed in this Article were decided under the old rule, but as it turns out, none of them, not even the more adventurous ones, are likely to have come out differently under the new rule. None of these cases deals with a situation in which the attorney’s conduct might have “tend[ed]” to mislead the tribunal but was not “reasonably certain” to have done so. And none of these cases deals with the potential situation that has so troubled some of the critics of Frankel, the early Kutak Commission drafts, and Rule 3.3(a)(5); namely, one in which the attorney might have to disclose privileged information. The New Jersey Supreme Court’s changes to Rule 3.3(a)(5) make the rule a more credible instrument of enforcement, but they do not remove its potential to modify the way adversarial business is conducted in New Jersey’s legal system.

#### CONCLUSION

The experience of New Jersey suggests that simply enacting ethics rules of the type Frankel envisioned is unlikely to make trials

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<sup>266</sup> State Bar of Tex. Prof’l Ethics Comm., Op. 504, 58 TEX. B.J. 718, 718–19 (1995).

<sup>267</sup> Attorney Grievance Comm’n v. Rohrback, 591 A.2d 488 (Md. 1991). *But see In re Seig*, 515 N.W.2d 694 (Wis. 1994) (holding that lawyer violated local ethics rules in not disclosing that a client was using the client’s brother’s name in connection with traffic offenses); Office of Disciplinary Counsel v. Heffernan, 569 N.E.2d 1027 (Ohio 1991) (holding that lawyer violated Code of Professional Responsibility DR 7-102(B)(1) for failing to disclose that his client had falsely assumed the identity of his brother for purposes of his brother’s traffic offense).

<sup>268</sup> *See supra* text accompanying note 176.

more truthful without a broader commitment to candor on the part of the legal profession. The evidence strongly suggests that Rule 3.3(a)(5) notwithstanding, New Jersey courts have not been comfortable enforcing, and New Jersey lawyers are not comfortable observing, a broader duty of candor than exists in other jurisdictions. In New Jersey, as in other jurisdictions, a lawyer is not responsible for helping the tribunal arrive at the truth.

The question is whether, over an extended period of time, a series of cases like *McKenney* and *Seelig* could gradually induce lawyers to be more committed to the truth. The bar's hostile reaction to the early Kutak Commission drafts, as well as the reception of Rule 3.3(a)(5), are reminders that American lawyers have a deep-seated view of themselves as partisan gladiators. That conception of the lawyer's role does not leave much room for a duty to make the tribunal aware of information that could damage a client's cause.

New Jersey's experience with Rule 3.3(a)(5) can help us to evaluate some of the major arguments made against Frankel's proposal over the years.<sup>269</sup> The experience of New Jersey does not bear on the arguments that in an adversary system some values take precedence over truth, and that the ultimate end of truth-seeking sometimes requires the deliberate subversion of truth. Those are larger philosophical issues. Likewise, New Jersey's experience does not help to evaluate the argument that Frankel's proposals would weaken the attorney-client relationship and discourage effective representation because New Jersey has not systematically enforced Rule 3.3(a)(5).<sup>270</sup>

New Jersey's experience with Rule 3.3(a)(5) does, however, support the prediction that simply writing stricter ethics rules is unlikely to change adversarial conduct. Pizzi and Saltzburg argued<sup>271</sup> that the nature of an adversary system puts pressure on ethics rules. A lawyer whose job is to win for the client will always test the boundaries of permissible conduct, shading facts to present them in the light most favorable to the client. Until recently, lawyers, disciplinary bodies, and judges seemed to have a common understanding that lawyers simply cannot, consistent with their role, observe the letter of the old Rule 3.3(a)(5). The New Jersey Supreme Court tacitly acknowledged this point when it narrowed Rule

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<sup>269</sup> See *supra* Part I.B.

<sup>270</sup> See *supra* text accompanying notes 68–70.

<sup>271</sup> See *supra* text accompanying notes 71–72.

3.3(a)(5), and recognized the bar's complaint that "the very nature of [Rule 3.3(a)(5)] makes compliance difficult."

The new rule, however, if treated literally, would continue the old rule's dramatic departure from the traditional adversary system. The new rule exempts privileged communications from disclosure. This prevents lawyers from having to disclose client confidences and therefore relieves the most extreme tension created by the rule. But most material facts, or facts without which the tribunal could be misled, are not privileged. Anything the lawyer learns from anyone other than the client is not privileged, and even if the lawyer learns the information from the client, the information is not privileged unless confidential. For example, the facts withheld in *McKenney* and *Seelig* were not privileged. In fact, Frankel's original proposal had included an exception for privileged communications.

The other major change to the rule is from "may tend to be misled by such failure" to "is reasonably certain to be misled by such failure." But the significance of that change depends—as does the meaning of Rule 3.3(a)(5) more generally—entirely on what "misled by such failure" means, and that is not an easy question. The word "misleading" is well understood. "Misleading" is the standard used in SEC Rule 10b-5,<sup>272</sup> probably the most famous example in American law of a standard prohibiting deception. Most people understand that a statement is misleading if, while literally accurate, it causes the person who hears the statement to believe something other than what the speaker knows to be correct.

