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# A Proposal to Require Lawyers to Disclose Information About Procedural Matters

BY WILLIAM H. FORTUNE*

## INTRODUCTION

*Suppose jury selection in a criminal case is completed just before lunch. The judge fails to swear the jury before breaking for lunch and does not think about it when court reconvenes in the afternoon. The judge calls on the prosecutor for an opening statement to the unsworn jury. Assume the law of the jurisdiction is that failure to swear the jury is nonwaivable error. The defense attorney is the only person in the room who realizes the jury has not been sworn. Must the lawyer inform the court of the omission? Or may the defense attorney hold this information as a "hole card" to be played only if the client is convicted? Indeed, must the attorney withhold the information if the client so requests?*[1]

*On similar facts, the Massachusetts appellate court said that failing to disclose exceeded the limits of zealous advocacy;*[2] *the Massachusetts Supreme Court "express[ed] no opinion" about the attorney's ethics but*

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[1] I encountered this scenario while defending a man charged with murder. In the absence of authority clearly requiring disclosure, I concluded I could not tell the judge that he had not sworn the jury. I did not reveal the information. The client was convicted of manslaughter and sentenced as a persistent felon to 20 years. I counseled the defendant not to play the "hole card" because I thought the prosecution would welcome a new trial. He insisted that I raise the issue of the unsworn jury. I did so, he received a new trial, was convicted of murder on retrial (with different counsel), and sentenced to 75 years.

[2] *See* Commonwealth v. Pavao, 658 N.E.2d 175, 181 (Mass. App. Ct. 1995), *rev'd*, 672 N.E.2d 531 (Mass. 1996) (explaining that the judge had not taken a guilty plea correctly).

*recommended a change in the disciplinary rules to make disclosure mandatory.*[3]

In the absence of a rule clearly requiring disclosure, a lawyer is obligated not to disclose information which is adverse to the interests of a client.[4] However, judges should be able to expect lawyers to disclose information about procedural matters. This Article argues that Model Rule of Professional Conduct 3.3 should be amended to require disclosure of information about procedural matters. Part I describes the events in *Potter v. Eli Lilly & Co.*,[5] a case involving a secret settlement related to Prozac.[6] Part II makes the argument for a rule requiring disclosure of procedural information.[7] Part III describes how such a rule would be applied.[8]

## I. THE PROZAC SECRET SETTLEMENT CASE

On September 15, 1989, Joseph Wesbecker, a disgruntled former employee of Standard Gravure, entered the company's plant in Louisville, Kentucky, where he shot and killed eight people and seriously wounded twelve others before taking his own life.[9] Wesbecker, who had a history of mental illness, had recently been placed on Prozac, an anti-depressant drug manufactured by Eli Lilly ("Lilly").[10]

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[3] *Pavao*, 672 N.E.2d at 535.

[4] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).

[5] Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996).

[6] *See infra* notes 9-69 and accompanying text.

[7] *See infra* notes 70-150 and accompanying text.

[8] *See infra* notes 151-66 and accompanying text.

[9] The facts herein are taken from a variety of sources including *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1199 (7th Cir. 1996); *Potter*, 926 S.W.2d at 451; Brief for Appellant apps. 2-9, *Potter* (No. 95-SC-000580); Appellees' Reply Brief apps. C-H, *Potter* (No. 95-SC-000580); and Reply Brief for Appellant app., *Potter* (No. 95-SC-000580). Original briefs submitted to the Kentucky Supreme Court are available in the University of Kentucky College of Law Library. *See also* John Gibeaut, *Mood Altering Verdict*, A.B.A. J., Aug. 1996, at 18; Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1229-34 (delivering an amusing but overstated account of the case).

[10] *See Potter*, 926 S.W.2d at 451.

The wounded and the estates of the deceased sued numerous defendants, including Lilly. The cases were consolidated in No. 96-CI-06033, styled *Fentress v. Shea Communications*[11] in Kentucky's Jefferson Circuit Court, and assigned to Circuit Judge John Potter. Other than Lilly, all defendants settled or were dismissed prior to trial.[12]

The plaintiffs claimed that Prozac substantially contributed to Wesbecker's homicidal state of mind on that tragic September day. Their theory was that some individuals become agitated and violent when they start taking Prozac; that Lilly should have warned health providers and prospective consumers of this risk and recommended close monitoring after initiation of use; and that the tragedy would not have occurred if Wesbecker had been monitored by the physician prescribing the drug.[13] Lilly, of course, took issue with the plaintiffs' theory of the case.

The trial, which began on September 26, 1994, was trifurcated. The first phase was to determine if Prozac was unreasonably dangerous and the extent, if any, to which Prozac contributed to the deaths and injuries of the Standard Gravure victims.[14] The second phase, to be tried before the same jury, would decide the issue of punitive damages. The third phase, tried before a different jury, would assess compensation.[15]

On December 7, as the first phase drew to a close, Judge Potter ruled that the plaintiffs would be allowed to introduce evidence that Lilly was sanctioned in 1985 for failing to tell the Food and Drug Administration ("FDA") of adverse incidents arising from the use of Oraflex.[16] Oraflex was an arthritis drug made by Eli Lilly that had subsequently been taken off the market. Judge Potter allowed the Oraflex evidence because he found that Lilly had opened the door to this evidence by stressing the company's cooperation with the FDA in obtaining approval of Prozac.[17]

During the evening of December 7, the attorneys for the plaintiffs and defendant entered into a secret and unusual agreement. The terms of the agreement, which were later reduced to writing, were as follows:

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[11] Fentress v. Shea Communications, No. 96-CI-06033 (Jefferson Cir. Ct. verdict returned Dec. 12, 1994).

[12] *See Potter*, 926 S.W.2d at 451.

[13] *See* Winkler v. Eli Lilly, 101 F.3d 1196, 1199 (7th Cir. 1996) (describing the events in *Fentress*).

[14] *See Potter*, 926 S.W.2d at 451.

[15] *See id.*

[16] *See id.* at 451-52.

[17] *See id.* at 452.

1) All terms and conditions were subject to the jury reaching a verdict; the agreement was a nullity if the jury was hung or the case were otherwise mistried.

2) The parties would submit no more evidence, including the Oraflex evidence.

3) The parties would not appeal the jury's decision.

4) Lilly could renew its motion for a directed verdict.

5) In the event of a jury verdict for plaintiffs, Lilly would pay half of the plaintiffs' costs.

6) In the event of a jury verdict for plaintiffs assessing Lilly's liability between 0% and 30%, Lilly would pay the plaintiffs $X (the "sum certain").

7) In the event of a jury verdict for plaintiffs assessing Lilly's liability between 31% and 50%, Lilly would pay the plaintiffs 1.25X.

8) In the event of a jury verdict for plaintiffs assessing Lilly's liability between 51% and 100%, Lilly would pay the plaintiffs 1.75X.

9) The plaintiffs would decide how the money was to be divided between them.

10) Lilly would take care of the subrogation claims of the workers' compensation carrier.

