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DEFENDING THE INDEFENSIBLE: NAVIGATING THE STRATEGIC AND ETHICAL LANDSCAPE OF DEFENDING CLIENTS WHO HAVE ENGAGED IN INDEFENSIBLE CONDUCT

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I. INTRODUCTION

As an attorney asked to provide a defense to a prospective client, you may be confronted with claims involving gross negligence, palpably credible allegations of fraud, intentional misconduct, or otherwise overtly malicious and utterly indefensible behavior. Indeed, there may be times when the conduct at issue has led to enormous losses in terms of money, reputation, and sometimes even life and limb. When presented with these claims, you will immediately face questions about whether the case is something you feel comfortable defending. It even may present a practical business issue; i.e., can my firm or I afford to be associated with the defense of this client, or the defense of this type of behavior? Assuming you have sufficient comfort level in taking on the matter, you will have to navigate potential coverage issues, regulatory concerns, and ethical concerns, and, where insurance is available to fund the cost of the defense, considerations with regard to the tripartite relationship, as well as moral concerns with regard to defending and protecting from exposure the individuals/entities alleged to have been involved. Managing these various issues and concerns can be a delicate balancing act, requiring careful consideration of the issues presented on multiple levels and creative litigation strategies. In the following discussion, we will explore the moral, ethical, and strategic considerations to be balanced in successfully defending "indefensible" conduct and navigating a path to successful resolution of the claims.

A. Identifying/Defining the "Indefensible" Claim

1. When There Is Clear-Cut, Indisputable Liability on the Facts and Law

One of the most difficult circumstances presented to defense attorneys is what to do with a case that exhibits clear liability under both the facts and the law. This can be presented in many different ways. Often, unfavorable documents may evidence the "bad facts" at issue. Even more troublesome, there are times where the defendant has actually confessed liability. This can take many different forms: for example, an apology to the injured party; a revelation to a business partner or colleague; or even in a formal proceeding, such as a disciplinary action against a professional. Today, with a smartphone in every hand, there is often the potential for incriminating texts, voice mails, and video.

2. When the Case Is Theoretically Defensible, but There Are Big Obstacles to Surmount

More complex circumstances can arise when the case is theoretically defensible under the facts or law, but other factors make the case extremely difficult to defend. This can occur in cases where one of the following may exist:

- The defendant's story simply does not add up due to inconsistencies in his/her own recitation of the facts or comparison of the story with those of other involved parties.

- The defendant has made prior sworn statements compromising, but not completely eviscerating, his/her defense position.
- The defendant or corporate representative is thoroughly unlikable or presents badly.

- The defendant is unable to participate in the defense due to death, mental incompetence, or inability on the part of counsel to locate him/her.

- The legal rationale on which the defense relies is tenuous at best.

- The defendant or a critical witness has engaged in outrageously objectionable, weird, or otherwise offensive conduct, even if tangential to the matter at hand.

- The defendant or the principal is under indictment or criminal investigation and will not attest to anything under oath.

Additionally, numerous other factors can create obstacles in the defense of a claim. For example, high-profile cases with negative publicity tend to be more difficult to defend. A video of a fireball caused by your client's alleged negligence, accompanied by cries of despair, may appear on the nightly news and other media outlets. How do you defend a case where the entire nation has been emotionally agonizing over the events giving rise to the claims? Alternatively, unreasonable defendants who either push for settlement or want their day in court at any cost can create significant hurdles for lawyers to overcome. Cases venued in states or brought under theories of recovery where attorney fees are recoverable and the amounts dwarf the actual damages at issue can incentivize plaintiff 's counsel to make extreme demands and actually show disinterest in even good faith settlement discussions while they build up their attorney fees. Cases where there is discoverable information that, when revealed, has the potential for exponentially increasing the value of the case can be problematic. Parallel criminal proceedings or investigations may interfere with the ability to mount a defense, or other circumstances may exist that render defendants unable to defend themselves or participate in their defense. Finally, there are circumstances, even if none of these factors is immediately apparent, where seasoned defense counsel can instinctually feel that the case will be difficult to defend.

B. Ethical Concerns

Defending truly difficult cases typically requires an attorney to think creatively and sometimes to engage in aggressive legal tactics and litigation strategies that implicate important ethics rules, including conflict-of-interest rules. Those strategies also may involve activities by lawyers and their agents that may be viewed, rightly or wrongly, as triggering the crime-fraud exception to the attorney-client privilege; exceeding the bounds of proper witness preparation; and receiving and utilizing what some lawyers describe as "bootleg" evidence. This article briefly touches upon the American Bar Association Model Rules of Professional Conduct[1] and case law relating to these topics.

The use of the term "aggressive" to describe a lawyer was once more kindly received because lawyers were, as a matter of "ethics," urged to be "zealous" on behalf of their clients. Professor Charles W. Wolfram in his seminal treatise on ethics[2] explained the importance of the zealousness mandate in the ABA's former Model Code: "The heading of [ABA Disciplinary Rule ('D.R.')] 7-101 [i.e., 'Representing a Client Zealously'] assumes that a lawyer will 'represent a client zealously,' repeating the axiomatic message of Canon 7 of the [ABA] Code that 'a lawyer should represent a client zealously within the bounds of the law.'"[3]

In the current ABA Model Rules, the notion of zealousness—as a stated goal of advocacy on behalf of a client—plays a much more muted role, at least in the context of the language of the Model Rules and their commentary. Now, the notion of zeal is mentioned only in Comment 1, which notes, in part, that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Some rules and commentary in some states do not mention the terms "zealousness" or "zeal" at all. Nonetheless, it is important to remember that the motto of many fine and decent lawyers is that "I will advance my client's interests within the bounds of the law."

But what are the bounds of the law? The answer, as discussed below, is often measured in terms of the crime/fraud exception to the attorney-client privilege and related issues of improper handling of witnesses and evidence.

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1. The former ABA Model Code has been superseded by the ABA Model Rules of Pro-fessional Conduct. Although the Model Rules do not govern in any state (because each state has its own version of the rules governing attorneys), many states have patterned their ethical rules after the ABA Model Rules. The ABA Model Rules, particularly as they relate to ethics opinions issued by the ABA, have been relied upon and cited on numerous occasions by courts, disciplinary committees, and ethics scholars in various jurisdictions.
2. Charles Wolfram, Nature of the Principle of Zeal: Requirement of Commitment to Client Interests, in MODERN LEGAL ETHICS § 10.3.1 (1986).II. Zealous advocacy for trial lawyers
3. Id. (citations omitted; emphasis added).

II. ZEALOUS ADVOCACY FOR TRIAL LAWYERS

A. Introduction

Understanding the principles relating to, for example, the offering of questionable testimony and documents, lawyer deceit, the duty to correct false testimony, witness coaching, etc., requires an understanding of the sometimes murky application of the relevant provisions of the applicable Rules of Professional Conduct of the lawyer's state of admission or the venue in which the lawyer practices.

B. Ethical Advocacy and Its Limits

1. Significance of the Crime-Fraud Exception to the Attorney-Client Privilege

The attorney-client privilege, although the oldest privilege for confidential communications, is a limited one that must be proven to exist by the person asserting the privilege.[4] As United States v. Roe explains, the privilege applies

(1) where legal advice of any kind is sought
(2) from a professional legal adviser in his or her capacity as such
(3) so that the communications relating to that purpose
(4) made in confidence
(5) by the client
(6) are at his or her instance permanently protected
(7) from disclosure by himself or herself or the legal adviser,
(8) except that the protection can be waived.[5]

Communications are not considered to be within a legitimate attorney-client relationship if the attorney is wittingly or unwittingly being used to commit a crime or fraud. Thus, communications that would otherwise be protected by the attorney-client privilege or the attorney work-product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.[6]

The Fifth Circuit adopted the view of the Second Circuit and various other courts in In re Grand Jury Subpoena[7] when it held that the crime fraud exception to the attorney-client and work-product privileges does not extend to other communications between the client and the attorney. It is limited to

4. See, e.g., United States v. Roe, 68 F.3d 38 (2d Cir. 1995).
5. JOHN HENRY WIGMORE,EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (1961 & Supp. 1991); see also Roe, 68 F.3d at 39–40.
6. See, e.g., In re Grand Jury Subpoena, 745 F.3d 681, 689 (3d Cir. 2014); In re Grand Jury Proceedings, 417 F.3d 18, 28 (1st Cir. 2005); Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 663 (10th Cir. 1998); In re Grand Jury Subpoena Duces Tecum (Marc Rich), 731 F.2d 1032, 1038 (2d Cir. 1984); Amusement Indus. Inc. v. Stern, 293 F.R.D. 420, 441 (S.D.N.Y. 2013).
7. 419 F.3d 329 (5th Cir. 2005).

those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct.

