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SUMMARY KEYWORDS

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00:01

Okay, let's get started. Thank you everyone for braving the rain and coming down and spending the next hour or so with me talking about legal ethics. State Bar thinks it's a good idea for you to have these chats from time to time, exactly for them every three years. So I presume that many of you are looking for this credit to fulfill your MC le obligations. And most likely you're in the reporting group that's going to report that to the State Bar at the end of January. And I'm just guessing. Just a related note, the State Bar is very interested in being sure that you fulfill your MC le requirements. You must remember that fulfilling those requirements means not only taking the required number of courses, it also remains It also includes obtaining a record of your attendance and keeping that record of attendance. If you are unfortunate enough to be audited by the State Bar last year, out of the last three year compliance period, about 6000 lawyers were randomly audited for MC Li compliance. And if you are unable to show that you have complied with your m CLE requirements, you'll have a chance to make up those credits, not pro tunc. so to speak, and pay a fee. What you must not do under any circumstances ever is certify your MC usually compliance to the State Bar unless you have a taken the courses and B have the records to show that you took the courses. In the last five years about 50 attorneys have been disciplined for lying to the State Bar about their MC Li compliance. And the standard discipline that the State Bar asked for is a 30 day vacation from the practice of law, which is public discipline. Those of you who follow discipline matters. If you read the California bar journal, every month, you will see a number of attorneys who have been capped by the state bar for lying to the State Bar who sit in the state bars view about their amsale e compliance. So again, do not certify your compliance unless you've actually taken the courses. And you have the certifications to show that you took the courses. Moving on to the identify topic for today, the name of our presentation today is Pretty Little Liars. title of a movie that came out, it seemed to me an appropriate title to snag for this presentation. Because what we're going to talk about for the next hour or so is dealing with

dishonest clients, and what the various ramifications are, in principle in the rules of professional conduct. This is very much in the formal part of this presentation, it's very much going to be a rules centered discussion. However, there are many aspects of this problem beyond what's in the rules. So I want to encourage questions I want I want to encourage comments. I even want to encourage war stories. If you have a war story about a dishonest client, you'd like to share. Because sometimes learning from other people's experiences, even negative experiences can be a very valuable thing. I would caution you to be sure if you wish to share such a story that you don't reveal any confidential client information. Just censor out all the details and and maybe talk about the the experience you had with the dishonest client. I'll share my story first. And it's not a very dramatic story. When I left the State Bar went into private practice. One of my very first clients was a civilian, as I call them a non attorney that had been the client of an attorney for various business ventures that he was involved in. And he hired me to do a fee arbitration with his former attorney. being new to private practice, of course, I was quite eager to have a client and I spent a lot of time preparing for the fee arbitration proceeding. And in the course of that I asked my client multiple times. Did you have a written fee agreement with the lawyer?

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At least three times I asked that question and we three times I was told yes on that note, he told me No I did not have a written fee agreement with the lawyer never showed me written fee agreement. Never had a written fee agreement. So we go into the fee arbitration. And it's Mike, since my client had bought the fee arbitration, he goes up first, his former lawyer, the opposing party, in this proceeding, walks up to him, thrust the document under his nose, and says, Do you recognize this? Yes, I do. What is that? Well, that's the fee agreement, you had me sign. And the fee arbitration went downhill from there. You might imagine we lost. I've often pondered that story through the years, and tried to understand why my client would apparently misrepresent such an important fact to me, I've never been able to get to the bottom of that. And it's puzzled me to this day. Clients are strange creatures. They sometimes have a flexible view of reality, if you will. And sometimes when that flexible view of what's real and what's not real, gets them in trouble. They come and see us. So we're going to talk a little bit about what the rules of Professional Conduct say about that, and what the rules of professional conduct the rules that you're bound to obey, under penalty of professional discipline. Say about how you might deal with some of these Pretty Little Liars. When they show up, or at least when they're live show up. Let's start out talking about the fundamental value of honesty. In the legal profession, this may seem like common sense, and it is to some degree common sense. It's stuff everybody learned in law school. But it's not a bad idea to review that knowledge from time to time. It's not directly concerned with what we do with how we deal with the dishonesty of our clients. But there are some crossover issues that occasionally show up. So it's good, it's a good reminder that honesty is one of the most fundamental rules of ethics for an attorney. In fact, in the act of dishonesty, corruption or moral turpitude, on the part of a lawyer is a cause for disbarment or suspension

