Disclosure Obligations of a Lawyer
Who Discovers That Her Client Has
Violated a Court Order During Litigation

A lawyer who discovers that a client has violated a court order prohibiting or limiting transfer of assets must reveal that fact to the court if necessary to avoid or correct an affirmative misrepresentation by the lawyer to the court. A lawyer also must disclose the client's conduct or, in the alternative, withdraw from continued representation of the client in the litigation if necessary to avoid assisting the client in a fraud on the court. Continued representation of the client in the litigation may constitute assistance in a fraud on the court where the client's conduct destroys the court's ability to award effective relief to the opposing party. Upon withdrawing from the representation, the lawyer must make a disclosure sufficient to avoid continued reliance by the court on prior representations of the lawyer that now are known to be untrue but, absent such a necessity, the lawyer may not disclose the client's misconduct to the court or successor counsel without the client's consent.

The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel.

We assume, for purposes of this opinion, that the lawyer learned of the client's misconduct after it occurred and that the client is not continuing to
dispose of assets in violation of the court’s order.\(^1\) We further assume that the lawyer has actual knowledge that the client violated the order, based either on a communication by the client to the lawyer or on other information coming to the lawyer’s attention that the lawyer reasonably believes to be reliable. To determine the lawyer’s obligations, we must consider the scope of Rule 3.3 governing candor toward the tribunal\(^2\) and its relation to Rule 1.6 governing confidentiality of information.\(^3\) A lawyer may not knowingly make a false statement of material fact to a court and may not knowingly fail to disclose a material fact to the court when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.\(^4\) As provided in Rule 3.3(b), these

1. A lawyer’s knowledge that her client is engaged in an ongoing criminal act raises questions different from those presented when the criminal conduct has been completed. A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent, Rule 1.2(d), and must disclose facts to a court when necessary to avoid doing so. Rule 3.3(a)(2). We do not address in this opinion the circumstances under which a lawyer must, under these rules, disclose ongoing conduct of a client that constitutes contempt of court.

2. Rule 3.3 (Candor Toward the Tribunal) states in relevant part:

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

   (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

3. Rule 1.6 (Confidentiality of Information)

   (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

   (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

      (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
      
      (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

4. \textit{See} Rule 3.3(a)(1) and (2).
duties of candor to the tribunal apply even if performance of the duty will require disclosure of information that the lawyer otherwise is prohibited from disclosing by Rule 1.6(a). However, unless disclosure is necessary to avoid a false statement by the lawyer to the court or to avoid assisting a client in a criminal or fraudulent act, the lawyer is bound by the obligation of confidentiality in Rule 1.6(a) and may not reveal the client’s misconduct to the court without the client’s consent. The Committee concludes that is true even if the client’s misconduct is a violation of an order entered by a court during litigation in which the lawyer represents the client.

In this opinion, the Committee first addresses the lawyer’s duty where the lawyer or the client has made, or will be required to make, an affirmative statement to the court concerning the status of the client’s assets. Second, we consider under what circumstances disclosure may be necessary to avoid assisting a crime or fraud by the client. Finally, we consider what disclosure obligation, if any, is imposed on a lawyer who withdraws or is discharged because the client refuses to correct a fraud on the court.

I. A Lawyer Must Avoid or Correct Affirmative False Statements to the Court

A. Statements by the Lawyer

A court is entitled to assume that a lawyer will not mislead the court by making affirmative statements of fact the lawyer knows to be false; Rule 3.3(a)(1) prohibits a lawyer from doing so. Accordingly, when a lawyer discovers that a client has violated a court order, the lawyer first must ensure that any affirmative misrepresentations by the lawyer to the court are avoided or corrected.

Upon learning of the client’s misconduct, the lawyer should review her prior statements to the court and determine whether any of those representations were untrue when made in view of the information now known to her. If a false representation has been made, then the lawyer must determine whether the misrepresentation is material to an issue to be decided in the litigation. Although the lawyer will have violated no rule at the time of the statement because she did not know of its falsity, continuing to act for the client with knowledge that the court and an adverse party may act in reliance upon the false representation imposes on the lawyer a duty to correct or withdraw it. Otherwise, the lawyer would be assisting the client in a fraud on the court.

5. Rule 3.3(a)(1) prohibits a false statement of a “material” fact to the tribunal and Rule 3.3(b) provides that the duties stated in paragraph (a) “continue to the conclusion of the proceeding.” Thus, correction is not required when the fact stated is not material to an issue in the litigation. Further, if a lawyer learns after the conclusion of the litigation that a statement made by her to the tribunal was untrue, then the rule does not require correction of the statement. The Committee does not here consider the question whether a proceeding is "concluded" for purposes of Rule 3.3(b) when a final judgment has a continuing effect, as in the case of an injunction, and the judgment
Avoidance or correction of a false representation by the lawyer does not always require disclosure of the facts of the client's misconduct. The lawyer may, for example, simply decline to respond to an inquiry from the court or withdraw an earlier statement and refuse to provide further information, in reliance on the attorney-client privilege and the client's privilege against self-incrimination. Although the lawyer's action will signal to the court that there is a problem, and may lead to adverse consequences for the client, the action is necessary in order for the lawyer to comply with her ethical obligations and remain as counsel in the litigation.