11) The fact of the agreement and the terms of the agreement were to be and remain strictly confidential.[18]

Thus, *if the jury reached a verdict*, the agreement assured the plaintiffs of at least X dollars while capping Lilly's exposure at $1.75X. It was not a typical high-low agreement[19] because the plaintiffs were not free to take the bottom figure and end the litigation. The agreement required the plaintiffs to try the case until a verdict was reached (or the case was dismissed on Lilly's motion). As became apparent later, the agreement was structured as it was so that Lilly would be able to point to a defense verdict as an exoneration of Prozac.[20]

On December 8, Judge Potter met with the attorneys to discuss the Oraflex evidence, which had been the subject of his ruling the day before.

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[18] *See* Summary of Verbal Agreement (on file with author).

[19] *See, e.g.*, Stewart v. M.D.F., Inc., 83 F.3d 247, 249-52 (8th Cir. 1996); Hoops v. Watermelon City Trucking Co., 846 F.2d 637, 639-40 (10th Cir. 1988) (defining a high-low agreement as one in which the parties have agreed that the defendant will pay the plaintiff at least as much as the low figure but no more than the high figure).

[20] *See* Brief for Appellant app. 9, Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996) (No. 95-SC-000580) (setting forth Affidavit of Lisa Mullins Parker).

However, plaintiffs' counsel announced that he would not offer the evidence at the liability stage but would instead "reserve the offering of the Oraflex documents that have been previously tendered for admission into evidence, reserve that for admission into the punitive damages phase, if any."[21] Defense counsel added that the proof was complete and ready for argument.[22]

At this point, by Judge Potter's order, the attorneys and judge went off the record for a brief discussion. It is unfortunate that the discussion was not recorded because the attorneys evidently believed that Judge Potter thought there was an agreement but that he did not want to know the details of the agreement.[23] Judge Potter filed an affidavit in the Kentucky Court of Appeals in which he summarized the off-the-record conversation as follows:

> I either asked the parties if "money had changed hands" or stated that I assumed that "money had changed hands." In response I was told by the attorney for one side (with the other side present) or by both sides that money had not changed hands. Both sides then stated that a "justiciable" controversy remained.[24]

The affidavits of the lawyers present a somewhat different story. Paul Smith, the plaintiffs' lead counsel, filed an affidavit which states:

> Judge Potter stated that he anticipated that the Plaintiffs might decide not to offer the Oraflex evidence, and that he had spoken with either another judge or another lawyer with whom he consulted regularly, and whose opinion he respected, and that they concurred that there was nothing improper or irregular concerning our decision to not introduce the evidence, even if money had changed hands. What Judge Potter did ask was whether or not there were still issues to go to the jury. I specifically remember this because I was the individual that used the term "justicia-

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[21] Brief for Appellant app. 3, *Potter* (No. 95-SC-000580) (setting forth Transcript, at 4, Fentress v. Shea Communications (Jefferson Cir. Ct. proceedings of Dec. 8, 1994) (No. 96-CI-060033)).

[22] *See id.*

[23] *See, e.g.*, Appellees' Reply Brief app. G, *Potter* (No. 95-SC-000580) (setting forth Affidavit of Edward H. Stopher, Fentress v. Potter (Ky. Ct. App. 1995) (No. 95-CA-001215)).

[24] Brief for Appellant app. 2, *Potter* (No. 95-SC-000580) (setting forth Affidavit of Judge John W. Potter, *Fentress* (No. 95-CA-001215)).

> ble" mentioned in Judge Potter's affidavit. I assured Judge Potter that there were indeed justiciable issues to be submitted to the jury.[25]

Irvin Foley, another of the plaintiffs' lawyers, remembered Judge Potter saying that it was not important if money changed hands.[26] Joe Freeman, a defense attorney, recalled Judge Potter saying the he did not want to know if money changed hands.[27] Lawrence Myers, another defense attorney, remembered Judge Potter saying there was nothing unethical about an agreement to omit the Oraflex evidence and he did not want to know if there had been payment in consideration of the agreement.[28]

The court reporter remembered Judge Potter taking the proceeding off the record after Smith, the plaintiffs' lead counsel, said he would not introduce the Oraflex evidence. According to this reporter, Judge Potter then said that he had anticipated such a decision, that he had consulted with another judge, and that he saw nothing wrong with an agreement to leave certain evidence out.[29] The court reporter remembered the attorneys telling Judge Potter that the case was definitely going to the jury.[30]

Based on these affidavits, it is fair to conclude that Judge Potter had been put on notice that some kind of agreement had been reached with regard to the Oraflex evidence. Apparently, Judge Potter thought that the defendants had agreed to pay the plaintiffs something in return for not introducing the Oraflex documents. He was not, it seems, aware of the rest of the agreement: the high-low agreement, the requirement that there be a verdict, and that there would be no appeals and no further stages of the trial. He did not ask the attorneys what they had agreed to, and they apparently thought he did not want to know. When he went back on the record, Judge Potter said he would bring the jury in and tell them that the attorneys had agreed to submit the case without further evidence.[31]

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[25] Appellees' Reply Brief app. D, *Potter* (No. 95-SC-000580) (setting forth Affidavit of Paul L. Smith, *Fentress* (No. 95-CA-001215)).

[26] *See id.* app. G (setting forth Affidavit of Irvin D. Foley, *Fentress* (No. 95-CA-001215)).

[27] *See id.* (setting forth Affidavit of Joe C. Freeman, *Fentress* (No. 95-CA-001215)).

[28] *See id.* (setting forth Affidavit of Lawrence J. Myers, *Fentress* (No. 95-CA-001215)).

[29] *See id.* (setting forth Affidavit of Julia K. McBride, *Fentress* (No. 95-CA-001215)).

[30] *See id.*

[31] *See id.* app. E (setting forth Transcript, at 5, Fentress v. Shea Communications (Jefferson Cir. Ct. proceedings of Dec. 8, 1994) (No. 96-CI-060033)).

The case was argued to the jury on December 9, 1994. Three days later, the jury found Eli Lilly not to be at fault.[32] Lilly broadcast the verdict as proof of Prozac's safety. An affidavit filed in the court of appeals summarized the press releases:

> "Lilly's chairman, Randall L. Tobias, said in a statement that the company now had 'proven in a court of law . . . that Prozac is safe and effective.' "[33]
>
> "The verdict was crucial to Lilly because Prozac is the company's best-selling drug. . . . A verdict against Prozac could have been a public relations disaster for Lilly."[34]
>
> "A jury's verdict clearing Prozac of inciting a Louisville man to mass murder has lifted a cloud over the anti-depressant and may even boost sales of the Eli Lilly and Co. drug."[35]
>
> " 'I would assume that some of these 160 [other pending Prozac cases] would either be dismissed or just dropped,' in part because of the enormous resources Lilly invested in defending the Wesbecker case, said Ed West, a Lilly spokesman. 'When you peel it all back you get into a question of money. . . . If it becomes apparent it's very difficult to win big money in Prozac suits, this probably sends some message.' "[36]
>
> " 'We feel this was a complete vindication for the drug. It should absolutely answer the question once and for all,' said Lilly lawyer Joe Freeman."[37]

As reported in the court of appeals affidavit, a Lilly trial attorney, appearing on a *Prime Time Court* television program on December 30,

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[32] *See* Potter v. Eli Lilly & Co., 926 S.W.2d 449, 452 (Ky. 1996).