under the BNP code, section 6106. That includes it in the act of dishonesty, corruption, moral turpitude, that occurs within the practice of law, or outside the practice of law. attorneys have been disciplined, for instance, by writing bad checks on their personal checking accounts, where they knew there were no funds, a form of fraud, passing bad checks or cutting checks. Even though it has nothing to do with the practice of law, it still is a violation of this statute and you're calm and your duty of honesty toured the world at large, not only the court, not only the client, but everybody else. BMP Code Section 6106, you might think that's such an important ethical duty would be set forth in our rules of professional conduct. But in fact, if you look at our current rules, you're not going to see the duty of honesty, anywhere in the rules. And the reason for that is that we are, we all know that we are uniquely blessed living in California for many reasons, in the world of professional ethics were uniquely blessed because we, unlike most other states, we not only have rules of professional conduct, we have a whole overlay of other law that appears in the state bar act. BMP Code Section 6000. At sec, some of you may be familiar with some of those rules. That's where 6106 says, and there are many statutes within this this body of statutory law that directly govern your behavior as lawyers and there are many statutes that on their own terms provide for professional discipline. If you read nothing else, the dangerous thing to say, because I want you to read a lot of stuff you need there's a lot you must keep up on. If but if nothing else, if you don't know the ethical rules, as stated in black letter law, you must be familiar with the rules of professional conduct of the State Bar. And you must be familiar with at least Business and Professions Code Section 6068, which are the statutes that provide for the duties of an attorney. There's a lot more there's a whole lot more to look that that you probably did, you know should know about you are after all charged with knowing it, but at the very least if you take nothing else away from this presentation, Understand that those two bodies of law are central to your knowledge of professional ethics. And in fact, attorneys are disciplined. Many attorneys have been disciplined solely because they were ignorant of what the rules were. So

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a little off topic, but kind of a preface to our discussion. So read that stuff. Now among the duties of an attorney that appear in Section 6068, there are a number of them. There is this wonderful language that appears in Section 606 ad, it is the duty of an attorney to do all of the following. Because a bunch of sections D section says it is the duty of director to employ for the purpose of maintaining the causes confided in him or her. Those means only errors consistent with truth, and to never deceit to never seek to mislead the judge, or any judicial officer by an artifice, or a false statement of fact, or law. This is in the BMP code. Now, it's wonderful language, it's archaic language, it was written in the middle of the 19th century, by guy named Stephen field comes from something called the field code. In 19th century America, people were very anxious to commit all of the common law to written statutes, because they thought it was much fairer to have written statutes people can read, as opposed to having to pour through tons of common law decisions by judges, Stephen field, wrote the field code and tried to codify a lot of these things. The ironic thing

about Stephen field who worked in New York was the field code was never enacted in any state, but California. And only because Stephen fields brother, a 49, are happened to sit in the very early days of our bear Republic on the California Supreme Court. So we have this wonderful archaic language means only as consistent as truth, consistent with truth, and to never seek to mislead by an artifice or a false statement of fact, or law. Again, we're doubly blessed in California. So in case you didn't get the message from Stephen field, you also got a rule of professional conduct that says basically the same thing. Consistent with truth, never seek to mislead, that includes never seeking to put on any evidence or testimony, you know, to be false. You could not introduce false evidence, if we know it to be false. You are duty bound by BMP Code Section 606. AD, not to put it on. Now, we have a proposed new rule on part of part of my purpose in this presentation, is to introduce you to some of the changes that are going to be coming up. A couple of weeks ago, some of you were at our presentation regarding new rules of professional conduct. Well, we have a new rule. It's essentially going to restate what is in rule five dash 200.