As the Restatement (Third) of the Law Governing Lawyers § 82, explains:

> The attorney-client privilege does not apply to a communication occurring when a client:
>
> (1) Consults a lawyer for the purpose, later accomplished, of obtaining assistant to engage in a crime or fraud or aiding a third person to do so, or
> (2) regardless of the client's purpose at the time of the consultation, uses the lawyer's advice or other service to engage in or assist a crime or fraud.[8]

When a client consults a lawyer with the intention of violating elemental legal obligations, there is less social interest in protecting the communication. Over the years, some litigants have argued that there is a public policy exception to the attorney-client privilege that allows the piercing of the privilege based upon a balancing test of the public good. In an excellent analysis of the issue, Southern District of New York Judge Sweet thoroughly addresses the issue in G-I Holdings, Inc. v. Baron & Budd.[9] The court found that the public policy exception to the attorney-client privilege has rarely been utilized and can rarely be justified.[10] In rare situations, New York courts have applied the exception to allowing the court to require an attorney to disclose the client's address where doing so was necessary for the safety and welfare of a young child. But other attempts to expand the public policy exception have been rejected.

The client need not specifically understand that the contemplated act is a crime or fraud. The client's purpose in consulting the lawyer or using the lawyer's services may be inferred from the circumstances. It is irrelevant that the legal service sought by the client, such as drafting an instrument, was itself lawful.[11]

2. The Crime-Fraud Exception

Pursuant to ABA Model Rule 8.4(c) (and its counterpart in most states), "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[12]

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8. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §82(AM.LAW INST. 2000).
9. 2005 U.S. Dist. LEXIS 14128, at *1 (S.D.N.Y. July 13, 2005).
10. Id. at *11–12.
11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 cmt. c.
12. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM.BAR ASS'N 2015). Needless to say, conduct may be deceitful even in the absence of affirmative acts by the lawyer. For example, In re Forrest, 265 A.D.2d 12, 13–14 (N.Y. App. Div. 2000), the court imposed reciprocal discipline based, in part, upon a disciplinary finding in New Jersey that a lawyer had failed to inform both the arbitrator and opposing counsel that his client had died.

Pursuant to ABA Model Rule 3.3(a)(1) (and its counterpart in most states), "a lawyer shall not knowingly . . . 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."[13]

Pursuant to ABA Model Rule 3.4(b) (and its counterpart in most states), "[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[14]

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12. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM.BAR ASS'N 2015). Needless to say, conduct may be deceitful even in the absence of affirmative acts by the lawyer. For example, In re Forrest, 265 A.D.2d 12, 13–14 (N.Y. App. Div. 2000), the court imposed reciprocal discipline based, in part, upon a disciplinary finding in New Jersey that a lawyer had failed to inform both the arbitrator and opposing counsel that his client had died.

13. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1). Because of the nature of the adversary system, the prohibition against introducing false testimony does not prohibit a lawyer from attempting through cross-examination to discredit the truthful testimony of witnesses. See Carl Selinger, The "Law" on Lawyer Efforts to Discredit Truthful Testimony,46OKLA.L. REV. 99 (Spring 1993). For an intelligent discussion of the issues relating to presenting "false defenses" in criminal cases, see Harry I. Subin, Is This Lie Necessary? Further Reflections on the Right to Present a False Defense,1GEO.J.LEGAL ETHICS 689 (1988); John B. Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission," 1GEO.J.LEGAL ETHICS 339 (1987); 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); cf. Debra Baker, Shredding the Truth, 85 ABA J., no. 10, Oct. 1999, at 40 (discussing application of the ethical prohibition against asserting facts with no factual basis and prohibition against asserting a frivolous position in the context of attacking victim-witnesses' credibility in the courtroom).

These articles notwithstanding, one federal district court judge has ruled that he would not permit a defense lawyer to introduce evidence either on cross-examination or during direct examination of the defense witnesses that was inconsistent with evidence that had been suppressed in a pretrial hearing. United States v. Lauersen, 2000 U.S. Dist. LEXIS 16404, at *24 (S.D.N.Y. Nov. 13, 2000). In Lauersen, Judge Pauley found that a pretrial "proffer" of the defendant could not be used by the government to impeach the defendant's testimony, should she testify, because the defendant had not knowingly waived her rights. On the other hand, the court would not allow defense counsel to cross-examine witnesses or introduce affirmative evidence on the defense case in a manner that would be inconsistent with the proffer. The court took this position because it felt that it was "duty bound to protect the integrity of the proceeding and to ensure that matters presented to the jury are grounded in good faith. Id. at *23–24; see, e.g., N.Y. COMP.CODES R. & REGS. tit. 22, § 1200.33 [D.R. 7-102] (2000).

> In contrast to the reasoning of the Lauersen court, Justice White's dissenting opinion in United States v. Wade, 388 U.S. 218, 258 (1967), an opinion joined in by Justices Harlan and Stewart, expressed this view of the legitimate role of defense counsel:
>
> If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . [D]efense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable of defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for the truth.

For a further discussion of the fascinating, and often impenetrable, topic of the role that the "truth" plays in the adversarial process, see Eleanor W. Myers & Edward D. Ohlbaum, Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy,69FORD.L. REV. 1055 (2000); Stephen Ellman, Truth and Consequences,69FORD.L. REV. 895 (2000).

14. MODEL RULES OF PROF'L CONDUCT r. 3.4(b).

Pursuant to ABA Model Rules 8.4(a) and 1.2(d) (and their counterparts in most states), "[i]t is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; and shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is illegal or fraudulent."[15]

ABA Model Rule 3.3 provides that

(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) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) *The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.*[16]

Tempering these "protective" ethical mandates is the uncertainty of other seemingly nonmandatory ABA Model Rules:

(1) ABA Model Rule 1.6(b)(2)—"A lawyer may reveal confidential information ...to prevent the client from committing a crime . . ."
(2) ABA Model Rule 1.6(b)(3)—A lawyer may reveal or use confidential information to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.
(3) ABA Model Rule 1.16(b)(2) and (3)—A lawyer may, but is not required to, withdraw from a matter when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" and when "the client has used the lawyer's services to perpetrate a crime or fraud." It is important to remember that under notions of agency law, a "lawyer may . . . be liable under civil or criminal law for aiding and abetting a client's misrepresentation."[17]

15.MODEL RULES OF PROF'L CONDUCT r. 8.4(a), r. 1.2(d).
16.MODEL RULES OF PROF'L CONDUCT r. 3.3 (emphasis added).
17. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (Statement to Non-Client), Reporter's Note, cmt. c (AM.LAW INST. 2000); see also cmt. d, cmt. e.

A lawyer's transmission of information on behalf of a client, even on a matter seemingly as removed as transmitting a letter given to him or her by a client, can be viewed as making the attorney subject to the duty to correct. This reflects the engrafting of the law of "agency" on the duties of attorneys, which, at the same time, must be tempered with an analysis of the relationship between the attorney and the client. As one group explained:

> Undertaking to transmit information does not necessarily involve an undertaking to do anything more, and it is important to identify the characteristics that will signal both when a lawyer has become the alter ego of the client and how becoming an alter ego affects his professional responsibilities and his professional liabilities."[18]

These disciplinary rules contain problematic definitions of a lawyer's mental state; i.e., "knows," "information clearly establishing," and "believed."
The Second Circuit and other courts have held that the language in D.R. 7-102(B) (the predecessor to ABA Model Rule 3.3(a)(3)), which uses the language "a lawyer comes to know of[the evidence's]falsity...referring to 'information clearly establishing that' means "actual knowledge."[19] In an interesting article, Rebecca Roiphe suggests that because ethics rules require "actual knowledge" before most sanctions are triggered, lawyers are permitted to hide behind "willful ignorance"—a somewhat dubious position.[20] Indeed, ABA Model Rule 1.0(k) defines "[k]nowingly," "known," "know," or "knows" as "denot[ing] actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[21]

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18. Am. Bar Ass'n Working Group on Lawyers' Representation of Regulated Clients, Laborers in Different Vineyards? The Banking Regulators and the Legal Profession, at 157 (Discussion Draft Jan. 1993).
19. Doe v. Fed. Grievance Comm., 847 F.2d 57, 62 (2d Cir. 1988); see, e.g., United States v. Parse, 789 F.3d 83, 115–16 (2d Cir. 2005) ("suspicion" that statements are false not equivalent to "knowledge" that statements are false); United States v. Shaffer Equip. Co., 11 F.3d 450, 459 (4th Cir. 1993); Addamax Corp. v. Open Software Found., 151 F.R.D. 504, 510 (D. Mass. 1993); United States v. Del Carpio-Cotrina, 733 F. Supp. 95, 99 (S.D. Fla. 1990). It is important to emphasize that "know" or "knowledge" does not mean "reasonably should know." In re Lucarelli, 611 N.W.2d 754, 761 (Wis. 2000) (in rejecting the claim that a prosecutor knowingly brought a case unsupported by probable cause, the court rejected the argument that "knowledge" can be satisfied by a finding of "reasonably should know").
20. Rebecca Roiphe, The Ethics of Willful Ignorance,24GEO.J.LEGAL ETHICS 187 (2011).
21. MODEL RULES OF PROF'L CONDUCT r. 1.0(k) (emphasis added).