[33] Brief for Appellant app. 9, *Potter* (No. 95-SC-000580) (setting forth Affidavit of Lisa Mullins Parker, *Fentress* (No. 95-CA-001215) (quoting *Jury Rules Out Drug as Factor in Killings*, N.Y. TIMES, Dec. 13, 1994, at A22)).

[34] *Id.* (quoting *Jury Clears Prozac in Killing Spree*, INDIANAPOLIS STAR, Dec. 13, 1994, at A1).

[35] *Id.* (quoting *Verdict May Boost Sales of Prozac*, INDIANAPOLIS NEWS, Dec. 13, 1994).

[36] *Id.* (quoting Leslie Scanlon & Todd Murphy, *Wesbecker Rampage Not Linked to Prozac: Decision May Not Affect Other Cases*, COURIER-JOURNAL (Louisville, Ky.), Dec. 13, 1994, at A1).

[37] *Id.* (quoting *Prozac Not to Blame in Slaying, Jury Says*, USA TODAY, Dec. 13, 1994, at A3).

1994, implied that the company had not paid anything in the Wesbecker case. "'Moderator: Why don't you settle the [pending Prozac cases]? John McGoldrick (Lilly trial attorney): The company feels very strongly that when it is right it defends its medicines.'"[38] In the ensuing dialogue, one of the plaintiff's attorneys goes along with the charade, implying that Lilly had achieved "total victory."[39]

The attorneys made a number of statements to Judge Potter, as well as to the press, which misrepresented the situation. At the time of the off-the-record proceeding, the plaintiffs' lead counsel stated he would reserve the Oraflex evidence to the punitive damages phase, if any, knowing, of course, that the agreement precluded punitive damages.[40] On December 8, 1994, before the case was submitted to the jury, the defense attorneys argued that the compensatory damages phase ought to proceed the punitive damages phase, knowing that under the agreement the trial would have no further phases.[41] The attorneys appeared to concur in Judge Potter's suggestion on December 12 that the case be mediated if there was a plaintiffs' verdict (indicating he did not understand the nature of the agreement).[42] Plaintiffs' attorney asked about a date for the punitive damages trial (which he knew could not occur).[43] Also, attorneys for both plaintiffs and defendant played dumb when Judge Potter asked them on December 12 if they had a "clue" how a juror got the idea that the case had been settled.[44] After the defense verdict, plaintiffs' lead counsel was quoted in the *Indianapolis Star* as saying an appeal would be up to the plaintiffs (when he knew there would be no appeal).[45]

Judge Potter entered a judgment on the jury verdict dismissing the plaintiffs' claims.[46] Then, having gotten wind of the secret agreement,

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[38] *Id.* (quoting *Prime Time Court* (syndicated television broadcast, Dec. 20, 1994)).

[39] *Id.* (quoting *Prime Time Court* (syndicated television broadcast, Dec. 20, 1994)).

[40] *See id.* app. 3 (setting forth Transcript, at 4, Fentress v. Shea Communications (Jefferson Cir. Ct. proceedings of Dec. 8, 1994) (No. 96-CI-060033)).

[41] *See id.* app. 5 (setting forth Transcript, at 54, *Fentress* (No. 96-CI-060033)).

[42] *See id.* app. 7 (setting forth Transcript, at 13-14, *Fentress* (No. 96-CI-060033)).

[43] *See id.* app. 8 (setting forth Transcript, at 16, *Fentress* (No. 96-CI-060033)).

[44] Reply Brief for Appellant app., Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996) (No. 95-SC-000580) (setting forth Transcript, at 23-30, *Fentress* (No. 96-CI-060033)).

[45] *See* Brief for Appellant app. 9, *Potter* (No. 95-SC-000580) (setting forth Affidavit of Lisa Mullins Parker, *Fentress* (No. 96-CI-060033)).

[46] *See Potter*, 926 S.W.2d at 452.

Judge Potter sua sponte moved on April 19, 1995, to correct the judgment pursuant to CR 60.01[47] due to an alleged clerical mistake.[48] He subpoenaed the attorneys to a hearing to determine the accuracy of the court's judgment.

Counsel for both sides united to fight Judge Potter's attempt to smoke out their secret agreement. They sought a writ from the Kentucky Court of Appeals to prohibit Judge Potter from enforcing the subpoenas and proceeding with the CR 60.01 hearing. They also denied there had been a settlement.[49] "'The case was decided by jury verdict. It was not settled.'"[50] The plaintiffs' lead counsel went further. He told the *New Jersey Law Journal* that "'there was no secret settlement. That's absolutely not correct.'"[51] He went on to say he had made a "'judgment call'" to reserve the Oraflex evidence until the punitive damages phase, but "'[u]nfortunately we didn't get to that point.'"[52]

On June 15, 1995, the court of appeals granted the writ of prohibition, reasoning that Judge Potter had lost jurisdiction to correct the judgment.[53] Judge Potter appealed to the Kentucky Supreme Court, which unanimously held that a trial judge has the inherent power to insure that its judgments are "correct and accurately reflect the truth."[54]

> Once the trial judge had reason to believe that there was some absence of accuracy in its judgment so that the judgment did not properly conform to the true facts of the case, the trial judge had a duty, as well as a right, to investigate by means of a hearing to determine that the judgment accurately reflected the truth. The trial judge has inherent power to execute this responsibility.[55]

The court went on to say that the inherent power of the court goes beyond actual fraud to encompass "bad faith conduct, abuse of judicial process, any deception of the court and lack of candor to the court. . . .

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[47] *See* KY. R. CIV. P. 60.01.

[48] *See Potter*, 926 S.W.2d at 452.

[49] *See id.*

[50] Affidavit of Lisa Mullins Parker, *Fentress* (No. 96-CI-060033) (quoting *Eli Lilly Settled Prozac Case*, INDIANAPOLIS STAR, Apr. 21, 1995, at E1).

[51] *Id.* (quoting *Kentucky Fried Verdict Up for Grabs*, N.J. L.J., May 15, 1995).

[52] *Id.* (quoting *Kentucky Fried Verdict Up for Grabs*, N.J. L.J., May 15, 1995).

[53] *See Potter*, 926 S.W.2d at 452.

[54] *Id.* at 453.

[55] *Id.*

Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process."[56] The court then directed Judge Potter to hold a hearing to determine the "true nature of the settlement between the parties so as to ensure the integrity and accuracy of the judgment of the court."[57]

Note that the court and Judge Potter characterized the agreement of December 8 as a "settlement."[58] The attorneys involved, however, rejected that characterization. As reported in the press in May 1995, when the attorneys sought a writ of prohibition from the court of appeals, "[b]oth sides . . . adamantly maintain there was no settlement or any agreement that settled or decided the question of Lilly's liability. 'The issue of liability,' both parties say in the writ of prohibition, 'was resolved only by the jury verdict.' "[59] The attorneys asked the Kentucky Supreme Court to modify the Potter opinion to remove the characterization of the agreement as a "settlement." The court denied the motion.[60] A year later, a Lilly spokesman defended the agreement and insisted that it was not a settlement. "If a settlement had happened, why would we want it to go to a jury?"[61]

After the supreme court ruling, Judge Potter appointed an assistant attorney general as friend of the court to investigate the circumstances leading up to and surrounding the agreement. The friend of the court investigated and filed a comprehensive report, which was made part of the circuit court record.[62] On the joint motion of the parties, Judge Potter filed an amended judgment on March 24, 1997, indicating that the case had been settled. He then withdrew from the case.[63] Except for the amount paid by Lilly (acknowledged to be substantial), the papers and pleadings in the case were unsealed.[64]

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[56] *Id.* at 454.