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And it is going to go into a lot more detail because one of the purposes in enacting the new rules, one of the purposes and copying some parts of the ABA model rules, which are not the law in California, but the basis for the law and the other 49 states is to fill in some of the gaps and uncertainties that appear in our law to give you better what's known as prophylactic guidance. prophylactic means before it happens. So you will know before you do the dumb thing, whether it was a dumb thing or not. Unlike the poor slob who does the dumb thing, and doesn't find out it's a dumb thing until they get a letter from the State Bar. duty of candor, new rule 3.3 it's kind of it's very similar to five dash 200 and a little bit similar to 6068. d. You can't make a false statement of fact or law, you can't fail to disclose adverse authority. You can't misquote the language of a book statute and decision. But the paragraph we're really looking at is paragraph 3.3 a three which states explicitly for the first time in our jurisprudence, our written rules that you cannot offer evidence that you know to be false. It goes on to say if a lawyer the lawyers client or a witness called by the lawyer has offered material evidence and A lawyer comes to know of its falsity. The lawyer shall take reasonable remedial steps, I'm sorry, reasonable remedial measures, I should say, including if necessary, disclosure to the tribunal, which means the court or the arbitrator or, you know, whatever the forum is where you have some kind of neutral, adjudicator. That's the primary No. Let's stop there for a second. Because in ponder what this means, this means that if in the middle of the trial, your client, like my client, at the fee arbitration, gets up and suddenly starts telling something dramatically different from what they told you. You have to at least, like that needs to go off in your mind as to whether you have now inadvertently exposed the court to false testimony. I didn't do anything about my clients false testimony, why didn't know it was false. That's one of the problems we'll explore in a second. How do you know it's false? How do you know it's just not contradictory? Sometimes that's very difficult to know. Which is why it's judgment calls are required in this area. But if your client gets up, and suddenly starts testifying a

dramatically different fashion, from what they told you, you've at least at that point, have to question whether the client has engaged in some kind of fraud on the court.

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Now, that's one problem. And it's a big problem. It's hard to offer a lot of guidance there. In terms of, of what you do, obviously, if you think your client may have testified falsely, you need to have as soon as practical a discussion with the client about their testimony, and try to figure out what where they were coming from with that. Warriors I've talked to who tell me war stories. Tell me things like, well, the client was up there. And what the client told them was while I was up there, and I was testifying, and I realized probably what I was testifying to that wasn't you know, even though I told you, I was sure what happened, I wasn't really sure what happened. And when I was cross examined, I remembered some new facts that I then volunteered on cross examination, if you know stories like this, so the client on the fly suddenly had a moment, either a clarity where they realize they'd lied to you earlier. Or they had a moment of clarity when they realized that maybe this is a good time to tell the truth. It's it's very difficult to know what can go on in the clients mind to problems discerning whether it's false. second problem, if you do discern is false. What do you do that? You've had a discussion with your client, your client is admitted the answers they just gave in cross examination. Let's say were false. I wanted to make up something that sounded better whatever the explanation is. What do you do? Well, you can refuse. So if you know about an advance, you can refuse to offer that evidence. But oftentimes, your client won't tell you that. There's an exception to that. And that's for a criminal defendant, a criminal defendant has a constitutional right to testify. And you cannot prevent a criminal defendant if the criminal defendant wishes to from taking the stand and testifying. I civil the civil client, you may be able to say well, if you intend to testify that way, I can't put you up on the stand. I won't call you as a witness. Where it might get sticky is if your client is potentially could potentially be called by the other side as an adverse witness under evidence code 776 and and interviewed as the other side's witness with leading questions. That's a technique the state board typically doesn't the discipline proceeding in a disciplined proceeding. The first witness is the respondent attorney who's called to the stand and and examined by the state bar's deputy trial counsel under Rule 776, which allows you to ask leading questions can be very effective technique if if you think the client's testimony may be false. Can't do it in a criminal matter. A lawyer who represents a client in a proceeding Before I try funeral and who knows person intends to engage is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent and here's where we get to the problem part except to the extent permitted by BNP Code Section 606. A and rule 1.6. So you're required to take a reasonable remedial measure. But our version of the model rule is delimited. By California's expansive duty of confidentiality. Now, comma 3.3 is one of the rules that's now out. I'm sorry, proposed rule 3.3 years out for public comment now. And you can comment on this rule to the rules revision commission until January 9, if you should choose to one of the proposed parts of the

rule 3.3 comment five is is meant to give us some kind of guidance as to what reasonable remedial measures might be. It says reasonable remedial measures under paragraphs a three and be referred to measures that are available under these rules on the State Bar act, and which a reasonable lawyer would consider appropriate under the circumstances. To comply with the lawyers duty of candor, they reference 606 ad here.

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remedial measures also include explained to the client the lawyers obligations under the rule, and where applicable, the reasons for the lawyers decision to seek permission from the court to or the tribunal to withdraw. And remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. And finally, it says that the lawyer if the clients an organization, the word should or should consider the provisions of one point 13, which has to do with the war it was has to do with representing the organization as client. But the important point is that remedial measures do not include the disclosure of client confidential information, which the lawyers required to protect under both the BMP code and our new rule 1.6. That will have been a question.