"Misled by such failure" is much more difficult. This phrase refers to the *effect* of an omission on the hearer, not to the properties of a statement. The phrase appears to presume an objectively truthful, correct, or complete version of events. If a tribunal fails to perceive that version, it has been misled. If the tribunal fails to perceive that version because it was not aware of a particular fact, then that fact must be material and the failure to disclose it violates Rule 3.3(a)(5). Conversely, if a fact is material, then by definition, it could affect the tribunal's understanding of events, and that means that without that fact, the court could be misled. The definition of "misled" as used in Rule 3.3(a)(5) thus collapses into the definition of materiality, or the other way around. Either way, the change from "may tend to be misled" to "reasonably certain to be misled" seems to deal only with the importance of the withheld fact to the issue on

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<sup>272</sup> 17 C.F.R. § 240.10b-5 (2004).



which it will shed light—in other words, with how material the fact actually is. But if a fact is not very material, then a failure to disclose it does not matter much. The difference between the new rule and the old rule, then, is that the new rule does not apply to insignificant cases.

In other words, the new version of the rule retains the key feature of the old version, which is also the basic difficulty of this rule and indeed with parts of Frankel's original proposal in an adversary system of procedure. That difficulty, reflected in one form or another in nearly all of the criticisms of Rule 3.3(a)(5), the early Kutak Commission drafts, and Frankel's proposal, is that a duty of affirmative candor requires the lawyer to think in some sense about what result the court *should* reach. But a lawyer hired to help a particular client is in a poor position to make that judgment. If New Jersey's Supreme Court continues its experiment, we will find out whether lawyers are incapable or merely, for the time being, unwilling.

#### APPENDIX

##### DEC. 16, 1974: FRANKEL'S PROPOSAL

(1) In his representation of a client, unless prevented from doing so by a privilege reasonably believed to apply, a lawyer shall:

(a) Report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses.

(b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.<sup>273</sup>

(c) Question witnesses with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate,

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<sup>273</sup> Cf. Rule 10b-5 of the Securities and Exchange Commission:

It shall be unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[.]

17 C.F.R. § 240.10b-5(b) (2004).

intelligible, or fair than it otherwise would be.

(2) In the construction and application of the rules in subdivision (1), a lawyer will be held to possess knowledge he actually has, or in the exercise of reasonable diligence, should have.<sup>274</sup>

AUGUST 1979: INITIAL DRAFT OF THE  
ABA'S MODEL RULES LEAKED TO THE PRESS

3.2: CANDOR TOWARD THE TRIBUNAL

In presenting a cause, a lawyer shall be properly candid to the tribunal.

(a) A lawyer shall not: . . . .

(2) Make a knowing misrepresentation of fact;

(3) Fail to disclose a fact, even if the fact is adverse, when:

(i) Law or the rules of professional conduct require the lawyer to disclose the fact; or

(ii) Disclosure of the fact is necessary to correct a misapprehension resulting from a previous representation the lawyer has made to the court; or

(iii) Disclosure of the fact would probably have a substantial effect on the determination of a material issue of fact, except [in criminal defense context].

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<sup>274</sup> From Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). The ABA disciplinary rules he was proposing to supplement or displace, MODEL CODE OF PROF'L RESPONSIBILITY, DR 7-102, provided:

(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.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

. . . .

(B) 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 affected person or tribunal . . . .

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

(4) [except in context of criminal defense], offer evidence that the lawyer knows beyond a reasonable doubt to be false or fabricated, or offer without suitable explanation evidence that the lawyer knows is substantially misleading. If a lawyer discovers that evidence or testimony that the lawyer has presented is false or fabricated, it is the lawyer's duty to disclose that fact and to take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification or fabrication;

....

JANUARY 30, 1980: "DISCUSSION DRAFT" OF THE ABA'S MODEL RULES

RULE 3.1: CANDOR TOWARD TRIBUNAL

A lawyer shall be candid toward a tribunal.

(a) A lawyer shall not:

....

(2) make a knowing misrepresentation of fact;

(3) [except in context of criminal defense] offer evidence that the lawyer is convinced beyond a reasonable doubt is false, or offer without suitable explanation evidence that the lawyer knows is substantially misleading;

....

(b) [except in context of criminal defense] if a lawyer discovers that evidence or testimony presented by the lawyer is false, the lawyer shall disclose that fact and take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification.

....

(d) [except in context of criminal defense] a lawyer shall disclose a fact known to the lawyer, even if the fact is adverse, when disclosure:

(i) is required by law or the rules of professional conduct;

or

(ii) is necessary to correct a manifest misapprehension resulting from a previous representation the lawyer has made to the tribunal.

....

## MAY 30, 1981: "PROPOSED FINAL DRAFT" OF THE MODEL RULES

## RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal, or fail to disclose a fact in circumstances where the failure to make the disclosure is the equivalent of the lawyer's making a material misrepresentation;

(2) fail to make a disclosure of fact necessary to prevent a fraud on the tribunal;

....

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

## AUGUST 1983: THE MODEL RULES AS ADOPTED BY THE ABA

## RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) 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;

....

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

....

## MODEL RULES OF PROFESSIONAL CONDUCT, 2002 VERSION

## RULE 3.3: CANDOR TOWARD 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;

....

(2) 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. . . .

(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.

NEW JERSEY RULES OF PROFESSIONAL CONDUCT, 1984-2003 VERSION

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) 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 an *illegal*, criminal or fraudulent act by the client;

. . . .

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) *fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.*

(Emphasis added to show departure from 1983 version of the Model Rules of Professional Conduct.)

NEW JERSEY RULES OF PROFESSIONAL CONDUCT, 2004 VERSION

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) 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 an illegal, criminal or fraudulent act by the client;

.....

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

*(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.*

(Emphasis added to show departure from 1984 version of the New Jersey Rules of Professional Conduct.)