[57] *Id.*

[58] *Id.*

[59] Affidavit of Lisa Mullins Parker, Fentress v. Potter (Ky. Ct. App. 1996) (No. 95-CA-001215) (quoting *Kentucky Fried Verdict Up for Grabs*, N.J. L.J., May 15, 1995).

[60] *See* Order, Potter v. Fentress (Ky. Oct. 18, 1996) (No. 95-SC-580-MR) (copy on file with author).

[61] Gibeaut, *supra* note 9, at 18.

[62] *See* Letter from Ann M. Sheadel, Office of the Attorney General, to Judge John Potter et al. (Feb. 10, 1997) (on file with author).

[63] *See Court Ruling Means Prozac Settlement to Remain Secret*, CINCINNATI ENQUIRER, Jan. 7, 1998, at B02.

[64] *See* Order, Fentress v. Shea Communications (Jefferson Cir. Ct. entered on Dec. 23, 1996) (No. 96-CI-06033) (copy on file with author).

In January 1998, Judge Edwin Schroering, who inherited the case after Judge Potter recused himself, dismissed the case as settled.[65] In ending the legal controversy, Judge Schroering refused to order the amount paid to be revealed, holding that such a revelation would cause irreparable injury to Lilly.[66]

Why did the parties enter into the secret settlement? The plaintiffs' motivation is obvious. Wesbecker intentionally shot his victims. To hold Lilly liable, the jury would have to believe that Prozac caused him to act as he did. Prozac was and is a widely-used and effective anti-depressant. It had been approved by the FDA. Wesbecker, who had a history of mental illness, had threatened his co-workers before he started taking Prozac. The plaintiffs must have known that the chances of the jury finding Lilly liable were slim. The settlement guaranteed them a substantial sum even if the jury found no liability.

Lilly's motivation is more subtle. Lilly apparently wanted to take a Prozac case to trial in the hope that a defense verdict would deter litigation.[67] Lilly wanted a public relations victory but did not want to expose itself to a huge damage award. The arrangement thus restricted damages to a maximum of $1.75X, where X represents the sum that Lilly promised to pay if it was exonerated. The most that Lilly could have been liable for was an additional 75% of X.[68] The arrangement worked as Lilly had hoped. There was a defense verdict, and Lilly could thus crow that the jury had exonerated the product and imply that no money had been paid to the plaintiffs. It obviously would not have deterred potential plaintiffs to announce that Lilly had paid the plaintiffs a substantial sum even though exonerated by the jury.

Of course, the public relations effect was not what Lilly sought. When Judge Potter sniffed out the secret agreement, the resulting publicity undid the deterrent effect of the verdict and raised questions about Lilly's ethics.[69]

In retrospect, it is clear that the attorneys erred in not telling Judge Potter about the agreement. This error was magnified by misstatements to the court, which appear to be the result of the attorneys assuming that Judge Potter did not want to know about the agreement or that he could not be trusted to keep the agreement secret.

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[65] *See Settlement in Prozac Case to Remain Secret, Judge Rules*, LEXINGTON HERALD-LEADER (Lexington, Ky.), Jan. 7, 1998, at B4.

[66] *See id.*

[67] *See id.* James Burns, a Lilly lawyer, acknowledged that the jury verdict "was used to discourage others from pursuing litigation against Prozac." *Id.*

[68] *See supra* note 18 and accompanying text.

[69] *See* Gibeaut, *supra* note 9, at 18.

## II. ATTORNEYS SHOULD BE REQUIRED TO DISCLOSE PROCEDURAL INFORMATION

It is often said that lawyers are officers of the court.[70] While some have used that term to refer to attorneys' ethical obligations generally, it more commonly refers to lawyers' obligations to the judicial system. These obligations may sometimes supersede lawyers' obligations to their clients.[71] The assumption, which often is at odds with reality, is that attorneys will strive to do justice rather than simply to win.[72] As Professor Gaetke notes, by calling themselves officers of the court, lawyers claim that they are more than mere agents of their clients.[73]

> The organized bar's explicit and repeated characterization of lawyers as officers of the court clearly conveys the impression that the model strongly influences the balance created by the existing law of legal ethics. Certainly that impression is an appealing one for the profession to create. The virtuous overtones of the officer of the court label and the positive public image that it generates accrue directly to the lawyers themselves. By asserting that their profession is somehow imbued with a public or judicial element, lawyers distinguish themselves favorably from other occupational groups that serve their own clientele as paid agents, concerned only with their principals' narrow private interests. The characterization allows lawyers to emphasize to all who will listen the public nature of their calling, as well as their critical role in the serious matters of society.[74]

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[70] *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 64 (1992); Gentile v. State Bar, 501 U.S. 1030, 1072 (1991). A Westlaw search of the federal courts database discloses more than 250 opinions since 1990 referring to lawyers as "officers of the court." Search of Westlaw, ALLFEDS database (May 13, 1999).

[71] *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 42 (1989). In *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1305 (1998), for example, a federal court of appeals upheld a trial judge's order for an attorney to remove a political button. "As an officer of the court," the lawyer had no right to insert his political views into the controversy. *Id.* at 27.

[72] *See In re* Bruce Lindsey, 158 F.3d 1263, 1285 (D.C. Cir.), *cert. denied sub nom.*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) ("Necessitated by the nature of the lawyer's function, the attorney-client privilege enables the lawyer as an officer of the court properly to advise the client, including facilitating compliance with the law.").

[73] *See* Gaetke, *supra* note 71, at 43.

[74] *Id.* at 44-45.

The disciplinary codes promulgated by the American Bar Association (the Model Code of Professional Responsibility and the Model Rules of Professional Conduct) require attorneys to observe certain rules of litigation behavior.[75] This Article opines that judges have a right to expect attorneys to voluntarily disclose information which can fairly be characterized as relating to "procedural" matters, i.e., not relevant to the merits of the controversy. The *Fentress* agreement falls into this category. If judges have a right to expect information about procedural matters to be disclosed, attorneys should have an ethical obligation to volunteer such information. Model Rule 3.3 should be amended to make this obligation explicit.[76]

Model Rule 3.3 presently requires attorneys to volunteer information in three situations: 1) where it is necessary to do so to avoid assisting a criminal or fraudulent act by the client;[77] 2) where the judge is apparently unaware of case or statutory law in the controlling jurisdiction directly contrary to the client's position;[78] and 3) in ex parte proceedings where the judge should know of adverse facts in order to rule.[79] In these three contexts, the attorney, as an officer of the court, must volunteer information even if the information is adverse to the client.[80] Model Rule 3.3 would be improved by the following addition: "Rule 3.3 Candor Toward the Tribunal a) A lawyer shall not knowingly:"[81] *(5) fail to disclose to the tribunal relevant and material information about procedural matters of the case known to the lawyer and not disclosed by opposing counsel.* The comment to the new rule might read as follows:

> Obligation to Disclose Information about Procedural Matters
>
> As officers of the court, advocates have a duty to disclose to the tribunal relevant and material information about procedural matters. Tribunals have a right to expect attorneys to reveal information about procedural matters, that is matters which do not affect the merits of the controversy. While no listing can be complete, the following

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[75] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, 7-106 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 3.4, 3.5 (1998). The Model Code was originally promulgated in 1969, and the Model Rules in 1983.