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Yes. Is this proposed rule 3.3 concerning this very issue, particularly in criminal cases, abrogate or distinguish prior precedents from courts that say that when a lawyer representing the criminal defendant, right, and the defendant indicates that he or she wishes to testify, and the lawyer has every reason to believe that it's false, that the lawyer has like three options, according to court precedents? Yeah.

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Knicks vs. Whiteside. And this how's this distinguish that? Well, it does it it what when you read it, you you can see the word appears to do is kind of thread a careful path through all of that, without, I mean, basically telling you what your options are, without being really that explicit. I mean, the reasonable lawyer test is an interesting cop out, what would a reasonable lawyer do? Well, sometimes that kind of test is hard to apply in practice, it sort of presumes that you have some experience in this area. What would a reasonable lawyer do? Well, someone who's been practicing law for 30 years, like me might have a better idea than someone who's been practicing law for three years. So it's a little difficult to know sometimes what the reasonable lawyer could do. But because in California, this concept is so conservative scribed, by our duty of confidentiality, we have it, you know, ironically, our role is kind of better, because you have less, you have less latitude for action when the client decides to lie. And I think we'll get to some more discussion about those three options in a second. But first, you've got to know that California is

the great exception, as the writer kerygma gwilliam, said, in every way, and we know that certainly this year, better than ever, where the rest of the country marches to a different driver and when I go to national meetings, I am reminded of that always. In California, we have an extremely strict confidentiality rule that comes straight from good old Stephen Dudley field. scribbling in the 1849. And it's got, again, this wonderful archaic language, it's the duty of attorney to do all of the following he to maintain and violet the confidence and at every peril to himself or herself to preserve the secrets of his or her client. Well, that's nice every parallel to yourself, you have to preserve the secrets of the client. In other words, if it means you walk the plank, if it means you endure the wrath of the judge, if it means you lose time, money, emotion, if it means you do something that may be morally offensive, in some other context, you have to preserve the confidential confidentiality of your client, your client comes to you and says, I did it. He can't disclose that to the judge. It but now, since about 10 years ago, we have an exception, if your client comes to you and doesn't say I did it, or that says something like, like the defendant, in a case called people vs. Dang said, says to the lawyer, don't worry about that witness, they're not going to testify. Now, we get to the very first and so far, the only exception to confidential in California, you're required, you're you may but you're not required to reveal confidential information relating to the representation of a client to the extent you reasonably believe it's necessary to prevent a criminal act that you reasonably believe is likely to result in the death and death or substantial bodily harm, as to reasonably he's in one sentence, which usually means problems. But if your client says I'm going to kill the witness, or indicates I'm going to rub the witness out, he now have an option to have an escape hatch, under the strict rule of confidentiality, to rat your client out all kinds of ramifications there, including the idea that at some point, you may have to disclose to the client. If you say this, I will have to rat you out. That it also means that when it comes to reasonable remedial measures, based on this statute, and I think we have the we have what our new confidentiality rule. Again, part of what these new rules are going to do is take some of these concepts that are in the BMP code and and also give them a new home and the rules of professional conduct. 6068 e 1.6. You can't go to the judge and say, Judge, my client testified falsely, you can't do it. You can't rat your client out to the core. It's different in the ABA model rule land, which is the other 49 states now model roles are rules written by a private organization, the American Bar Association.

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And but they've been adopted in some form, but the other 49 states, and in California, we will probably adopt our version, the one that's up for discussion now. My guess is by this time next year, we will have a our own version of the model rules. It basically tracks what our version 3.3 says until you get to the last paragraph. And there it significantly deviates. talks about reasonable remedial measures, if necessary disclosure to the tribunal or a refusal to offer evidence other than testimony of a client in a criminal matter next versus Whiteside that the lawyer reasonably says false. But c says the duty stated in paragraph 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. And we have the rule 1.6 here in an ABA jurisdiction. Another state and until recently, some federal courts in California who followed or at least extensively follow the ABA model rules are made reference to them in their own rules. There was an ability or the idea that you could disclose otherwise confidential information, ie ratting your client out to the court if that was a necessary and reasonable remedial measure under ABA 1.6 but model rule 1.6 is also important because while it may not be an issue in California, there are exceptions to confidentiality here that are applicable not only in the context of litigation but also in transactional work. And it's our we have not adopted these in California, we probably won't ever adopt them, as long as we have 606 ad, but in the ABA model rules jurisdiction, you can, number one is are reasonably certain death or substantial bodily harm exception to is to prevent the client, you can reveal confidential information to prevent the client from committing a crime or fraud that's reasonably certain result in substantial injury to the financial list, interest or property of another, prevent, mitigate or rectify substantial injury to financial interests, or property of another that's reasonably certain a result, or has resulted from the client's commission of a crime or fraud. in furtherance of which the client has used the lawyer services. Some of you may have seen stories in the legal press, about lawyers in high profile cases in other states, suddenly withdrawing from representation, or in some cases actually making disclosure that their client had hired them to perpetrate some kind of crime or fraud. These stories have appeared and illustrates the difference between the rest of the country in California, none of that stuff can be real revealed in California.