Whether withdrawal from the representation without disclosure of the client's misconduct is sufficient to fulfill the lawyer's ethical duties depends upon whether false statements already have been made to the court. If the concern is only that representations will be required in the future and the client directs the lawyer not to reveal information the disclosure of which would be required to make those representations truthful, then the lawyer must withdraw from the representation. That is because a lawyer may not continue with a representation if it will result in a violation of the Rules of Professional Conduct or other law. When the lawyer already has made an affirmative representation of material fact that she now knows to be false, however, withdrawal from the representation may not be sufficient. If the lawyer's statement was one upon which the court may continue to rely in future conduct of the litigation, correction of the statement is required whether or not the lawyer withdraws from the representation. A lawyer's duty to correct her own false statements to the)

may have been influenced by false statements to the court. Settlement of litigation without informing the court or opposing counsel of a prior, material false statement made during the litigation may violate the lawyer's duty of candor to the court. See In re Mines, 523 N.W. 2d 424, 426 (S.D. 1994).

6. Although we do not opine on questions of law, we note that there may be circumstances where compelling a lawyer to reveal information received from a client that is incriminating to the client will contravene the Fifth Amendment and the attorney-client privilege. See Fisher v. United States, 425 U.S. 391, 402-05 (1976).

7. See Rule 1.16 (Declining or Terminating Representation), which states in relevant part, "[e]xcept as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law . . . ."

8. Rule 3.3 states that the obligations imposed on the lawyer continue "to the conclusion of the proceeding." As we stated in Formal Opinion 93-376, the obligations therefore presumably continue so long as the litigation is pending, even if the lawyer has withdrawn. In Kansas Bar Ass'n Ethics/Advisory Services Committee Opinion 98-01 (March 16, 1998), the Committee concluded that where a lawyer learned after the conclusion of a workmen's compensation proceeding that his client had given false testimony in order to receive benefits, disclosure to the tribunal was required because the benefits had not been fully received and the tribunal could modify its order. We do not address in this opinion issues raised in such a circumstance.
court is, in this respect, no different from her obligation in civil cases to take reasonable remedial measures upon discovery of a client’s perjury, a subject discussed in Section II of this opinion.

**B. Statements by the Client**

If false representations of fact have been made by the client, but not by the lawyer, then Rule 3.3(a)(1) does not apply. In such a case, the lawyer’s duty is governed by Rule 3.3(a)(2) and (4), which require a lawyer to reveal a fact to a tribunal when “necessary to avoid assisting a criminal or fraudulent act by the client,” and to “take reasonable remedial measures” upon discovery that the lawyer has offered material evidence that is false.

When a lawyer learns that a client has violated an order prohibiting transfer of assets, the lawyer should determine whether the client has made or will be required to make representations in the litigation that, absent disclosure of the misconduct, are or will be false and material. Such representations could, for example, include periodic reports of transactions required to be made by the order itself, or discovery responses made by the client during the litigation, or testimony at a deposition, hearing, or trial. As the Committee stated in Formal Opinion 87-353 dealing with client perjury, when a lawyer knows that her client intends to make a false statement to the court, the lawyer must advise the client against such a course of action. If the client insists on presenting false information, then the lawyer must withdraw from the representation and, if withdrawal is not permitted, must make disclosure to the court of the falsity of the information.

If the client’s misrepresentation already has been made, whether in testimony, discovery responses or periodic reports to the court required by its order, then the Committee’s conclusions in Formal Opinion 93-376 apply. In that opinion, the Committee concluded that a lawyer who discovers her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court. We emphasize, however, that Formal Opinion 93-376 dealt with a situation where there was a “potential ongoing reliance upon [the] content” of the false deposition testimony, and correction of the false testimony was therefore necessary to prevent an ongoing fraud upon the court. The lawyer should satisfy herself that the false statement by the client is one upon which the court or the opposing party may rely in the future before deciding that disclosure is necessary.

9. In Opinion 91-4, the Massachusetts Bar Association Committee on Professional Ethics concluded that, absent a valid Fifth Amendment privilege of the client, a lawyer had a duty to disclose a client’s false statement to a probation officer. Assuming that the false statement (the client’s true name) was, as the Massachusetts Committee believed, “an effort to obtain a lighter sentence by lying” and the false statement was therefore material, the opinion is consistent with Opinion 93-376.
II. A Lawyer's Obligation to Avoid or Correct a Continuing Fraud upon the Court May Require the Lawyer to Disclose a Client's Violation of a Court Order

We turn now to the question whether disclosure that a client has violated an order restricting the transfer of assets or, in the alternative, withdrawal from the representation, is required where neither the client nor the lawyer has made or will make any false affirmative representations to the court or the opposing party. The answer depends upon whether the lawyer's silence after learning of the client's misconduct will assist the client in a fraud on the court, or will be tantamount to a false representation.