[76] The Model Rules are currently being studied by the ABA's Ethics 2000 Committee. Proceedings can be found in the ABA website at <http://www.abanet.org/cpr/e2k>.

[77] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2).

[78] *See id.* Rule 3.3(a)(3).

[79] *See id.* Rule 3.3(d).

[80] *See* Gaetke, *supra* note 71, at 62-63.

[81] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

should ordinarily be considered procedural: jurisdictional issues, mootness, real party in interest, settlements, identity, procedural errors by the judge not relating to the merits of the controversy, and errors as to the record.

### A. *The Argument Based on the Implicit Agreement of Good Faith and Fair Dealing*

Model Rule 3.3(a)(1) says that "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal."[82] The comment says that there are circumstances where failure to disclose is the equivalent of an affirmative misrepresentation.[83] This Article argues that an attorney is obligated to volunteer information in two situations: 1) where the judge is laboring under a misunderstanding that is attributable, at least in part, to the actions of the attorney; and 2) where disclosure is necessary to correct the judge's mistake about a basic assumption.

In the *Fentress* case, the attorneys failed to meet either obligation. After the in-chambers meeting of December 8, 1994, they knew that Judge Potter misapprehended the agreement. It is clear from the record that he was unaware that the parties had agreed there would be no punitive damage trial or appeal. They had the opportunity to correct his misunderstanding, but they did not. Rather, they reinforced it. When a juror asked about the case having been settled, Judge Potter said it had not and asked if anyone knew what the juror might have heard.[84] The attorneys played dumb. They were under an obligation at that point, if not before, to reveal the agreement because they knew that the agreement was capable of being considered a "settlement," as the supreme court later characterized it.[85]

More fundamentally, however, the attorneys were obliged to tell Judge Potter what they had done. As long as there was a verdict, Lilly would pay the plaintiffs $X but not more than $1.75X. There would be no appeal, no punitive damages trial, and no compensatory damages trial.[86] Judge Potter was entitled to know what they had done in order to manage his calendar

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[82] *Id.* Rule 3.3(a)(1).

[83] *See id.* Rule 3.3 cmt.; *cf.* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 98-412 (1998) (discussing the duty to correct statements which were believed to be correct when made but are later determined to have been incorrect).

[84] *See supra* note 44 and accompanying text.

[85] *See supra* text accompanying note 58.

[86] *See supra* note 18 and accompanying text.

and to consider whether the jury and public should be told of the nature of the agreement. A judge is entitled to know that the parties have entered into a partial settlement.

When an attorney files a complaint or enters a court appearance in some other way and the case is assigned to a judge, a relationship analogous to a contractual one is established between the judge and the attorney, with obligations flowing in both directions. The judge is obligated to be impartial, diligent, courteous, and faithful to the law.[87] As an officer of the court, the attorney has a number of obligations to the judge, among them to plead in good faith,[88] expedite litigation (consistent with the client's interests),[89] disclose false testimony under certain circumstances,[90] and disclose adverse authorities not otherwise made known to the court.[91]

The *Restatement (Second) of Contracts* states that nondisclosure is equivalent to an assertion when a person knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.[92] The *Restatement*'s examples reflect the marketplace's notions of "fair dealing." For example, there is an obligation to reveal latent defects but no obligation to reveal external events which affect value.[93]

If the same standard is applied to lawyers and judges, the question is: what are "basic assumptions"? The nondisclosure of such assumptions should amount to a breach of the obligation to act in good faith and in accord with notions of fair dealing between counsel and the court. The standard should be that lawyers, as officers of the court, will voluntarily tell the judge of procedural information which the judge should have in order to fairly and expeditiously handle the litigation. One basic assumption is that things are as they appear to be. In other words, the parties' actual positions are the same as their apparent positions.

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[87] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

[88] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1998); Gaetke, *supra* note 71, at 62-64.

[89] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2.

[90] *See id.* Rule 3.3(a)(4); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987).

[91] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3).

[92] *See* RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1979).

[93] *See, e.g., id.* § 161 illus. 4, 7.

In *Potter*, what was not disclosed was an agreement which affected the court as well as the parties because the agreement eliminated any punitive and compensatory damages trials.[94] The agreement also reduced the amount in controversy to $.75X, the difference between the low and high figures.[95] Whether or not the jury or the public was entitled to know of the agreement, it is clear that Judge Potter was entitled to know of it. He was entitled to know the amount in controversy, he was entitled to know that there would be no appeal, and he was entitled to know there would be no punitive or compensatory phases.

In two of its present subsections, Model Rule 3.3 requires disclosure of procedural information. Like the Model Code of Professional Responsibility,[96] Model Rule 3.3(a)(3) requires the disclosure of directly adverse legal authority.[97] Adverse legal authority might be procedural or substantive. Professor Gaetke describes the obligation to reveal adverse authority as "the most noteworthy example of the . . . subordination of the interests of the client and the lawyer in favor of those of the judicial system."[98] The adverse effect on a client can be dramatic. Assume a lawyer represents a client who has pled guilty to a criminal offense. Because the client has no record, the judge is inclined toward probation. However, the defense attorney knows that a recently passed law precludes probation for the offense. The judge does not appear to be aware of the change in the law. The defense lawyer is ethically obligated to tell the judge that his client cannot be probated even if the prosecutor is aware of the change in the law and willing to go along with probation. The obligation to reveal runs to the court, not to the opposing party.

While it is suspected that few lawyers would subordinate the client's interests in the above situation,[99] attorneys are theoretically subject to

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[94] *See supra* note 18 and accompanying text.

[95] *See supra* note 18 and accompanying text.

[96] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B) (1980).

[97] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1998). Kentucky is one of the few states which does not require disclosure of adverse authority. The author served on the committee which considered the Model Rules and proposed a set of rules to the Kentucky Supreme Court. The committee recommended adoption of Model Rule 3.3(a)(3), which would have carried forward the disclosure obligation of the Code. For reasons never made clear, the Kentucky Supreme Court rejected the recommendation. *See* KY. SUP. CT. R. 3.3.

[98] Gaetke, *supra* note 71, at 57.

[99] *See* Monroe Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 837 (1982) (citing a study of the District of Columbia Bar in which 93%

sanction if they do not "reveal cases and statutes of the controlling jurisdiction that the court needs to be aware of in order to rule intelligently on the matter."[100] The premise of the rule is that judges have a right to expect the assistance of the attorneys in ascertaining the law. As officers of the court, attorneys must help the judge if the judge is mistaken or unaware of the law. If attorneys are obligated to reveal adverse authority where the client's interests might be harmed, there would seem to be no reason why attorneys should not be required to disclose procedural information that does not involve the merits of the case.

Model Rule 3.3(d) is the other subsection of Model Rule 3.3 which requires disclosure of procedural information. It requires attorneys in ex parte proceedings to inform the judge of all facts known to the attorney which the judge should know about before deciding the matter at issue.[101] The relevant comment states the obvious: there is a need for complete disclosure because the other side is not represented.[102] The comment also reflects the premise of the adversary system: "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; *the conflicting position is expected to be presented by the opposing party.*"[103] It follows that when things are not as they seem–when the parties are no longer as adversarial as they appear–the judge should be aware of that fact.