The Supreme Court in Nix v. Whiteside[22] held that in applying the ethical rule's "knowledge" standard, a lawyer was permitted to advise the court of what he believed would be perjurious testimony by a client based solely upon the client indicating he would testify on his own behalf in a manner inconsistent with the version he had previously told the attorney.

The knowledge/belief dichotomy—that is, the dichotomy between the attorney's mandatory duties as opposed to discretionary duties—goes to the heart of decisions that lawyers must make every day, both in and out of the litigation context. Indeed, in Shade v. Great Lakes Dredge & Dock,23 a federal district court in Pennsylvania was faced with whether a lawyer violated ABA Model Rule 3.3's proscription against intentionally presenting false testimony based upon the fact that the attorney called a witness to testify to a version of facts that was completely contrary to the version the witness had given under oath in another proceeding on both direct and cross-examination. When accused of this misconduct, the attorney defended his conduct by explaining that the prior inconsistent testimony was merely peripheral evidence and that it had been offered in the prior proceeding to explain the witness's own subjective beliefs.

The *Shade* court explained that even the outright inconsistency was not enough to support the conclusion that the attorney had knowingly presented false testimony:

> "Even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the [adversarial system of justice] process." That is, the overall duty of truth "takes its shape from the larger object of preserving the integrity of the judicial system." However, it is important to emphasize that a mere suspicion of perjury is not enough to require disclosure to the court. As [ABA Model Rule 3.3(a)(4) and (c)] indicates, an attorney's duty to inform the court does not arise unless the attorney knows that false testimony has been elicited; an attorney has the option of refusing to offer testimony she believes to be false.[24]

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22. 475 U.S. 157 (1986); see also Frank S. Finnerty Jr. & Robert P. Guido, Ethical Considerations in the Defense of a Criminal Case, CRIMINAL TRIAL ADVOCACY 17 (Ronald E. Cohen & James C. Neely eds., 8th ed. 1999) (arguing that, in their view and based on their analysis of the law, including Nix, the standard for revealing the intention of a client to commit perjury is "what a reasonable attorney would believe under the circumstances").

23. 72 F. Supp. 2d 518 (E.D. Pa. 1999).

24. Id. at 523 (emphasis added; internal citations omitted). In fact, it is this elastic concept of "knowledge" versus "belief " that permits a prosecutor to use inconsistent factual theories of a crime in successive criminal trials. Cf. Michael English, A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?,68 FORD.L.REV. 525, 541 (1999) (because a prosecutor is limited only by the proscription of not knowingly presenting false testimony, "ethical codes suggest that the prosecutor's personal opinion is irrelevant"); N.Y. Cty. Lawyers' Ass'n Comm. on Prof 'l Ethics, Op. No. 698 (attorney not obliged to produce medical information that would be detrimental to the client's claims as long as no specific request is made for those documents). But see Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) (Due Process Clause forbids state from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offense arising out of the same event). For a discussion concerning how various state courts have addressed the issue of whether, or under what circumstances, prosecutors can lie, see Thomas Moore, Can Prosecutors Lie?,17GEO.J.LEGAL ETHICS 961 (2004).

For a discussion of the how state courts across the country have defined the level of information that constitutes "knowledge" under the ethical rules, see *Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court* by Erin Jaskot and Christopher Mulligan.[25] Jaskot and Mulligan note:

> Those courts adopting standards have articulated definitions of knowledge ranging from circumstantial evidence and a good faith belief to a more stringent definition of proof beyond a reasonable doubt. The majority of courts have required at the very least "some corroboration . . . more than unsubstantiated rumor" before an attorney may invoke Model Rule 3.3 [the duty to correct witness perjury]. Other courts have defined the standard as "firm factual basis." But these vague and varying standards have done little to clarify the issue for practicing attorneys, and leave scholars to question "[h]ow can a lawyer recognize when she has a firm factual basis rather than a reasonable doubt of a client's intention to commit perjury while on the witness stand."[26]

Finally, it must be emphasized that the "knowledge" requirement does have teeth and cannot be sidestepped by the willful ignorance of the facts. "[A] lawyer's denial of knowledge is not conclusive on the question. And, as in criminal law, a lawyer's conscious avoidance of knowledge of the falsity of evidence should not prevent a finding of actual knowledge."[27] On the other hand, a lawyer acts improperly when he or she seeks to withdraw from a case simply to avoid the "danger" inherent in a client's possible perjury or involvement in presenting false evidence. This flows from the fact that such action harms the client, and therefore, a lawyer will be punished for acting without the necessary factual basis.[28] As one writer cautioned:

> If the lawyer's disquietude about a client's intended testimony is the result of mere conjecture or an unsubstantiated opinion, however, the lawyer should present the testimony. Importantly, even if the lawyer's suspicion permits formation of a reasonable belief that the evidence is false—and thus permits its non-introduction under D.R. 7-102 (A)(4) and Model Rule 3.3(c)—this does not entitle, or require, the lawyer to make disclosure or take other remedial action under [Model] Rule 3.3(a)(4) [mandating that a lawyer take remedial measures when the lawyer knows that he or she has previously offered evidence that the lawyer knows to be false].[29]

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25. Erin K. Jaskot & Christopher J. Mulligan, Current Developments 2003–2004: Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court,17GEO.J.LEGAL ETHICS 845 (2004).
26. Id. at 847 (footnotes and citations omitted).
27. Charles Wolfram, What Lawyers Know, MODERN LEGAL ETHICS § 12.5.1 (1986); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120, Reporter's Note, cmt. c (AM.LAW INST. 2000) (the concept of conscious avoidance, a concept applied generally in criminal law, also applies to the notion of when a lawyer knowingly uses false evidence); ABA Formal Op. No. 353 n.9 (1987) (a lawyer who does not ask his or her client questions about certain facts of the case to avoid the ethical dilemma may be violating the duty to provide competent representation).
28. See, e.g., Calley v. Woodruff, 751 So. 2d 599 (Fla. Dist. Ct. App. 1998).
29. MODERN LEGAL ETHICS § 12.5.1, supra note 27, at 656; see also Legal Background, ABA Model Rule 3.3, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 328 (4th ed.) (1999)(a lawyer's reasonable belief that a client intends to testify falsely must be based on independent investigation of the evidence or on distinct statements made by the client).

The "teeth" of the "knowledge" requirement is reflected in the manner in which courts have applied the knowledge standard case and in the way they have articulated an attorney's obligation to question what a client claims to be true. For example, in Manhomhan v. Rome Developmental Disabilities Services Office,30 Senior Federal District Court Judge Munson considered the question of whether defense counsel in a civil case had properly and ethically signed a response to interrogatories based upon what his client had told him. Judge Munson explained that "[s]o long as the attorney does not have obvious indications of the client's fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his client's position."[31]

Similarly, a federal district court judge in Georgia in Knox v. Hayes[32] considered the claim that a lawyer had allowed a witness to an accident to sign an affidavit even though the attorney knew that it contained material falsehoods. The judge found that based upon the witness's prior deposition testimony, it was "crystal clear" that the witness actually disagreed with the contents of the affidavit he was signing. In rejecting the lawyer's claims that he had acted in good faith, the judge explained:

> All jurists know that the line between advocacy and falsehood is blurry. Lawyers pursue many cases and within each and every case the opportunities for crossing the line are many. Lawyers, both plaintiffs and defendants, in daily competition, will often position themselves as close to the line as possible; it is for the Court to sift the facts from strategic characterizations and word choices, and to carefully decide what is good lawyering and what is fraud.[33]

This raises the question of whether a lawyer has a duty to correct false testimony elicited by another attorney. In considering this, it is noteworthy that the prohibition of ABA Model Rule 3.3(a)(3) against offering or using false evidence reaches those situations in which perjurious testimony is not elicited on direct examination but rather on cross-examination by an opposing lawyer.[34]

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30. 1999 U.S. Dist. LEXIS 6530, at *12 (N.D.N.Y. 1999).
31. Id.
32. 933 F. Supp. 1573 (S.D. Ga. 1995).
33. Id. at 1582; see also In re Colvin, 336 P.3d 823 (Kan. 2014) (imposing discipline upon an attorney for his failure to correct an omission in demand letters that were relevant in subsequent motion practice); In re Johnson, 641 S.E.2d 535 (Ga. 2007) (imposing discipline upon an attorney who, among other things, failed to take remedial measures upon learning a client testified falsely).
34. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120, cmt. d (AM. LAW INST. 2000) ("A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify. A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness.").