A lawyer's continued appearance before the court is not an affirmative representation that her client is in compliance with all court orders, regardless of their nature. There are numerous circumstances in which a lawyer may be aware that her client is in violation of a court order—even one issued in the context of the matter in which the lawyer is representing the client—but has no reason to anticipate that the violation materially will affect the resolution of the litigation. For example, a court may order that a defendant in a criminal case comply with certain requirements as a condition of release; a domestic relations court may issue a "stay-away" order in a divorce case; or any court may issue a protective order providing for the confidentiality of information obtained in discovery. A lawyer's failure to report a violation of such an order by her client would not appear to constitute assistance to the client in committing a criminal or fraudulent act so as to require the lawyer under Rule 3.3 to either withdraw from representation of the client or disclose the client's violation to the court.

There are, however, circumstances in which the lawyer's continued appearance on behalf of a client reasonably would be viewed as a continuing representation to the court that the client is in compliance with an order prohibiting disposition of assets. Comment [2] to Rule 3.3 states that there are circumstances in which a failure to make disclosure is the equivalent of an affirmative misrepresentation. This is most certainly the case where the order itself requires the client to report certain transactions. Although requirements such as this necessarily do not require the lawyer to disclose a client's misconduct, they may require withdrawal if the client refuses to make the required report.

Even in the absence of explicit disclosure requirements, a lawyer's continued appearance for a client may constitute an affirmative representation. Such a circumstance was presented in the situation addressed by the Committee in Formal Opinion 95-397, where a lawyer's failure to disclose the death of her client was viewed as "tantamount to" and "the equivalent of" a misrepresentation that the lawyer continued to represent that client. 10

Disclosure of a client’s disposition of assets in violation of a court order also is required under Rule 3.3(a)(2) when "necessary to avoid assisting a criminal or fraudulent act by the client." Such a circumstance could arise if the client’s disposition of assets destroyed the subject matter of the litigation or the ability of the court to grant relief to the opposing party. That is so because the client’s conduct will have rendered the litigation a sham. Thus, in a claim for specific performance of a contract to deliver goods where the client already has disposed of the goods in violation of a temporary restraining order, the lawyer’s continuing representation of the client in the litigation after learning of the transfer likely would be viewed as a violation of the duty of candor. Similarly, if counsel is aware that a client’s violation of a court order has made it impossible for the court to grant relief requested on a pending motion, then the lawyer’s silence about the matter likely would be viewed as a deception of the court.

Not all violations of an order prohibiting or limiting the disposition of assets will trigger a duty to disclose or withdraw under Rule 3.3(a)(2). Whether such a duty exists depends upon the extent to which, in the context of the particular litigation, the conduct impairs the court’s ability to award effective relief to the opposing party. Where the order is designed to preserve assets to satisfy a possible money judgment in the case and a client having millions of dollars in assets engages in a prohibited transaction involving a relatively small amount of money, the conduct likely would not destroy the court's ability to grant effective relief, or otherwise make the litigation a sham. In such a circumstance, the lawyer may continue representing the client without disclosure of the client’s misconduct.

11. The terms "criminal or fraudulent act" in Rule 3.3(a)(2) encompass only crimes or frauds directed toward a matter pending before the court. Cf. Formal Opinion 92-366 n.8 (recognizing that Rule 3.3 requires that the fraud be implicated in a matter pending before a tribunal). Discovery responses or other statements provided to the opposing party ordinarily fall within Rule 3.3. See Formal Opinion 93-376. A lawyer representing a client in litigation, however, ordinarily is not obligated—or even permitted—to advise the court of crimes or frauds not involving the litigation that the client may be in the process of committing during the course of the lawyer’s representation of the client if disclosure would reveal information relating to the representation. See Rule 4.1(b).

12. In Formal Opinion 94-387, we concluded that a lawyer had no ethical duty to disclose, in negotiations to settle a claim, that the claim was time-barred. We observed, however, that the result under Rule 3.3 "might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit..."?