A 1994 Note in the *Georgetown Journal of Legal Ethics* analyzes Model Rule 3.3(d)–its common law roots, legislative history, and application.[104] Rule 3.3(d) requires disclosure of all material facts in situations where the adversary system cannot be relied on to produce that information. "The 'rare instances' where the Model Rules do utilize the attorney's role as officer of the court to aid in ascertaining the truth tend to be those cases where the adversarial process either breaks down or does not come into play at all."[105] Secret agreements such as the agreement in *Potter*

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of the lawyers surveyed said they would not cite adverse authority).

[100] WILLIAM FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 305-06 (1996) (citing Massey v. Prince George's County, 907 F. Supp. 138, 142 (D. Md. 1995)).

[101] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d).

[102] *See id.* Rule 3.3 cmt.

[103] *Id.* Rule 3.3 cmt. (emphasis added).

[104] *See* Jill M. Dennis, Note, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL ETHICS 157 (1994).

[105] *Id.* at 157.

tend to break down the normal adversarial process. Requiring disclosure of procedural information would thus be consistent with the present disclosure requirements of Model Rule 3.3 and would carry out the implicit promise that attorneys will act as officers of the court rather than as mere agents for their clients.

### B. *Judicial Authority for the Obligation to Disclose*

Occasionally judges are expansive in describing the duty to disclose. For example, Chief Justice Burger, concurring in *Fusari v. Steinberg*,[106] said, "[T]his Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of *any development which may conceivably affect an outcome*."[107] Looking at the situations in which courts have said there is a duty to disclose accomplishes two ends: first, to support the proposition that judges expect attorneys to disclose procedural information; and second, to identify what judges expect to be disclosed and help define procedural information.

### C. *Subject Matter Jurisdiction*

It is axiomatic that subject matter jurisdiction cannot be conferred on a court by agreement.[108] Courts have an independent duty to examine the basis of jurisdiction.[109] In *Richmond v. Chater*,[110] Judge Posner criticized the Social Security Administration for failing to challenge the court's jurisdiction over the plaintiff's claim. "Jurisdiction cannot be stipulated... and lawyers violate their duties as officers of the court when they agree to suppress their doubts about the court's jurisdiction."[111]

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[106] Fusari v. Steinberg, 419 U.S. 379 (1975). In *Fusari*, the plaintiff claimed that he was denied due process by Connecticut's summary termination of his unemployment benefits. The district court declared the Connecticut law unconstitutional, and the state of Connecticut appealed to the Supreme Court. After the district court decision the state amended its procedures to meet the district court's concerns. The Supreme Court remanded the case for reconsideration in light of the change in the law. Justice Powell noted that the parties had failed to inform the Court of the changes. *See id.* at 379.

[107] *Id.* at 390-91 (Burger, J., concurring) (emphasis added).

[108] *See* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).

[109] *See* Gutierrez v. City of San Antonio, 139 F.3d 441, 445 (5th Cir. 1998).

[110] Richmond v. Chater, 94 F.3d 263 (7th Cir. 1996).

[111] *Id.* at 267.

### *D. Mootness and Justiciability*

In an early case,[112] Justice Brandeis said the following about a stipulation which appeared contrary to the facts:[113]

> If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law. If the stipulation is to be treated as an attempt to agree "for the purpose only of reviewing the judgment" below that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."[114]

During World War II, Congress passed price control legislation which authorized the Price Administrator to control rent.[115] An enterprising landlord subsidized a suit by one of his tenants for the purpose of challenging the constitutionality of the Emergency Price Control Act. The tenant never met the attorney, obtained and paid for by the landlord, who filed suit for the tenant against the landlord.[116] The district court held the act to be unconstitutional after a hearing in which the tenant did not appear.[117] On appeal, the United States intervened and complained about the collusive nature of the suit. The Supreme Court agreed, vacated the district court judgment, and remanded with instructions to dismiss the case.[118]

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[112] *See* Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281 (1917).

[113] The parties stipulated that a railroad track was a "private" track. Justice Brandeis thought the record clearly showed the track was not private. *See id.* at 285.

[114] *Id.* at 289-90 (footnote omitted) (quoting California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893)).

[115] *See* United States v. Johnson, 319 U.S. 302, 304-05 (1943) (per curiam).

[116] *See id.* at 303-04.

[117] *See id.* at 303.

[118] *See id.* at 305.

In *Douglas v. Donovan*,[119] the court of appeals had the following to say about the failure of counsel to inform the court of an agreement which rendered the appeal moot.

> Despite the preemptive effect that the settlement agreement has had on the present litigation, counsel for neither Douglas nor the [Department of Labor] properly informed this court of its existence. In the original briefs filed before this court, for example, there is barely any mention of the settlement agreement. . . . Even worse, the settlement came to the attention of the court only accidentally at oral argument when Douglas' [sic] counsel was about to conclude his statement. Until that last minute reference, neither party mentioned the settlement agreement during thirty minutes of oral argument.
>
> As officers of this Court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of the litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large.[120]

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[119] Douglas v. Donovan, 704 F.2d 1276 (D.C. Cir. 1983). The plaintiff in *Douglas* filed suit in federal court to enjoin the Department of Labor from honoring a state garnishment of his Federal Employees' Compensation Act ("FECA") benefits. The plaintiff's ex-wife had obtained a garnishment order from an Iowa state court for back alimony and child support. *See id.* at 1277. The district court held that FECA benefits were not subject to garnishment and ordered the return of monies which had been deposited with the court clerk. *See id.* at 1278. The Department of Labor appealed. While the case was on appeal, the plaintiff and his wife settled their differences. They divided the money in the registry of the district court and agreed on a child support and alimony figure to be paid directly to the wife by the Department of Labor. *See id.*

The Department of Labor was a party to the settlement (it agreed to pay benefits directly to the wife) but did not want the case dismissed for mootness. *See id.* at 1279. The department wanted the court of appeals to decide whether or not FECA benefits were subject to garnishment. Apparently, it persuaded Douglas, the plaintiff, to continue the litigation (as appellee on appeal) even though the outcome could not affect Douglas since Douglas and his wife had agreed that their settlement would not be affected by the outcome of the appeal. *See id.*

The court of appeals did not hesitate to dismiss the appeal as moot when it realized that the plaintiff and his wife had settled their dispute. The court noted that the settlement had made it "virtually impossible" for there to be a future garnishment of Douglas's FECA benefits. *Id.*

[120] *Id.* at 1279.