Thus, the responsibility extends to any false testimony elicited by the lawyer as well as such testimony elicited by another lawyer questioning the lawyer's own client or another witness favorable to the lawyer's client.[35] Additionally, a lawyer with actual knowledge that a client intends to commit perjury has a duty to attempt to persuade that person not to do so, i.e., remonstrate.[36] The same Rule is applicable for a witness that the client intends to call.[37]

The lawyer's obligations are often viewed as a remonstration requirement: to urge the client or the witness not to testify falsely and to explain the consequences and dangers (such as criminal liability, the lawyer's responsibility to disclose, etc.) of doing so. After such admonitions, the lawyer may reasonably expect that a client will testify truthfully.38 And when a lawyer knows that the witness will testify truthfully as to some questions but not to others, the lawyer may call the witness but may not put a question to that witness knowing that the witness will respond with false testimony.[39]

Assuming remonstration is unsuccessful and the client insists on presenting false testimony at a trial, the lawyer may not call the client or witness to testify or must make efforts to address the specific testimony that will be false. A lawyer must refuse to present false testimony in a civil or criminal case even over the objection of the client. A lawyer may also refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.[40]

Assuming the client or witness surprises the lawyer and testifies falsely, ABA Model Rule 3.3 requires that a lawyer take reasonable remedial measures when false evidence has been offered. Those remedial measures are required for "materially" false evidence.[41]

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35. See MODERN LEGAL ETHICS § 12.5.1, supra note 27, at 659; In re Janoff, 242 A.D.2d 27, 30 (N.Y. App. Div. 1998) (upholding finding of misconduct where attorney failed to correct false deposition testimony by his client that was adduced by his adversary); In re Friedman, 196 A.D.2d 280, 290 (N.Y. App. Div. 1994) (upholding finding that attorney violated D.R. 7-102[B][2], the predecessor to Rule 3.3[a][3], because he failed to correct false testimony by his witness elicited on cross-examination); San Diego Cty. Bar Ass'n Advisory Op. No. 1983-8 (1983) (where witness testifies falsely on cross-examination, the lawyer who called that witness must nonetheless attempt to rehabilitate, correct, or impeach the witness); see also Mackler v. Turtle Bay Apparel Corp., 1999 U.S. Dist. LEXIS 16164, at *12 (S.D.N.Y. Oct. 21, 1999), rev'd in part, vacated in part (on procedural grounds), 225 F.3d 136 (2d Cir. 2000) (imposing $45,000 in sanctions on an attorney who knew his client testified falsely but did nothing to correct that testimony).
36. Nix v. Whiteside, 475 U.S. 157 (1986).
37. See MODERN LEGAL ETHICS § 12.5.1, supra note 27, at 657.
38. See ABA Formal Op. No. 353 (1987).
39. MODERN LEGAL ETHICS § 12.5.1, supra note 27, at 656.
40. ABA MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM.BAR ASS'N 2015).
41. ABA Model Rule 3.3(a)(3)â€™s duty to correct mandate has a materiality requirement. Interpreting New York's counterpart to Model Rule 3.3(a)(3) (which also contains a materiality requirement), the Departmental Disciplinary Committee of the Appellate Division expressed the view more than two decades ago that the duty to correct would not apply to trivial errors, such as what a witness might have eaten for breakfast.
42. See ABA MODEL RULES OF PROF'L CONDUCT r. 3.3(c).

The ABA Model Rule, unlike, for example, the New York Rule, provides that the duty to take remedial measures terminates at the conclusion of the proceeding.[42] The New York Rule, by contrast, does not identify a cutoff point when the duty to correct terminates. But certainly, the duty to take remedial measure would not terminate prior to the conclusion of the proceeding at issue.[43]

The lawyer's first obligation is, of course, to remonstrate with the witness/client and strongly urge him or her to correct the testimony. In addition to the issues mentioned above, the lawyer should discuss with the witness/client the lawyer's duty to disclose the perjurious testimony to the tribunal.[44] If the remonstration is unsuccessful, the attorney "shall take reasonable remedial measures, including, if necessary," disclosure to the tribunal.

Assuming the client or witness refuses to rectify the fraud and correct the false testimony, Rule 3.3(a)(3) requires that the lawyer take action because there is no issue of attorney-client privilege. In short, the duty to correct and notify the tribunal of the fraud is now clear.

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42. See ABA MODEL RULES OF PROF'L CONDUCT r. 3.3(c).
43. MODERN LEGAL ETHICS § 12.5.1, supra note 27, at 660.
44. Comments 10 and 11 to Rule 3.3 provide the following guidance:
[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

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

In the event that a lawyer moves to withdraw from representing a client, the lawyer should move to withdraw in camera and ex parte. The reasons underlying this practice were clearly set forth in Ficom International, Inc. v. Israeli Export Institute,[45] where the court noted that because withdrawal motions often rely on documents and other information protected by the attorney-client privilege, "the proper practice for an attorney in applying for an order relieving him from responsibility in a case is to serve opposing counsel with a 'bare bones' notice of motion, but being careful to submit the supporting documents to the trial court for inspection in camera."[46]

3. Limitations on Witness Preparation

Having discussed some of the basic ethics issues relating to the issue of candor by attorneys and the offering of questionable evidence, it is now helpful to consider how courts, ethics committees, and scholars articulate their views concerning the limits of witness coaching. Indeed, of all of the issues involving aggressive litigation, perhaps none is more fascinating and challenging than understanding the ethically acceptable limits of witness preparation (often referred to as witness coaching). Proper witness preparation is the sine qua non of success in litigation.

In considering a lawyer's conduct in witness preparation, one must understand that a lawyer operates under the combined directives of various ethical rules that parallel ABA Model Rules 8.4(a) and 1.2(d). Those Rules collectively provide that "a lawyer shall not knowingly engage in illegal conduct"[47] or conduct contrary to the Rules; shall not violate or attempt to violate the Rules, "knowingly assist or attempt to induce another to do so, or do so through the acts of another"[48]; and shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is illegal or fraudulent. Previously, in some states, including New York, this duty of diligence combined with a respect for lawfulness was expressed in Canon 7 of the New York Lawyer's Code of Professional Responsibility, which required a lawyer to represent a client "zealously within the bounds of the law."[49]

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45. 1989 U.S. Dist. LEXIS 1368 (S.D.N.Y. Feb. 10, 1989).
46. Id. at *6, n.1; see also Team Obsolete, Ltd. v. A.H.R.M.A., Ltd., 464 F. Supp. 2d 164, 164–65 (E.D.N.Y. 2006) ("documents in support of motions to withdraw as counsel are routinely filed under seal where necessary to preserve the confidentiality of the attorney-client relationship between a party and its counsel, and that method is viewed favorably by the courts").
47. MODEL RULES OF PROF'L CONDUCT r. 1.2(d).
48. MODEL RULES OF PROF'L CONDUCT r. 8.4 (a).
49. NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC-1 ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations").

As discussed above, ABA Model Rule 3.3(a)(3) is the Rule that expressly prohibits an attorney from offering or using false evidence and contains its own "knowledge" element. There can be no question that the term "knowing" is strictly construed to mean actually that a guess or even a mere suspicion is not equivalent to actual knowledge of participation in fraud, deceit, or other wrongdoing.

District of Columbia Bar Opinion No. 79 (December 18, 1979) blends the notion of knowingly introducing false testimony with the process of witness preparation, as was discussed in an article by James M. Altman.[50] Altman notes that while former D.R. 7-102(A)(6) and (7), now Rules 3.4(a)(5) and 1.2(d), prohibits lawyers from participating in the creation of false evidence and counseling or assisting a client in conduct the lawyer knows to be illegal or fraudulent, these Rules do *not*

> give [] any advice on how to apply these truisms in the horseshed. And the only ethics committee opinion to comprehensively apply the Code's general norms to attorney conduct during witness preparation likewise makes "truth" the sole touchstone without providing practical advice:
>
> "[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witness for examination."[51]

Furthermore, Altman opines that as part of this witness preparation process, the attorney must educate the witness regarding how the witness's testimony fits into the entire dispute:

> Most witnesses need to be oriented to the theory of the case and how their testimony fits into it. After giving the veracity admonition [i.e., telling the witness that he or she must tell the truth], then, the lawyers will need to orient the witness; to describe the dispute between the parties; each party's primary legal contentions; the major factual issues in dispute; the material facts upon which each side will rely to make its case; the particular factual issues about which the witness probably will testify; and how the witness's testimony fits into the big picture.[52]

Altman also recognizes what most lawyers and judges already know:

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50. James M. Altman, Witness Preparation Conflicts,22LITIG. 38, 43 (Fall 1995).
51. Id. at 38 (quoting D.C. Bar Formal Op. No. 79).
52.Id. at 39.