13. Cf. In re Callan, 66 N.J. 401, 406-07, 331 A.2d 612, 615-16 (N.J. 1975) (attorneys who failed to reveal their client’s withdrawal of funds ordered to be maintained in a depository until the morning of a hearing on the motion to release the funds to the plaintiff were not in contempt, but noting that ethical issues were left to Bar Committee).
However, when the client disposes of an asset that is a subject of the litigation and the court’s order was designed to preserve it *pendente lite*, the client’s action has rendered the litigation a sham to that extent and the lawyer is required to disclose the violation or withdraw. Similarly, when a lawyer continues to defend an action for damages, restitution or disgorgement knowing that her client has dissipated or transferred assets in violation of an order to preserve them, the lawyer assists the client in a fraud on the court in violation of Rule 3.3(a)(2) if the lawyer reasonably should know that her adversary would not likely continue the litigation if he knew how few assets remained. Accordingly, in these circumstances, the lawyer who is unable to convince her client to regain control of the assets in question, or who finds the client is unable to do so, may not continue the representation absent disclosure of the facts to the courts.

III. Disclosure Obligation of Lawyer Who Withdraws

The Committee also has been asked to address whether a lawyer who withdraws or is discharged and is replaced by new counsel has any continuing disclosure obligation when the client has violated a court order prohibiting the client’s disposition of assets. We assume that the lawyer who has withdrawn or been discharged knows that the client intends to make a false statement to the court or believes that her continued representation of the client would assist the client in a fraud on the court. We conclude that the lawyer may not make disclosure to successor counsel or to the court in the absence of client consent.

It is well-established that when a client actually has testified falsely or the lawyer otherwise has presented false evidence and the lawyer later learns of the falsity of the evidence or testimony before the conclusion of the proceeding, the lawyer must disclose the client’s perjury to the court if the lawyer is unable to convince the client to rectify the perjury. The issue here, however, concerns a future false statement by the client, rather than false evidence that already has been presented to the court.

We believe the resolution of this issue is controlled by Formal Opinion 87-353 dealing with client perjury. In the second half of that opinion, we addressed a lawyer’s obligation when a client states an intention to commit perjury at trial. We reexamined Informal Opinion 1314 (1975), which concluded that the lawyer in that situation must advise the client that the lawyer must take “one of two courses of action,” to wit, withdrawal prior to the submission of the false testimony or reporting the falsity of the client’s testimony to the tribunal. Formal Opinion 87-353 did not take issue with the conclusion

14. We also assume that the lawyer personally has made no representations to the court, not known to have been false when made, upon which the court may continue to rely after her withdrawal. As explained *supra* in Section II, corrective action by the lawyer is required in such a circumstance.

15. See Formal Opinion 87-353.
of Informal Opinion 1314 that the lawyer had two courses of action available to her. Although this issue did not receive substantial consideration in Formal Opinion 87-353, it is implicit in its reasoning that the Committee viewed withdrawal as an effective alternative to informing the court, provided the lawyer was able to withdraw prior to the submission of the false testimony.

When faced with intended future perjury by a client, withdrawal is sufficient to enable the lawyer to avoid assisting criminal or fraudulent act by her client. If the lawyer no longer represents the client, then the lawyer will not be in a position to engage in any conduct covered by Rule 3.3(a) that would trigger an obligation to disclose the client’s intended false statement to the court or, in the alternative, to successor counsel. Specifically, on the facts under consideration, Rule 3.3(b) requires disclosure of otherwise confidential information protected by Rule 1.6 only to prevent the lawyer from knowingly making a false statement of material fact to the tribunal; failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or offering evidence the lawyer knows to be false. If the lawyer no longer is representing the client, then the lawyer will not be in a position to make a false statement of material fact to the court, as the lawyer will not be appearing in court for the client at all. For the same reason, the lawyer cannot be said to be assisting the client’s criminal or fraudulent act or offering false evidence because the lawyer will not be performing any services for the client. Accordingly, the lawyer will be violating no duties imposed by Rule 3.3 and, therefore, has no authority to disclose information protected by Rule 1.6.

When a lawyer discovers that her client already has given false evidence, Rule 3.3(a)(4) requires that the lawyer “take reasonable remedial measures.” In Formal Opinion 93-376, we concluded that this duty exists when a lawyer discovers that a client has committed perjury during discovery proceedings in advance of the presentation of the false evidence to the tribunal. In that situation, the client already had committed the perjury and created the false evidence and the lawyer had, albeit unknowingly, assisted in making that evidence available to the opposing party. We found that the potential of the false evidence to be presented to the court gave rise to a duty by the lawyer to take reasonable remedial measures to make sure that the court was not misled.