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But

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conceivably, there could be a set of circumstances where you as a California lawyer might be held to these rules. For instance, for instance, if you were admitted pro hot DJ in another federal district court, in another state. If you ever do that, if you ever go to another state, another Federal District, it's a very good idea to take a look at what their local rules require, in terms of what is the body of law that will be applicable to you. There's a principle in California, it's called the choice of law rule. It's our current rule one dash 100. That says, California rules of court are calculated as a professional conduct are binding on California Attorneys, except where their presence in another jurisdiction justifies the the imposition of another rule. Now, sometimes California lawyers outside the state are engaged in transactional work. And some kind of choice of law analysis has to be made by a lawyer in that situation. Especially if it looks like you're being asked to do things that are marginal, as there's got to be some font given as to whether this is a situation where you need to make disclosure. Does this make sense? Okay, any questions so far? So waiting for those word stories. Anyway, that's 1.6. Now, up until a few years ago, our local district court, federal district

court in the southern district had a standard and the standard generally appear somewhere around rules, local rules, 8384. In every federal district court in the country, they parallel they track the Federal Rules of Civil Procedure. So if you if you ever need some guidance as to what the ethical standards are in the federal district court, you're in, look at around local rules 8384. Until a few years ago, our southern district had a rule that said, the standards of Professional Conduct required of members of the State Bar of California are adopted as our standards. However, we also encourage lawyers to be familiar with and apply the American Bar Association Code of Professional Responsibility, which was the body of law that preceded the monitor rules. That body also had a provision similar to rule 3.3 that essentially allowed you to blow the whistle on a client in federal court, who had testified falsely or intended to testify falsely commit some kind of fraud on the court. And up until the rule was recently changed. I have set on MC le panels with federal judges, where we debated you know, the very parameters of this kind of situation. And the federal court judges really like the ABA model rule 3.3. They really want to know if they've been subject if there's been any false testimony or something. Some kind of fraud perpetrated in their court. And to the extent I don't know how many of you have ever practiced in federal court or dealt with federal court judges, their lifetime appointments and to give them superpowers you don't, because they've got some kind of red s underneath that road. Federal Court judges think pretty much that they are a power onto themselves. So being forearmed with knowing the standards that you're going to be judged by in federal district court is probably a good thing. Because federal federal judges tend to do what they want to do. And sometimes that doesn't really comport with what the rules are. La has a similar rule, but notice the difference at the end. They say standards of California or the standards we judge you by. But the model rules of professional conduct of the American Bar Association may be considered as guidance. And this is consistent with some California law that has said in the past, that where the California rules of professional conduct, are silent on an issue or ambiguous on an issue is permissible to look to the ABA model rules. For more guidance for guidance, because the ABA model rules

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are longer, more detailed, had been the result of a lot of scholarship and work by individuals looking to create a nationwide standard. So conceivably, in the central district, you might have a federal court judge, maybe bankruptcy court, maybe federal district court who thinks that the ABA model rules really supply the better rule of decision. One of the reasons we're updating our rules of professional conduct, to incorporate more of the ABA model rules is to try to smooth out these differences among jurisdictions. So you may, ultimately, you may get a federal district court judge who thinks that you are indeed duty bound to let your client out. And so far, an attorney and a catch 22, where if you do one thing, you get disappointed if you do the opposite, you get this. That's the catch 22, you're right. It's like, I want to do what the federal court judge wants me to do. But it may subject me to discipline by the State Bar of California. And I've seen those situations where were ultimately in most cases, the ambiguity was explained to the state bar, and

they backed off and understood that if push comes to shove, and there's an ethical dispute, and the judge is telling you, this is what I want you to do, I mean, what are you going to do contempt of court or state bar discipline, the bar understands that if the judge orders you to do it, even though there there are older California cases that talk about contempt, and basically say, where you're gonna follow California rules to the end, pack your toothbrush, whenever you go to court, you may have to face some jail time for contempt. The State Bar is not has not been so harsh in the real world in going to that extent. So we talked a lot about remedial measures client, either tending to lie in court or who has lied in court, it's important to catch.