> Those who regard a witness's initial recollection as the truth (or at least the witness's version of it) logically must regard any effort to change the initial recollection as unethical tampering with testimony, if not outright subornation of perjury. But common experience—not to mention several judicial decisions—suggest that such a conclusion evidences a naive view of human memory and knowledge.[53]

In a law review article entitled *The Anti-False Testimony Principle and the Fundamentals of Ethical Preparation of Deposition Witnesses*,[54] Stephen Goldman and Douglas Winegardner suggest that helping a witness think about the facts, consider word choice, and evaluate alternatives does not violate the ethical rules, provided that the lawyer keeps in mind what they call the "Anti-False Testimony Principle" and its underlying moral premise. The authors describe this principle as follows:

> The fundamental ethical tenets affecting a lawyer's witness preparation duties, which are equally applicable in deposition or at trial, are cast as two prohibitions on the introduction of "false" testimony. Rule 3.4(b) of the Model Rules of Professional Conduct (Model Rules) provides that "[a] lawyer shall not . . . (b) falsify evidence, [or] counsel or assist a witness to testify falsely," and Rule 3.3(a) of the Model Rules requires that "[a] lawyer shall not knowingly . . . (3) offer evidence that the lawyer knows to be false." Although Model Rules 3.4(b) and 3.3(a)(3) apply in different situations, their goal is the same—to prevent a lawyer from tampering (actively or passively) with the factual record. Together, these rules reflect a fundamental and underlying principle that aims to prevent lawyers from placing incorrect and dishonest testimony in the record. We call this underlying concept the "Anti-False Testimony Principle."[55]

Inevitably, the line between acceptable and unacceptable witness preparation is one that is intensively fact and context specific. The ethical rules providing that a lawyer may not advise or assist a witness to give false testimony, nor knowingly use perjured or false testimony, may be difficult to apply in the fringe areas. For example, one writer aptly recognized that showing a witness documents to see how it affects the witness's recollection can be a valuable practice, but it is improper to do so in a manner suggesting that the witness conform his testimony to what he has read or so that the witness gives a consistent story that matches other evidence in the case.

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53. Id. at 40. Among the decisions cited in Altman's article is Resolution Trust Corporation v. Bright, 6 F.3d 336 (5th Cir. 1993), which is discussed later in this article. Altman also cites Koller v. Richardson-Merrell, 737 F.2d 1038, 1058 (D.C. Cir. 1984) (seeking a witness's retraction of a statement damaging to a client was not improper because counsel did not "know," and it was not "obvious," that the retraction would be false), vacated on other grounds, 472 U.S. 424 (1985).
54. Stephen M. Goldman & Douglas A. Winegardner, The Anti-False Testimony Principle and the Fundamentals of Ethical Preparation of Deposition Witnesses,59 CATH. U.L. REV.1 (2009).
55.Id. at 9-11.

Similarly, a lawyer who begins a witness prep session with the words “Let me tell you what the law is. . . .” may—fairly or unfairly—be viewed as having caused the witness to change his or her testimony. Similarly, although it is acceptable to suggest different ways a witness can phrase a response, coaching a witness to hedge testimony by saying “I believe” when in fact the witness has a clear recollection may be improper. Finally, a lawyer may suggest to a witness a particular phraseology, but not when it alters the substance or intended meaning of the witness’s testimony. Similarly, a prep session may become improper when the attorney makes excessive use of leading or suggestive questions and/or when the intention or the consequence of the attorney’s conduct is to have the witness parrot what the lawyer is saying or asking.[56]

There is a significant and often-cited decision by the Fifth Circuit that explains the broad discretion an attorney has to attempt to persuade witnesses to change written statements. In Resolution Trust Corporation v. Bright,[57] two Resolution Trust Company (RTC) attorneys questioned one of the bank’s former officers, Barbara Erhart, concerning issues relating to malfeasance by other former officers at the bank. After interviewing Erhart three times, the RTC attorneys asked her to return to their office to review and sign an affidavit. When she arrived, the attorneys questioned her again, made last minute revisions to an affidavit they prepared, and told her that the affidavit she would be asked to sign had several statements in it that she had not discussed with them, but which they believed to be true.[58] Erhart made semantic changes to parts of the affidavit but disagreed with substantive statements that the two RTC attorneys had drafted. The RTC attorneys questioned her extensively about the changes she had made and asked her to reword some of them to “emphasize” the culpability of the other former bank officers in certain controversial cash transactions. Erhart refused to sign the affidavit because she did not have personal knowledge of the statements the attorneys wanted her to include. The RTC attorneys were not content to accept Erhart’s initial refusal to revise her changes; in an effort to have Erhart see things their way, the RTC attorneys described to her their understanding of how certain events transpired at the bank. Among other techniques, they aggressively challenged some of her assumptions about the conduct of the other officers. Erhart refused to alter the initial changes she had made.[59]

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56. Harold K. Gordon, Crossing the Line on Witness Coaching, N.Y.L.J., July 8, 2005, at 16.
For a discussion of the limits of witness preparation, as applied to the use of trial consultants who interact with witnesses, see Nicole LeGrande & Kathleen Mierau, Witness Preparation and the Trial Consulting Industry,17GEO.J.LEGAL ETHICS 947 (2004).
57. 6 F.3d 336 (5th Cir. 1993).
58. Id. at 338–39.
59. Id. at 339.

The district court judge concluded that the RTC attorneys were trying to "talk [Erhart] into those statements" and that their conduct concerning the draft affidavit was tantamount to "tampering with" or "attempting to manufacture evidence."60 In addition to various financial sanctions, the court disbarred the RTC attorneys from practicing before it.[61] On appeal, the Fifth Circuit rejected the notion that the attorneys, in essence, had sought to elicit or create false testimony. The court explained the boundaries of witness documentation creation: "It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate."[62]

Professor William Hodes, the author of various ethics texts,[63] commented on the practice of attorneys showing deposition witnesses documents and other materials in order to refresh the witness's recollection in his article The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law.[64] His view is that even the use of a "scripted" document to prepare witnesses for depositions, including the showing of key photographs to witnesses to refresh their recollections, is not suborning perjury. Professor Hodes views such witness preparation as ensuring that the witness

> . . . would . . . be able confidently and effectively to present their truthful testimony under pressure. . . . "It is unlikely that [the rule against improperly influencing a witness' testimony means] that any attempt to influence a witness' testimony is improper, since the entire process of witness preparation is directed to some degree at influencing a witness' testimony."[65]

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61. Id.

62. Id. at 341; see also Fred Zacharias & Shaun Martin, Coaching Witnesses,87KY. L.J. 1001, 1015 n.9 (1999) ("Lawyers in pretrial settings typically use preexisting documentary evidence to prepare clients and witnesses for their depositions. . . . Accordingly, it is common practice for such lawyers to encourage a witness to review key documents produced during discovery . . . before his deposition." (citations omitted)); Richard Wydick, The Ethics of Witness Coaching,17CARDOZO L. REV. 1, 37 n.112 (1990) (The author describes the process of "Grade Three Coaching," in which the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story. "By definition, grade three witness coaching does not involve knowing inducement of testimony the lawyer knows is false. It therefore does not violate [the ethical rules prohibiting the offering of false evidence or falsifying evidence, or assisting a witness to testify falsely or inducing a witness to testify falsely]."); Joseph Piorkowski Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching,1GEO.J.LEGAL ETHICS 389, 390 (1987) (explaining that one of the primary objectives of preparing witnesses is to refresh the witness's recollection). Lawyers may or may not agree with such views.

63. For example, Professor Hodes is co-author, along with Peter R. Jarvis and Professor Geoffrey C. Hazard Jr. (original Reporter for the ABA Model Rules), of the treatise The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (2d ed. 2000) (with annual supplements); Legal Research: A Self-Teaching Guide to the Law Library (2d ed. 1988); and numerous articles.

64. William Hodes, The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law,30TEX.TECH L. REV. 1343, 1348–49, 1363–66 (1999).