By contrast, when a lawyer knows only of a client’s intention to make a false statement in the future and the lawyer has not offered any false evidence or made any false statement to a court, the only provision of Rule 3.3(a) at issue is subparagraph (a)(2), which requires disclosure of material facts when necessary to avoid assisting a client’s criminal or fraudulent act. We found in Formal Opinion 87-353 that the lawyer’s withdrawal was sufficient to enable the lawyer to “avoid assisting” the client’s criminal or fraudulent act when the client states an intention to commit that act in the future. We reach the same conclusion with respect to a lawyer’s withdrawal to avoid assisting a client’s continuing fraud on the court caused by disposition of assets in violation of a preservation order.
This opinion addresses the application of Rule 5.6 to the following fact situation:

A law firm's partnership agreement includes language which provides that upon the voluntary withdrawal of a partner for any reason other than for the purpose of engaging in the practice of law within a specified geographic area ("the protected territory") the withdrawing partner shall be paid for such partner's proportionate share of fees received by the continuing partnership subsequent to his withdrawal for work performed prior to the time of his withdrawal. The amount be paid to the withdrawing partner would be equal to 75% of the average annual partnership profit distributed to such partner during the past three full fiscal years immediately preceding his withdrawal. The agreement further provides that if the withdrawing partner engages in the practice of law in the protected territory within eighteen (18) months after his withdrawal, then he shall not receive any compensation or other consideration for his proportionate share of the fees received by the continuing partnership unless arrangements agreeable to the remaining firm and the withdrawing partner are made for such partner's participation in the continued practice of law with the firm in an "of counsel" capacity.

The question presented is whether offering or making such an agreement violates Rule 5.6 of the Rules of Professional Conduct.

**Analysis**

Rule 5.6 is as follows:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy between private parties.

The official comment to Rule 5.6 makes it clear that only portion of Rule 5.6(a) could have any application to the fact situation at hand.

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.
Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Recently Rule 5.6 has come under attack. See Welliver, "When the Walls Come a 'Tumblin' Down; A Look at What Happens When Lawyers Sign Noncompetition Agreements and Break Them," 29 Ind.L.Rev. p. 729 (1996), Parker, "Noncompete Agreements Between Lawyers: An Economic Analysis, 40 Res Gestae, p. 12 (Oct. 1996). Whether or not one accepts the arguments advanced against Rule 5.6, the uncontroversial fact is that the Rule is presently in force. So for purposes of the partnership agreement described above, the issue is whether or not the Rule as written is violated.

It is fair to note that the agreement does not prohibit a withdrawing partner from practicing law wherever, whenever, or however he or she chooses to do so. The agreement provides an incentive for the withdrawing attorney to try to reach some accommodation with the firm as to a new relationship (termed "of counsel" by the agreement) but the withdrawing partner is not required to do so. Still, there could be little doubt but that the intent of the agreement is to deter a withdrawing partner from competing with the firm for clients.

A California case dealing with a similar agreement held that assessing a reasonable cost to a withdrawing partner who seeks to compete with the firm is not unreasonable. Howard v. Babcock, 6 Ca. 4th 409, 25 Cal. Rptr. 2d 80, 863 P.2d 150 (Cal. 1993). However the California court appears to have taken a minority view. By far the larger number of reported decisions interpreting some version of Rule 5.6 (which is based on the ABA Model Rule 5.6) prohibit any form of restraint on a lawyer's freedom to practice law. See, e.g., Spiegel v. Thomas, Mann & Smith, P. C, 811 S.W.2d 528 (Tenn. 1991); Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990); and Cohen v. Lord, Day & Lord, 551 N.Y.S.2d 157, 550 N.E.2d 410, 75 N.Y.2d 95 (1989).

There is room to argue that in the fact situation presented there is no substantial restraint on the withdrawing partner. After all it is not known (nor could it be known when the agreement is made) whether the consideration to be withheld from a competing ex-partner is a substantial amount of money. However, the rule does not speak only to agreements which "substantially restrict" or "meaningfully restrict" an attorney's right to practice.

The lone Indiana case dealing with Rule 5.6 is Blackburn v. Sweeney, 637 N.E.2d 1340 (Ind.App. 1994). The impact of the opinion in Blackburn is questionable because the case was dismissed by the Supreme Court on petition to transfer. Blackburn v. Sweeney, 659 N.E.2d 131 (Ind. 1995). Nevertheless, the Court of Appeals' opinion is instructive.

The facts in Blackburn involved a restriction on the right of departing partners to take with them any personal injury file. The Allen Superior Court determined that the agreement was void because it violated Rule 5.6 of the Rules of Professional Conduct. The parties then made a new agreement which restricted the right of the withdrawing partners to advertise their services within certain geographic areas. Blackburn, supra, 637 N.E.2d 1341-42. This agreement was later challenged through a new declaratory judgment action. Id., 1342. The Court of Appeals noted that "[t]he goal of protecting potential clients from a diminution of their access to competent
counsel was recognized in the landmark decision of Bates v. State of Arizona (1997), 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810", Id., at 1343. The court then went on to write that "[b]ecause of the objective of Prof. Cond. R. 5.6 of protecting counsel accessibility, most courts have refused to enforce clauses in agreements which indirectly restrict the practice of law with financial disincentive provisions." Id., at 1343. Indicating that the objective of the agreement in Blackburn was to decrease competition and that the purpose of Rule 5.6 is to avert such a result, the Court of Appeals concluded that the restriction on advertising was unenforceable. Id., at 1344.