Clearly, attorneys must inform courts when a case is moot or non-justiciable.[121]

### *E. Real Party in Interest*

The issue of real party in interest has arisen, interestingly, in non-collusive cases involving the death of a party. In *Kentucky Bar Ass'n v. Geisler*,[122] an attorney was publicly reprimanded for accepting a settlement offer without telling opposing counsel and the court that her client had died. The court based its opinion in part on the fact that, without court appointment, the attorney lacked authority to act for the estate which had become the real party in interest.[123]

### *F. Identity of the Parties*

In several cases, attorneys have substituted "ringers" in an attempt to cause witnesses to identify the ringer as the person who committed the crime.[124] *United States v. Thoreen*[125] is notable because Thoreen, the defense attorney, was convicted for criminal contempt for his part in the ruse. Thoreen's client was charged with illegal salmon fishing.[126] Thoreen dressed a man named Mason in the same kind of clothing as the client, Sibbett, had been wearing and seated him at counsel table.[127] Sibbett wore business clothes and sat in the spectator seats. Thoreen pretended Mason

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[121] *See, e.g.*, Muhammad v. City of New York Dep't of Corrections, 126 F.3d 119, 123 (2d Cir. 1997) ("Such an agreement disserves the courts: lawyers, who are officers of the court, should not undertake to overlook jurisdictional questions that courts in the first instance expect the parties to raise.").

[122] Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578 (Ky. 1997).

[123] *See id.* at 579 (following ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995)); *see also* Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (stating that although a lawyer has a duty to represent his client zealously, he owes a duty to the court to inform it of the death of a plaintiff); *In re* A, 554 P.2d 479, 481 (Or. 1976) (discussing deponent's statement that his mother was in Salem but failure to mention that she was *buried* in Salem).

[124] *See, e.g.*, People v. Simac, 603 N.E.2d 97, 100 (Ill. Ct. App. 1992), *aff'd by* 641 N.E.2d 416 (Ill. 1994); United States v. Sabater, 830 F.2d 7, 8 (2d Cir. 1987).

[125] United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981).

[126] *See id.* at 1336.

[127] *See id.*

was the client and did not correct the judge when the judge referred to Mason as Sibbett.[128] After government witnesses misidentified Mason as Sibbett, Thoreen revealed the substitution.[129] The government sought and obtained leave to reopen, the witnesses were recalled and identified Sibbettt as the defendant, and Sibbett was convicted.[130]

Thoreen was then convicted of criminal contempt for his part in deceiving the court as to the identity of the person at counsel table. In upholding the conviction, the court of appeals said that Thoreen's conduct was "contumacious misbehavior" that obstructed justice.[131] The court held that Thoreen deceived the judge in order to trick the witnesses.[132] The court suggested that Thoreen should have asked the judge to allow an experiment in which the witnesses would have had to pick the defendant out of a group.[133]

In *Thoreen*, the attorney played an active role in deceiving the judge. Recent cases[134] and ethics opinions say–properly–that an attorney may not represent a client operating under an alias unless the client consents to the revelation of his true identity to the court.[135] In litigation, an attorney speaks on behalf of a client. By so doing, the attorney implicitly warrants that the client is who he appears to be. When arrested for traffic offenses, drivers sometimes produce false identification. The drivers in *State v. Casby*[136] and *Attorney Grievance Committee v. Rohrback*[137] maintained their false identities to avoid the consequences of their past driving convictions. The attorneys in these cases went along with the fraud. The result? In *Casby*, the attorney was convicted of a criminal offense.[138] In *Rohrback*, the attorney was suspended for forty-five days.[139] In both cases, the attorneys had assisted the fraud reluctantly.

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[128] *See id.*

[129] *See id.* at 1336-37.

[130] *See id.* at 1337.

[131] *Id.* at 1339.

[132] *See id.*

[133] *See id.* at 1342 n.7.

[134] *See, e.g.*, Attorney Grievance Comm. v. Rohrback, 591 A.2d 488, 494 (Md. 1991).

[135] *See* FORTUNE ET AL., *supra* note 100, at 310 n.14 (citing Fla. Op. 90-6 (1990), Va. Op. 1331 (1990), Mass. Op. 89-1 (1989), Pa. Op. 89-140 (1989)).

[136] State v. Casby, 348 N.W.2d 736, 737 (Minn. 1984).

[137] *Rohrback*, 591 A.2d at 488.

[138] *See Casby*, 348 N.W.2d at 737.

[139] *See Rohrback*, 591 A.2d at 488.

There is no evidence that the prosecutors in these cases were aware of the defendants' true identities. Nonetheless, the result should be the same even if the prosecutor is aware of the defendant's identity. The judge has a right to assume that counsel will set the record straight if the defendant is someone other than who he appears to be.

### *G. Secret Agreements*

This Article argues for the proposition that attorneys have an obligation to reveal any secret arrangement which alters the positions of the parties. The authority for that obligation is found in the "Mary Carter" cases, named after a Florida case that first considered a secret agreement in which the plaintiff settled with a defendant in return for the defendant remaining in the litigation and undermining a co-defendant.[140] Such agreements are designed to mislead the jury into thinking that the settling defendant is antagonistic to the plaintiff and aligned with the co-defendant when in fact the settling defendant is helping the plaintiff.[141] "A typical Mary Carter agreement usually has the following features: a. secrecy; b. contracting defendant remains in the lawsuit; c. contracting defendant guarantees plaintiff a certain monetary recovery; d. contracting defendant's liability is decreased in direct proportion to the increase in the non-agreeing defendants' liability."[142]

Mary Carter agreements are designed to unfairly prejudice non-agreeing defendants. In some instances, the plaintiff and settling defendant have attempted to conceal the settlement not only from the jury but also from the judge and opposing counsel. Courts considering Mary Carter agreements uniformly hold that there is a duty to disclose such agreements to the judge and that the obligation runs not just to opposing counsel but to the court as well.[143]

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[140] Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. App. 1967). "Mary Carter" agreements have been the subject of much discussion. *See, e.g.*, John Benedict, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368 (1987); J. Michael Phillips, *Looking Out for Mary Carter Agreements*, 69 WASH. L. REV. 255 (1994); John Quinn & Thomas Weaver, *Mary Carter Agreements*, LITIG., Spring 1994, at 41.

[141] *See* FORTUNE ET AL., *supra* note 100, at 318.

[142] Hoops v. Watermelon City Trucking, Inc., 846 F.2d 637, 640 (10th Cir. 1988).

[143] *See* Lytle v. Stearns, 830 P.2d 1197, 1203 (Kan. 1992) (holding that counsel must promptly disclose such an agreement to opposing counsel and the court); City of Houston v. Wallace, 585 S.W.2d 669, 672 (Tex. 1979) (holding that where employee had no interest in the consolidated case due to settlement, candor required that the court be informed to prevent submission of meaningless issues to the jury); Mustang Equip., Inc. v. Welch, 564 P.2d 895, 898 (Ariz. 1977) (stating that the agreement must be communicated both to opposing counsel and to the court prior to trial); Faber v. Roelofs, 212 N.W.2d 856, 861 (Minn. 1973) ("When a plaintiff settles with one of several defendants, fairness requires that full

If the agreement is revealed, the judge decides whether the jury is entitled to know the true relationship of the litigants.[144]

In settling its liability for the Exxon Valdez oil spill, Exxon paid seven Seattle food processors (the "Seattle Seven") $70 million in compensatory damages.[145] The secret agreement required the Seattle Seven to "take all reasonable, lawful and ethical . . . actions to assist Exxon so that Exxon may recapture or obtain a credit or offset for any punitive damages . . . to which Claimants may have been entitled."[146] The agreement required the Seattle Seven to participate in any class action for punitive damages, to assert a claim for a share of the damages, and to assign its share to Exxon, which would have the effect of creating a credit for Exxon against the total punitive damages award.[147] The jury fixed punitive damages at $5 billion.[148] The Seattle Seven fulfilled their share of the bargain by asking for 14.9% of the punitive damages, or $745 million.[149] If this claim had been sustained, Exxon would have benefitted by obtaining a credit against punitive damages of more than ten times what it had paid the Seattle Seven.