65. Id. at 1348, 1363.

Professor Hodes further explained that where a client is uncertain of certain facts, it is proper to show the client photographs, have discussions with others, and be prepped by the attorney in order to enable the client to make a "more confident statement." Although there is always the risk that a witness may remember a fact because of the horseshedding process, and not because of any true recollection, the cure of prohibiting the refreshing of recollection "is a cure worse than the disease. In order to serve their clients with full vigor, lawyers must not be afraid to take ethical risks of their own."[66]

III. Strategic options and considerations

Notwithstanding the seemingly "indefensible" nature of the conduct at issue, numerous strategies can be employed to provide a vigorous and potent defense to even the most challenging of claims presented, or at least offer a means of successfully managing and mitigating the risk presented.

A. Maneuver Case to Early Settlement

Early settlement may be the most utilitarian option if the plaintiff 's demand is relatively reasonable and the defendant is amenable to the options presented. This is often less complicated when there are no nonmonetary demands, counterclaims or fee disputes, or potentially uncovered claims. Moreover, where insurance is available, policy provisions, such as a reduction in a deductible or retention that kicks in if the case is settled in mediation, may make such a settlement even more valuable.

B. Defense Options

In the event that the case cannot be settled, numerous other strategies are available to mitigate or even obviate the risks presented by a seemingly indefensible claim. Initially, a host of technical defenses may be available. Each must be considered, and every available angle must be pursued. And if trial cannot be avoided, it is imperative to understand that every single phase of trial preparation and the trial itself provides an opportunity to reduce or even in some cases completely eliminate potential exposure.

1. Pursuing Technical Legal Defenses

Technical legal defenses to be explored include traditional legal defenses such as jurisdiction, standing to sue, failure to join indispensable parties, statutes of limitations, causation, ratification, unclean hands, or failure to comply with pre-suit requirements. Attacking damages also can be an enormously successful tactic. The following are some specific considerations that need to be made:

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66. Id. at 1365–66.

Jurisdiction

• Does the defendant have sufficient contacts with the forum state?

• Is the case a candidate for removal to federal court to achieve a more favorable venue?

• Was service proper (particularly as this may impact statute of limitations defenses)?

Proper Parties

Does the plaintiff have standing to sue? For example:

• A claim by a trust must be brought by the trustee, not the beneficiaries.[67]

• A decedent's claim must be brought by the estate executor or administrator, not the heirs.[68]

• A claim by a party plaintiff absolved of liabilities through bankruptcy may belong to the trustee in bankruptcy, not the party plaintiff.[69]

• Claims of children are assertable by their legal guardian, and not any family member.[70]

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67. Poyorena v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 49319, at *12 (C.D. Cal. Apr. 3, 2014); Lucas v. Tiernan, 2007 U.S. Dist. LEXIS 73998, at *4–5 (S.D.N.Y. Sept. 27, 2006); McDermott Found. v. Brantman (In re Estate of Brantman), 2011 IL App (2d) 101137-U, ¶ 26 (Ill. App. Ct. 2011); Pillsbury v. Karmgard, 22 Cal. App. 4th 743, 753 (1994); Jackson v. Kessner, 206 A.D.2d 123, 129 (N.Y. App. Div. 1994).

68. Mid-Ohio Sec. Corp. v. Estate of Burns, 790 F. Supp. 2d 1263, 1269 (D. Nev. 2011); Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1174 (C.D. Cal. 2008); Estate of Gavin v. Tewksbury State Hosp., 9 N.E.3d 299, 302–03 (Mass. 2014); Tucker v. Brown, 150 P.2d 604, 650–51 (Wash. 1944).

69. Flugence v. Axis Surplus Ins. Co. (In re Flugence), 738 F.3d 126, 131 (5th Cir. 2013); Henley v. Malouf (In re Roberts), 556 B.R. 266, 274 (Bankr. S.D. Miss. 2016); Hadsock v. Amer-ada Hess Corp., 2015 U.S. Dist. LEXIS 135956, at *12 (E.D. Pa. Sept. 28, 2015); Pfeifer v. Fed. Express Corp., 2014 U.S. Dist. LEXIS 42743, at *35 (D. Kan. Mar. 26, 2014); Jurista v. Amer-inox Processing, Inc., 492 B.R. 707, 731–32 (Bankr. D.N.J. 2013); Englader v. Gomez (In re Mastercraft Interiors, Ltd.), 2008 Bankr. LEXIS 3396, at *4 (Bankr. D. Md. 2008); Nat'l City Bank of Minneapolis v. Lapides (In re Transcolor Corp.), 296 B.R. 343, 362 (Bankr. D. Md. 2003);Tatev.Snap-OnTools Corp.,1997U.S.Dist.LEXIS1485,at*15(N.D.Ill.Feb.11, 1997).

70. Henderson v. Tex. Dep't of Family & Protective Servs., 2014 U.S. Dist. LEXIS 20374, at *3–4 (E.D. Ark. Feb. 19, 2014); In Re W. L. H., 723 S.E.2d 748, 749 (Ga. Ct. App. 2012); Blackwell v. Dep't of Soc. & Health Servs., 127 P.3d 752, 753 (Wash. Ct. App. 2006); McKnight v. Grange Mut. Cas. Co., 673 N.E.2d 1012, 1014–15 (Ohio Ct. App. 1996); Orsi v. Senatore, 645 A.2d 986, 990 (Conn. 1994).

• Corporate entities generally must be in good standing, such as being current with corporate tax obligations, to enjoy the privilege of using state courts.[71]

• Has there been a failure to join indispensable parties, such as others who have a claim to disputed assets?[72]

• Is the plaintiff legally incompetent? If so, the court may need to appoint a guardian ad litem.[73]

Statute of Limitations

While the statute of limitations for professional negligence generally starts to run from the date the claim should have been discovered, in some circumstances it actually may begin to run at the time of the negligent act giving rise to the claim, regardless of when the injury or damage was discovered.[74]

Some claims, such as statutory and FINRA arbitration claims, are subject to an absolute time limit from the date of the transaction regardless when a claim may be discovered.[75]

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71. Boyce v. Samson (In re Moss), 2014 Bankr. LEXIS 1303, at *17–18 (B.A.P. 9th Cir. 2014); Carrillo v. MCS Indus., 2012 U.S. Dist. LEXIS 155678, at *5–6 (D.N.M. Oct. 15, 2012); Real Estate Network, L.L.C. v. Gateway Ventures, L.L.C., 2005 U.S. Dist. LEXIS 35964, at *6 (E.D. Mo. July 12, 2005); Century Inv. Grp., Inc. v. Bake Rite Foods, Inc., 7 P. 3d 510 (Okla. Civ. App. 2000); EL T. Mexican Rests. v. Bacon, 921 S.W.2d 247, 253 (Tex. App. 1995).

72. McKenna v. Udall, 418 F.2d 1171, 1174 (D.C. Cir. 1969); Diodem, LLC v. Lumenis Inc., 2005 U.S. Dist. LEXIS 46865, at *38–39 (C.D. Cal. Sept. 13, 2005); Biagro W. Sales, Inc. v. Helena Chem. Co., 160 F. Supp. 2d 1136, 1142 (E.D. Cal. 2001); Sunlight Elec. Contracting Co. v. Turchi, 2015 Pa. Super. Unpub. LEXIS 657, at *11–12 (2015); Twp. Of S. Fayette v. Commw. of Pa., 459 A.2d 41, 44–45 (Pa. Commw. Ct. 1983).

73. Sturdza v. United Arab Emirates, 587 F. App'x 660, 660 (D.C. Cir. 2014) (internal citations omitted); Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 645 (2d Cir. N.Y. 1999); Garrick v. Weaver, 888 F.2d 687, 692 (10th Cir. 1989); Marsico v. Marsico, 94 A. 3d 947, 952 (N.J. Super. Ct. Ch. Div. 2013); Abolafia v. Reeves, 277 P.3d 345, 950 (Idaho 2012).

74. Brawner v. Educ. Mgmt. Corp., 513 F. App'x 148, 151 (3d Cir. 2013) (internal citations omitted); Cement Masons' Union Local No. 592 Pension Fund v. Almand Bros. Concrete, Inc., 2015 U.S. Dist. LEXIS 73645, at *8 (D.N.J. June 8, 2015); Forex Transactions Litig. v. Bank of N.Y. (In re Bank of N.Y. Mellon Corp.), 921 F. Supp. 2d 56, 91 (S.D.N.Y. 2013); Allen v. Erie Metro. Transit Auth., 2011 U.S. Dist. LEXIS 149698, at *31–32 (W.D. Pa. Dec. 30, 2011) (internal citations omitted); Hitchmon v. United States, 585 F. Supp. 256, 259–60 (S.D. Fla. 1984) (internal citations omitted); Burkholz v. Joyce, 972 P.2d 1235, 1236 (Utah 1998).

75. Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 2009 Bankr. LEXIS 446, at *4 (Bankr. S.D.N.Y. Feb. 24, 2009); Flight Sys. v. Paul A. Laurence Co., 715 F. Supp. 1125, 1130 (D.D.C. 1989); Sanchez v. State, 86 P.3d 1, 2–3 (Mont. 2004); Levin v. Kilborn, 756 A.2d 169, 170–72 (R.I. 2000); Bingham Cty. Comm'n v. Interstate Elec. Co., 665 P.2d 1046, 1051 (Idaho 1983); Schroud v. Van C. Argiris & Co., 398 N.E.2d 103, 105 (Ill. App. Ct. 1979).

Causation

Some claims essentially require "but for" causation, which may allow for an absolute defense, even in cases of clear negligence.[76] For example, an insurance broker fails to place requested coverage, but the uncovered claim would have fallen outside of the claims made policy period in any event, or a lawyer misses the statute of limitation on the filing of a legally deficient claim.

Ratification

The plaintiff's ratification of the defendant's actions may completely defeat its claim.[77] For example, a registered representative of a broker-dealer places an unauthorized trade. The client sees the trade on his activity statement but says nothing because the stock has increased in value. Later, when the stock drops and the client complains that the trade was not authorized, he will be deemed to have ratified the trade.[78] Or a registered representative makes patently unsuitable investments and trades that are clearly contrary to the customer's stated risk profile. Losses ensue over the next six months, and the registered representative doubles down on the strategy in an attempt to recoup the losses—with the result of still greater losses. While the customer may have a valid unsuitability claim for the first month or two (or three), at some point the customer has to take responsibility for the risky investment strategy that he has ratified by not stopping it as losses were mounting and the riskiness of the strategy became apparent.[79]

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76. Gowski v. Peake, 682 F.3d 1299, 1313 (11th Cir. 2012); Costa v. Desert Palace, 299 F.3d 838, 848–49 (9th Cir. 2002); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1183 (9th Cir. 2000); Garrett v. Bryan Cave LLP, 2000 U.S. App. LEXIS 7339, at *12 (10th Cir. Apr. 21, 2000); Shyface v. Sec'y of U.S. Dep't of Health & Human Servs., 165 F.3d 1344, 1348 (Fed. Cir. 1999); State v. Exxon Mobil Corp., 126 A.3d 266 (N.H. 2015); Clay City Consol. Sch. Corp. v. Timberman, 918 N.E.2d 292, 300 (Ind. 2009); Viner v. Sweet, 70 P. 3d 1046 (Cal. 2003).

77. Calma v. Templeton, 114 A.3d 563 (Del. Ch. 2015) (In the corporate law context, stockholders (as principals) can, by majority vote, retrospectively and, at times, prospectively, act to validate and affirm the acts of the directors (as agents)); Saggese v. Kelley, 837 N.E.2d 699 (Mass. 2005) (attorney may obtain consent to fee-sharing arrangement by ratification); Spellman v. Am. Universal Inv. Co., 687 S.W.2d 27 (Tex. App. 1984) (lessors' knowing receipt of royalty payments from mineral lease amounted to ratification of lease contract, thus barring lessors from claiming the allegedly fraudulent contract should be reformed or rescinded).

78. Jaksich v. Thomson McKinnon Sec., Inc., 582 F. Supp. 485 (S.D.N.Y. 1984).

79. Devil's Advocate, LLC v. Zurich Am. Ins. Co., 2014 U.S. Dist. LEXIS 146449, at *25 (E.D. Va. 2014); Altschul v. Paine, Webber, Jackson & Curtis, 518 F. Supp. 591, 594 (S.D.N.Y. 1981) (plaintiffs' failure to object to defendant's course of trading for two years, until the risk failed, despite ample opportunity to so object, constituted ratification); Bell v. Leonard St. & Deinard Prof'l Ass'n, 2016 Minn. App. Unpub. LEXIS 441, at *10–11 (May 2, 2016); In re Estate of Winograd, 582 N.E.2d 1047, 1049–50 (Ohio Ct. App. 1989) (internal citations omitted); Little v. Little, 391 So. 2d 1213, 1217 (La. Ct. App. 1980); Roberts v. Goodwin, 149 S.E.2d 420, 422 (Ga. Ct. App. 1966) (internal citations omitted); Manheim Dairy Co. v. Little Falls Nat'l Bank, 54 N.Y.S.2d 345, 361, 366 (N.Y. Sup. Ct. 1945).

Unclean Hands

Generally, a plaintiff who actively participates in wrongful conduct will not be rewarded.[80] For example, a company engaged in fraudulent accounting cannot pursue a claim against the accountant for failing to uncover it.[81] As another example, the perpetrator of a Ponzi scheme cannot sue other participants in the scheme for violations of RICO, nor can his creditors on his behalf in bankruptcy.[82]

Unavailable Damages

Some of the damages being claimed by a plaintiff may not be recoverable under the law, such as the case in New York, where recovery of lost profits arising from a fraudulent scheme that did not proceed as planned are barred.83 Claims for loss of reputation outside of a claim for defamation are generally not recoverable, and claims for emotional distress arising from property damage or economic loss are typically barred in most jurisdictions.[84] Damages are also typically not available for lost profits from new business ventures with no history of profitability to draw upon in calculating damages.[85]

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80. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 241 (1933) ("he who asks relief must have acted in good faith"); Saudi Basic Indus. Corp. v. ExxonMobil Corp., 401 F. Supp. 2d 383, 395 (D.N.J. 2005) ("There is also case law to support application of the unclean hands doctrine when a business partner engages in acts of self-dealing."); Clements Indus., Inc. v. A. Meyers & Sons Corp., 712 F. Supp. 317, 318 (S.D.N.Y. 1989) (no relief available to plaintiff who had attempted to extract trade secrets from defendant).

81. Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982); In re Integrity Ins. Co., 573 A.2d 928 (N.Y. App. Div. 1990).

82. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006).

83. MTI/Image Grp., Inc. v. Fox Studios E., Inc., 262 A.D.2d 20 (N.Y. App. Div. 1999); Lama Holding Co. v. Smith Barney, 668 N.E.2d 1370 (N.Y. 1996).

84. Hustler Mag. v. Falwell, 485 U.S. 46 (1988) (plaintiffs must meet First Amendment standards of proof for defamation claims in order to recover reputation damages); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (same); Exxon Mobil Corp v. Ford, 71 A.3d 105 (Md. 2013) (absent evidence of fraud or malice in underlying tort, emotional distress resulting from property damage not compensable); Blagrove v. JB Mech., Inc., 934 P.2d 1273 (Wyo. 1997) (homeowner's emotional distress damages not compensable in connection with property damage arising from negligent installation of water lines); Kleinke v. Farmers Coop. Supply & Shipping, 549 N.W.2d 714, 717 (Wis. 1996) (permitting recovery for emotional distress arising from property damage would remove any logical stopping point to a tortfeasor's liability); Waller v. Truck Ins. Exchange, Inc., 900 P.2d 619 (Cal. 1995) (because plaintiffs alleged emotional and physical distress flowed from non-covered economic loss, insurance company had no duty to defend under commercial general liability policy). Cf. Nnadili v. Chevron U.S.A. Inc., 435 F. Supp. 2d 93 (D.D.C. 2006) (District of Columbia law allows recovery of mental distress damages without physical injury for intentional torts such as trespass).

85. MindGames, Inc. v. W. Publ'g Co., Inc., 218 F.3d 652, 658 (7th Cir. 2000) (newness of a business is a factor in applying damages standards); Mali v. Odom, 367 S.E.2d 166 (S.C. Ct. App. 1988) (attorney malpractice action; estimates of anticipated monthly income from new school held speculative and without reasonable basis where offered without reference to operational history or standard method for estimations). But see RESTATEMENT (SECOND) OF CONTRACTS § 352, cmt. b (AM.LAW INST. 1981) (update Oct. 2016) (lost profits damages for new business may be established by expert testimony, economic and financial data, market surveys and analyses, and business records of similar enterprises); W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348, 1351 (Fla. 1989) ("A business can recover lost prospective profits regardless of whether it is established or has any 'track record.' "); Super Valu Stores, Inc. v. Peterson, 506 So. 2d

Failure to Comply with Pre-suit Requirements

Failure to comply with pre-suit requirements also may defeat all or a portion of a claim. For example, claims under consumer protection statutes may require a pre-suit demand letter, or in order to pursue a professional negligence claim in some jurisdictions, the plaintiff must obtain a certificate of merit from a qualified expert.[86] For federal employment discrimination claims, you first must file a charge of discrimination with the EEOC and obtain a right-to-sue letter before you can pursue a civil claim in federal court.[87] Even highly meritorious claims can be dismissed for failure to comply with these absolute pre-suit obligations.