For purposes of the agreement at hand, it is helpful to reiterate the point made by the New Jersey Supreme Court in Jacob v. Norris, McLaughlin & Marcus, (I 992) 128 N.J, 10, 607 A.2d 142, as quoted by the Court of Appeals in Blackburn.

We believe that indirect restrictions on the practice of law, such as the financial disincentives at issue in this case, likewise violate both the language and the spirit of R.P.C. 5.6 ... 

Because the client's freedom of choice is the paramount interest to be served by the R.P.C., a disincentive provision is as detrimental to the public interest as an outright prohibition. Moreover, if we were to prohibit direct restraints on the practice, but permit indirect restraints, law firms would quickly move to undermine R.P.C. 5.6 through indirect means. Jacob, supra, 607 A.2d at 148-49. Blackburn, 637 N.E.2d 1341, 1344.

Since the Rule's prohibition on agreements restricting the right to practice is absolute and since the agreement presented appears to be designed to prevent competition, the Committee concludes that the agreement violates Rule 5.6.
FACTS

A lawyer assists an Indiana resident (Client) with estate planning. The lawyer is only licensed to practice law in Indiana. During the estate planning process, the lawyer recommends that Client transfer his Florida vacation home into a revocable living trust to be prepared by the lawyer. Can the lawyer prepare the deed to transfer the Florida property into the revocable living trust?

ANALYSIS

A. Applicable Rules.

Indiana Rule of Professional Conduct 5.5(a) provides:

A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

B. Discussion.

The definition of unauthorized practice of law varies by jurisdiction. The preparation of a deed may be considered the "practice of law" in another jurisdiction. Therefore, in order to avoid violating Rule 5.5(a), the lawyer must verify that he will not be in violation of unauthorized practice laws in Florida if he prepares a deed to transfer a Florida property.
May an insurance defense attorney contract to defend insureds of a casualty insurance company, if the contract gives the carrier the right to control the defense of the insureds?

The attorney may enter into a contract to provide legal services that gives to the carrier the right to control the defense of the insured, provided that such contract does not permit the carrier to direct or regulate the lawyer's professional judgment in rendering such legal services and does not provide or encourage financial disincentives that likely would cause an erosion of the quality of legal services provided.

The terms of the specific contract that prompts the ethical inquiry do infringe upon the professional and independent judgment of defense counsel, and upon the quality of legal services that may be provided. The defense attorney may not ethically enter into such an agreement.

The inquirer has submitted the proposed formal contract (with the identity of the carrier redacted), several pages in length, which incorporates certain "litigation guidelines and procedures for defense counsel." The guidelines consist of an additional twenty-two pages of text, with numerous exhibits attached. The contract provides that all disputes between
defense counsel and the carrier under the proposed agreement, which cannot be resolved informally, must be resolved by formal arbitration, and that such agreement shall be construed and interpreted by the laws of a certain state other than Indiana. It is recited that the carrier routinely provides liability coverage to policyholders in the health care industry. The insured is not intended to be a party to the proposed contract.

The agreement undertakes, in considerable detail, to establish the financial relationship between defense counsel and the carrier, and includes billing guidelines which identify reimbursable expenses, hourly fees for various levels of professionals, and permitted activities by each group. It is required that defense counsel employ a "team" approach in defending a given insured, which team includes a senior litigator, an associate, and a paralegal/law clerk. Unless otherwise approved by the carrier, the senior litigator is solely responsible for the actual trial of a given case.

Regardless of which member of the team actually provides a given legal service, only the hourly rate applicable to the least skilled professional who could have handled such matter will be paid by the carrier. Further, when two or more members of the team confer about a given legal matter, a charge for the services may be made only by the attorney assigned to the matter, unless approved by the claims representative of the carrier in advance, even though the contract recites that conferences and strategy
sessions may be necessary upon occasion. The preparation of
intra-office memoranda is not regarded as a billable service.

The carrier expects that to the extent appropriate for the
matter at hand, paralegals, junior associates and/or law clerks
will perform any necessary legal research. "Repetitious
revisions" of documents and proofreading will not be compensated.
Organizing and indexing medical records (to be obtained in most
cases only by the carrier) are defined as non-billable clerical
services. Review and summarization of medical records (including
records produced in medical malpractice litigation) is to be
conducted by paralegals. Time required to travel within the
attorney's assigned geographic territory may not be billed, and
travel time outside the territory may be billed only at a
substantially reduced rate.

In its review of statements for services, the carrier will
not pay for legal services that do not comply with the
guidelines. Rather than making a partial payment, the entire
invoice will be returned to defense counsel unpaid until there is
compliance with the prescribed detailed format and/or the "proper
documentation" is supplied.