After finding out the details of the secret agreement, the presiding judge held that the Seattle Seven would not share in the punitive damages, and thus

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disclosure be made to the trial court and to all parties so that all will know the posture from which each tries the lawsuit.").

[144] *See* Ratterree v. Bartlett, 707 P.2d 1063, 1074-75 (Kan. 1985); FORTUNE ET AL., *supra* note 100, at 318-19. In *Dosdurisan v. Carsten,* 624 So. 2d 241 (Fla. 1993), the Florida Supreme Court went further. The court held that such agreements are void as against public policy, not only because of the unfairness to the non-settling defendant, but because of the necessity to "make misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship." *Id.* at 244. One of the basic assumptions is that the parties' litigating positions are as they are represented to be; that they are not simulating antagonistic positions in order to obtain a tactical advantage. The attorneys must tell the judge if their positions are other than as they appear to be. *See id.*

[145] *See In re* The Exxon Valdez, No. A89-0095-CV, 1996 WL 384623, at *7 (D. Alaska June 11, 1996), *aff'd*, 161 F.3d 12 (9th Cir. 1998); *see also* Amy Woods, In re Exxon Valdez*: The Danger of Deception in a Novel Mary Carter Agreement*, 21 SEATTLE U. L. REV. 413 (1997).

[146] *In re The Exxon Valdez*, 1996 WL 384623, at *8.

[147] *See id.* A 1996 amendment allowed the Seattle Seven to keep a small amount of the punitive damages award. *See id.* at *9.

[148] *See id.* at *12.

[149] Under the 1996 amendment, the Seattle Seven would have been entitled to keep $12.4 million, leaving the credit to Exxon at $732.6 million. *See id.* at *9.

Exxon would receive no credit against the award. The judge deemed it "repugnant" and misleading for the parties to withhold this agreement from the court.[150]

## III. APPLICATION OF A RULE REQUIRING DISCLOSURE OF PROCEDURAL INFORMATION

### A. *The Advantage of Having a Rule Requiring Disclosure*

Most lawyers prefer to do what judges expect of them. Lawyers believe that failing to do what is expected of them will harm their reputations. If, as contended in this Article, judges expect lawyers to volunteer information about procedural matters, then they will think badly of a lawyer who fails in this regard. A lawyer may not, however, act in derogation of the client's interest unless: 1) the client consents to the action; or 2) the lawyer is required to so act. The advantage of requiring disclosure is that the lawyer thereby is given an excuse to do the right thing. The lawyer can simply tell the client that there is no choice; disclosure is mandatory.

Several ABA Opinions support this way of thinking. ABA Informal Opinion 86-1518[151] states that a lawyer is not required to tell a client that an opponent, in drafting a document, has made an error in the client's favor. Why? The client has no right to take advantage of the error.[152] ABA Formal Opinion 92-368[153] states that a lawyer should return misaddressed faxes and letters which might contain confidential information without reading them.[154] "Like the ABA informal opinion on drafting errors, ABA Formal Opinion 92-368 provides 'cover' for a lawyer to do the 'right thing'–that is to return the documents unread without giving the client a say in the matter."[155] Clients have no legitimate expectation that their lawyers will read misdirected documents, and perhaps the greatest value of the ABA opinion is to discourage lawyers from allowing their clients to make the call on this issue.[156] Similarly, the rule proposed in this Article would require a lawyer to

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[150] *Id.* at *13.

[151] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1518 (1986).

[152] *See id.*

[153] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992).

[154] *See id.*

[155] FORTUNE ET AL., *supra* note 100, at 196.

[156] *See id.* at 196-97.

disclose procedural information which the lawyer recognizes should in fairness be disclosed.

Requiring disclosure of procedural information would admittedly inject an element of uncertainty into the Model Rules, but there is already uncertainty over what must be disclosed. For example, ABA Formal Opinion 94-387[157] says that a lawyer is not required to disclose that a claim is barred by the statute of limitations, while ABA Formal Opinion 95-397[158] says that a lawyer must disclose the death of a client. Therefore, the proposed rule should only require disclosure in obvious situations: where it is clear that the information does not run to the merits of the controversy, and where the lawyer recognizes that he or she is not entitled to the benefit which will result from nondisclosure. Based on the authorities cited above, information affecting the following matters must be disclosed:

(a) subject matter jurisdiction;
(b) mootness and justiciability;
(c) real party in interest;
(d) identity; and
(e) agreements which alter the relationship of the parties.

The duty to disclose should also extend to the following:

(a) the status of settlement negotiations;
(b) whether or not there is insurance;
(c) judicial procedural errors which could be exploited;[159] and
(d) judicial errors about matters of record.[160]

No attorney should be sanctioned for failing to disclose information unless the information is clearly procedural. For example, consider the following hypothetical posed in ABA Formal Opinion 287:[161]

> In a criminal case, the lawyer learns that the client has a criminal record. At sentencing the clerk tells the judge that the client has no record. The judge then says, "Since you have no record, I'm going to put you on probation." What should the lawyer do? Is the answer different if the judge adds, "Isn't

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[157] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387 (1994) (cautioning that there may be an obligation to disclose if the limitation period affects jurisdiction).

[158] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995).

[159] For example, failure to swear the jury would fall in this category.

[160] For example, the date on which a pleading was filed would belong in this category.

[161] ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).

> that right, counsel?" Does it make a difference if the lawyer learned of the record from the client?[162]

While the Ethics Committee was divided on how to handle the judge's questions, it determined that the lawyer was not required to volunteer information to correct the judge's misunderstanding.[163] The committee recognized that the client's record, while not running to the merits of the charge, contained relevant information *about the client* which the judge might use to the client's detriment.[164]

Attorneys reading this Article can probably think of information that, in the relevant circumstances, could be legitimately classified as either procedural or substantive. These are the tough calls. While a judge might be offended by nondisclosure in such a case, the attorney may not disclose without the consent of the client. The default rule in such a case is nondisclosure because attorneys are bound by the duties of confidentiality[165] and loyalty[166] not to reveal adverse information without client consent.

## CONCLUSION

Judges have a right to expect attorneys to tell them about procedural matters, matters not running to the merits of the controversy. However, in the absence of a rule requiring such disclosure, attorneys cannot disclose information if the disclosure might harm the client or strip away an advantage. This Article began with an example, drawn from a real-life experience, in which I did not tell the judge that the jury had not been sworn. I knew that the judge would reasonably expect to be told, and I knew the judge would think it unfair of me not to tell him. In the absence of a rule requiring disclosure, however, I could not give up the procedural "hole card," which could be played for my client's benefit at a later time. I should have been able to tell the judge he had not sworn the jury, but I could not do so. If there had been a rule requiring disclosure of procedural information, I would have been able to act as an officer of the court and do the right thing.

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[162] *Id.*, *reprinted in* FORTUNE ET AL., *supra* note 100, at 308.
[163] *See id.*
[164] *See id.*
[165] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).
[166] *See id.* Rules 1.1, 1.2.