2. Defending the Claim Through Trial

Assuming there is no realistic possibility of settlement and the case cannot be disposed of through application of a technical legal defense, critical trial considerations must be made.

First, it is imperative to appreciate that big bad cases with ugly facts often are fought on two fronts—in public and in the courtroom. You must be cognizant of both fields of battle at all times and consider what can be done to mitigate the efforts of the plaintiff's counsel to utilize media attention, sway a potential jury pool, and magnify damages. Where the case has received substantial media attention, to permit a fair trial for your client, efforts must be made to obtain a nondisclosure order by the court, directing that neither party make extrajudicial statements to the media concerning arguments, evidence, or settlement negotiations during the pendency of trial.

317, 327 (Ala. 1987) ("[A]nticipated profits of an unestablished business [may be recovered], if proved with reasonable certainty."); Olivetti Corp. v.AmesBus.Sys.,356S.E.2d578,585 (N.C.1987)("Whileweagree...that lost future profits are difficult for a new business to calculate and prove, we are persuaded that there should be no per se rule against the award of such damages where they may be shown with the requisite degree of certainty. Accordingly, we hold, along with what appears to be a majority of jurisdictions reaching the issue, that the new business rule is not the law of our state."); Short v. Riley, 724 P.2d 1252, 1254 (Ariz. Ct. App. 1986) ("[W]hen evidence is available to furnish a reasonably certain factual basis for computation of probable losses, recovery cannot be denied even though a new business venture is involved.").

86. See, e.g., MASS.GEN.LAWS ch. 93A, § 9(3) (requiring demand letter); TEX.BUS.&COM. CODE ANN. § 17.505(a) (Vernon Supp. 1992) (same); see also, e.g., Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011) (Pennsylvania law requires plaintiff to file certificate of merit within sixty days after filing professional negligence complaint); CAL.CIV.PROC.CODE § 411.35 (West <<year?>>) (requiring certificate of merit in actions against architects, engineers, and land surveyors); N.Y. C.P.L.R. 3012-a (MCKINNEY <<year?>>) (requiring certificate of merit in medical, dental, and podiatric malpractice actions); TEX.CIV.PRAC.&REM.CODE ANN. § 150.002 (West <<year?>>) (requiring certificate of merit in any action or arbitration proceeding for damages arising out of provision of professional services by licensed or registered professional); WASH.REV.CODE § 7.70.150 (<<year?>>) (requiring certificate of merit in actions against individual health care providers).

87. 42 U.S.C. § 2000e et seq.

Second, it is imperative to realize that trial begins at the deposition stage. Your clients and your witnesses have to be thoroughly questioned and carefully prepared. Mistakes in testimony from careless preparation will be portrayed as a lack of candor or outright dishonesty. The stakes are much higher in these cases. Mistakes are that much more serious. You must strive to get the testimony you need, in the way it is needed, at the outset. So in this regard it is imperative as well to understand exactly what is being alleged, exactly what the fact issues are, each and every element of the claims being asserted, and what must be proven to establish or blunt the claims being made. You also must identify, articulate, and make sure that your witnesses, always truthfully, testify in a manner consistent with the themes you want to present to the jury.

Third, jury selection is critical. In this regard, it is important to note that during the deliberative process, the most critical factor is the juror's long-standing predispositions.[88]

According to studies of juror biases, 76 percent of jurors believe that corporate executives lie and cover up, 30 percent believe that it takes "billions" to send a message to corporations, 71 percent do not believe there should be caps on juror awards, and 45 percent ignore a judge's instructions.[89] Develop a carefully considered questionnaire to uncover and identify potential juror biases. Get a jury consultant involved and make every effort to get a centrist jury selected. Further, do everything possible to get honest answers to your questions by letting the jury know at the outset that it is acceptable to have strong feelings and opinions; there are no right or wrong answers; and what is important, fair, and right is for everyone to be as honest as they can be.

It is also important to identify and weed out jurors who may have been influenced by media reports. The voir dire must be carefully crafted to identify not only traditional media, i.e., television and radio, potential jurors may watch or listen to, but also what websites they visit; what social media they use; and what they have seen, heard, or discussed about the facts in issue, as well as any opinions they may have developed. Additionally, it is important to determine if the potential jurors would be concerned about reactions to their verdict by anyone, including friends, family members, neighbors, acquaintances, or coworkers. It is important to ascertain if prospective jurors have any personal, moral, or religious beliefs and opinions that would influence or affect their ability to follow the law as it is explained to them and to render judgment.

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88. Neil Goldberg et al., Jury Psychology Can Undermine Plaintiffs' Expert Witnesses,FOR THE DEF., Dec. 2007, at 32–39.
89. Statistics based on data calculations suggested by DecisionQuest.

Fourth, it goes without saying, but it still needs to be said: opening and closing statements are the ballgame. They must be compelling, set the themes of your defense, and comprehensively and compellingly present your version of the events. Volumes of treatises have been written on opening and closing statements, so no more will be said on this, except for this: in a case where indefensible conduct is involved, if the issue is solely about damages, and the objective is to get the jury to fairly and objectively focus on the actual damages and not be swayed by anger or a desire to punish your client, it is imperative that the themes designed to tamp down the anger and get the jury to focus on the actual damages incurred must be established during the opening and compellingly reaffirmed during the closing.

Fifth, focus must at all times be kept on developing key damage mitigation information. Remember, you are coming into this case with the understanding at the outset that the conduct is in many ways utterly "indefensible." If liability is virtually a forgone conclusion, damages are the ballgame. Every effort must be made to build a defense to the asserted damages. In this regard, it is critically important to identify a damages expert early, identify the theory or theories by which you will be attempting to attack damages, and uncover every possible piece of information necessary to build the expert's damages argument and provide support for his damages analysis. Further, the expert must be carefully vetted and his background thoroughly explored. Has the expert ever been fired? Has the expert ever been determined at trial to be presenting a flawed, unscientific, or otherwise insupportable argument? Has the expert testified 500 times and always for the defense? Has the expert authored papers, prepared reports in other cases, or given presentations on issues similar to the issues before the court in your case that appear to contradict the positions he is taking for you? Does the expert assign all of the work to associates or does he actually work on the analysis? Does the expert sound credible or as someone who will literally say or do anything he is paid for? The time and attention spent on securing the right expert simply cannot be understated.

Sixth, again, where truly "indefensible" conduct is involved and horrific consequences have occurred, it is imperative to understand that the plaintiff 's attorney is going to be trying to stoke anger in the jury. The earlier you challenge the foundation for the anger, the better the chance for success in mitigating the exposure presented. This starts with the voir dire and continues into the opening statement and throughout the testimony of any defense witnesses. In fact, it is important that the corporate witnesses testifying in a case where an employee has engaged in indefensible conduct are carefully prepared in advance of their depositions to exhibit true contrition and sympathy where liability is not in dispute, and damages are what is going to be litigated at trial.

Seventh, where the case involves truly heinous conduct or tragic impacts—with the potential for imposition of emotionally charged compensatory and punitive damages—it is imperative that appropriate themes and defenses be presented to address these issues. In this regard, for example, it may be effective to own the misconduct—and even apologize for it—and in that way help steer the jury to an objective analysis of the actual damages incurred.

IV. Conclusion

When faced with the task of defending "indefensible" conduct, it is important to understand that the role of a lawyer is to provide an honest, ethical, and fulsome defense of the client, to the best of his or her ability. If for moral, business, or other reasons you feel uncomfortable representing a client in these circumstances, it is your obligation to pass on the representation. If you take it on, however, you need to understand the magnitude of the task you will be taking on and the holistic approach that must be taken to defend the claims asserted. Every possible angle for steering the case to early resolution must be considered, along with every possible option for achieving disposition on "legal" grounds. When trial cannot be avoided, every aspect of the trial must be carefully thought out, and the themes and issues that will be guiding your defense strategy must be employed at the outset and consistently throughout.

From an ethics standpoint, it is important to be cognizant of the fact that a lawyer who is attempting to defend the "indefensible" case may be tempted to consider pursuing strategies that are aggressive in nature. This is fine, and lawyers have an obligation to advance their client's interest zealously—but there are limits. In this regard, trial lawyers must have a keen understanding not only of what evidence is admissible, but also of the relationship between the rules of evidence, the rules governing conflicts of interest, the attorney-client privilege, and the principles governing questionable evidence.

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