In addition to the financial relationships between the
carrier and defense counsel, the guidelines purport to govern the
manner in which the defense of a given matter is handled and the
relationship between defense counsel and the insured, including
many of the lawyer's activities in providing such defense. The
guidelines recite that the carrier's claim department "closely
supervises and manages all facets of litigation," and that
defense counsel "must coordinate all defense activity with the
[non-attorney] claim professional."

The guidelines further recite that should any situation
arise that raises ethics-related questions during the course of
the relationship between the carrier and the defense counsel,
counsel's concerns should be expressed directly to the Senior
Vice President, Claims. One supposes that defense counsel might
have reluctance to express any concerns to such a high-ranking
officer of the carrier, who serves at a level far above that of
the claims representatives with whom counsel routinely deals, for
fear of chilling the relationship between counsel and the
carrier.

**DISCUSSION**

A. The Economic/Ethical Context

It is said that the property-casualty segment of the
insurance industry is embarking on a period of some of the most
dramatic changes that it has ever experienced, prompted by
financial pressures and strategic challenges of the marketplace.
Costs for litigation and indemnity are reportedly increasing
nearly exponentially, with litigation expense consuming nearly
55 cents of every claim dollar. "Changing Times in the Insurance
Feb. 1998, p.2. Among the defensive mechanisms being adopted by
the property/casualty carriers is the regulation of the
activities of their defense counsel:
Litigation management strategies, such as guidelines, budgets, billing formats, and audit programs and services, are cutting the costs of litigation. "Is It Too Late?," Walker, Id., at p. 6.

While defense attorneys must be sensitive to the economic survival of the carriers who employ them, such attorneys must also be increasingly vigilant that their paramount duties to their insured clients are not compromised. As one writer has posed the ultimate question:

The growing resort by insurance companies to billing guidelines and other restrictions raises serious ethical issues for attorneys, because of the unique tripartite relationship: while the attorney is retained by the insurer to provide representation to the insured, he is required to represent the interests of the insured. Can the lawyer serve two masters whose interest may conflict? "Restrictive Billing Guidelines: The Ethical Problems," Saylor, For the Defense, January, 1998, at p. 32.

B. The Implicated Rules

The current Rules of Professional Conduct do not accommodate well the tripartite relationship that exists between the liability insurance carrier, defense counsel and the insured. However, there is no equivocation in R.P.C. 5.4(c):

A lawyer shall not permit a person who recommends, employs, or pays a lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Equally plain is the admonition found at R.P.C. 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or third person, or the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation.

These rules do not forbid a lawyer from representing the interests of both the insurer and the insured at the same time. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has recently addressed the implications of the simultaneous service of two such clients:

A lawyer hired by an insurer to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some of the aspects of the matter. So long as the insured is a client, however, the Rules of Professional Conduct--and not the insurance contract--govern the lawyer's obligations to the insured. A lawyer hired to defend an insured pursuant to an insurance policy that authorizes the insurer to control the defense...must communicate the limitations on his representation of the insured to the insured, preferably early in the representation. (Emphasis added.) ABA Op. 96-403 (1996).

Indiana courts have published no opinion that directly addresses the issue of whether the insurer is indeed a client, in the insurer-insured-defense counsel context. Our Supreme Court has held that, in a situation where the interests of the insurance carrier and the insured policyholder do not fully coincide, the attorney's duty runs to the insured whom he has been employed to represent. Siebert Oxidermo, Inc. v. Shields, 446 N.E.2d 332, 341 (Ind. 1983). The prevailing, but certainly not unanimous, view from other jurisdictions is that the lawyer usually has two clients in such situations. No reported Indiana opinion contravenes the notion that the insurer is simultaneously a client. Our Supreme Court has also recognized that an attorney-client privilege protects investigation statements given
by the insured to the insurer, as the carrier may be seen as the agent of the attorney. *Richey v. Chapell*, 594 N.E.2d 443 (Ind. 1992). While the debate rages in the legal literature as to whether the attorney has one client or two in the tripartite relationship, the Indiana lawyer can have no doubt in light of *Siebert Oxidermo* that the insured is the primary client to whom all ethical duties are owed. The implicated rules discussed above bear upon the ethical propriety of an agreement to be bound by proposed guidelines which encroach upon the ability of the attorney to exercise independent professional judgment in the manner in which he or she defends an insured in a given legal matter.

C. The Offending Guidelines

To the extent that litigation guidelines merely define the financial relationship between an insurance carrier and its defense counsel, including communications between them, such parties enjoy the freedom to contract for whatever economic terms they wish, and no ethical considerations are ordinarily raised. But if the negotiated financial terms result in a material disincentive to perform those tasks which, in the lawyer’s professional judgment, are reasonable and necessary to the defense of the insured, such provisions are ethically unacceptable.

Especially troublesome are those provisions of the subject agreement which tend to curtail reasonable discussion between members of the defense team on a day-to-day basis, and which seek
to dictate the use of personnel within the lawyer's own office. Another example of a provision resulting in a material disincentive provides that if the senior litigator performs a particular service, e.g., argument of motions and other court appearances, conduct of depositions, or review of medical records or legal research, which could have been performed "suitably" (in the carrier's view) by an associate or paralegal, the service may be billed only at the hourly rate for the associate or paralegal. Similarly, the contract provides that once an associate attorney is assigned to a given matter, another associate may not be substituted without prior approval of the carrier. Such impairments of the responsible attorney's exercise of professional judgment as to the assignment of the most effective member of the litigation team to a given task is ethically impermissible. Lastly, to require, or even to permit, counsel to rely upon legal research by an unsupervised paralegal invites legal malpractice--a breach of counsel's duty to the insured--and is intolerable. Such provisions, even though intended merely to achieve cost efficiency, infringe upon the independent judgment of counsel, and tend to induce violations of our ethical rules.

CONCLUSION

There can be no bright-line test as to the kinds of controls to which insurance defense counsel may agree. Because of the breadth of activities which a given insurer may seek to manage, the ethical propriety of a given set of guidelines is necessarily
somewhat subjective. There are no better standards than those provided by Rules 5.4(c) [incorporated in 1.8(f) and 1.7(b).]

When confronted by proposed guidelines which cannot be followed ethically, the lawyer is well-advised to seek an acceptable modification. If such modification cannot be agreed upon, the representation must be declined.
OPINION NO. 4 OF 1998

ISSUE

May an Indiana attorney submit statements for insurance defense services to the insurance carrier's outside audit company, which statements contain confidential or privileged information?

OPINION

The submission of statements containing confidential information to an independent auditor, without the express consent of the insured after consultation, is a breach of the attorney's ethical obligation to maintain confidentiality of information. It may further constitute unethical conduct with respect to privileged information contained in the statement, if a waiver of privilege is caused by such submission to independent auditors, and if such waiver is detrimental to the insured's cause.

DISCUSSION

An opinion of this Committee has been requested by insurance defense counsel in response to requirements by some liability insurance carriers to submit all statements for legal services to independent auditing companies. These auditors review the statements for adherence to the assigning carrier's billing guidelines. The inquirers advise that there is an ever-increasing requirement by carriers that legal service statements contain detailed information, such as, for example, with respect
to correspondence and telephone conferences, the billing lawyer must identify the other party to the communication and the subject matter of the communication. Similarly, in a charge for legal research, counsel is required to describe in the statement the legal subject of the research. Bills are often required to include names of witnesses interviewed or experts consulted, and may describe, at least to some extent, what was discussed with such witnesses.

Rule 1.6(a) provides:

"A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures impliedly authorized to carry out the representation..."

It is clear that the kind of information required by the insurance carrier to be included in statements for services is confidential, because it relates to representation of the insured client. However, the insurance defense lawyer may provide such information to the insurance company, which has a duty to defend the policyholder, and such information relating to the defense of the insured is privileged. Richey v. Chappell, 594 N.E.2d 443 (Ind. 1992). In contrast, the privilege would not appear to extend to an independent auditing company, which, of course, has no contractual relationship with or duty to defend the insured client. Further, since the provision of such detailed information is not necessary to carry out the representation, there does not exist an implied authorization to reveal such information to others. Therefore, the conclusion is compelled that substantive information relating to the representation of a
client may not be furnished to independent auditors without the informed consent of the insured client.

The more critical issue in matters of litigation is that such detailed descriptions of legal services likely would describe "mental impressions, conclusions, opinions or legal theories" of defense counsel, subjects which ordinarily are protected from disclosure by the work-product privilege. Indiana Trial Rule 26(b)(3). The attorney-client privilege also ordinarily attaches to such communications with a client. However, to reveal such information to an independent auditor has been held to constitute a waiver of privilege, and such statements for services may become discoverable. United States v. Massachusetts Institute of Technology, 129 F.3rd 681 (1st Cir. 1997). Waiver is a fact-sensitive legal issue and this committee may not determine what may constitute a waiver.

If, indeed, a privilege becomes waived by the disclosure of privileged information in a statement for services, a host of other Rules are implicated: Rule 1.1 (incompetency of counsel); Rule 1.7(b) (material limitation by responsibility to another client); Rule 2.1 (failure to exercise of independent professional judgment); and Rule 5.4 (direction or regulation of professional judgment by person who pays the lawyer). Given the risk that providing privileged information to independent auditors may cause a waiver, a legal question yet to be determined under Indiana law, an Indiana lawyer may breach his or
her duty to the client by subjecting the client to the avoidable risk. At a minimum, the lawyer must carefully evaluate the propriety of including sensitive, privileged information in bills, and certainly not allow the release of such information to any third-party auditor without the informed consent of the insured client.