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See,

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this is a nuance of the bar rule that we don't have in California, it says the duties stated in paragraphs A and B continued to the conclusion of the proceeding. Which means that if you, you know, maybe your client lied a year ago as in his deposition, and now a year later, your the proceeding is still ongoing, you suddenly learn about it. At that point, you have a duty to take those reasonable remedial measures. Okay, let's go back to accepting representative representation. And we're talking about stuff that's in the sort of midstream or at the end of the representation. But the principle is important to understand how this applies. When you begin representation. Our proposed new rule 1.16 is going to track our current rule three dash 700, which is the withdrawal rule, and it's also going to incorporate a little bit of current rule Get the numbers turn around to det two dash two two dash 300 Sorry, I always want to call it three dash 202 dash 300 it says essentially you cannot represent a client. Other words begin representation or you cannot continue to represent a client if you know or should know the client is bringing an action conducting a defense asserting a position litigation or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. Or and you cannot undertake representation if you know or reasonably should know that the representation will result in a violation of these rules or the State Bar act, say bar act immediately. What bleeps in your mind is section 606 ad. The duty of candor, the duty to use means consistent with the truth. If you know or reasonably should know, at the beginning or at some point after representation begins, that your representation might result in a violation of these rules. At that point, under our rules, you have a duty to withdraw even duty not to undertake the representation. And you may have under pradesh 700, Subsection B, you may have a duty to withdraw. If the client seeks to pursue a criminal or fraudulent course of conduct. Or as use the water service to advance a course of conduct the lawyer reasonably believes was a crime or fraud. The lawyer insists the client client assistant lawyer pursue a course of conduct that is criminal or fraudulent or for which is the most useful catch all ground for withdrawal. The client by other conduct renders it unreasonably

difficult for the lawyer to carry out the representation effectively. How do you deal with a client who lies to you not a client who's lying to the court? Well, again, it's kind of like a reasonable attorney standard. When I've been in that situation, and I've caught a client lied to me, and my reaction has been almost always to say, well, you lied to me about this, I can't represent you anymore. here please sign this substitution of attorney for because in my experience, once a client lies to you about one thing, that's probably not a client, you're going to be able to trust. From that point on. The attorney client relationship is a relationship of mutual trust and confidence. And I emphasize the word mutual. Your attorney has to trust you, the client must trust the attorney but the attorney must also be able to trust the client. So withdrawal is an obvious remedy. But before you withdrawn here's where we get to some of the interesting possibilities that you talked about Knicks vs. Whiteside. You have a duty to dissuade the client. case law tells us both California case law and Supreme Court case law that if you know your client, if your client tells you I'm gonna get up there and falsely testify, the first thing you need to try to do is to dissuade the client from doing it. And you have to remonstrate as this wonderful old fashioned word we just saw says, you have to tell the client, no, you can't get up there and commit perjury, I will not. I strongly encourage you not to do it. If you insist on doing it, I'm going to withdraw from representing you because I can't represent somebody who was a perjurer. Now in a model rules jurisdiction, you might have an additional hammer saying, Well, you know, if you testify falsely at trial, under our modern our ethical rules, I will duty take some kind of remedial measure, which might include telling the court that you falsely testified that might be enough to dissuade them from testifying. But in a criminal case, where the defendant has a constitutional right to take the stand and testify. What do you do? What do you do? Now we get into the concept of noisy withdraw. And another corollary which can create a potential for conflicting student conflicting duties. A lawyer shall not terminate representation until the lawyers taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. You can withdraw if your client intends to lie but you're still duty bound to give them to do everything you can to avoid reasonable prejudice. Index versus Whiteside, what the court essentially said was that you have these three options, you can withdraw from representation, which would be a noisy withdraw in the middle of trial in the middle of a criminal trial, and when we see this in criminal cases, or suddenly the criminal defense lawyers say, you're, you know, Jad, you know, all of a sudden they're off the case, nosey withdraw. And it's a noisy withdraw, because most people can read between the lines and figure out the reason why they're off the case. So the Supreme Court and Knicks vs. Whiteside said, Well, obviously, this might be tremendously prejudicial to a criminal defendant, if the warrior withdraws in the middle of the case. So because we have this client, detect criminal defendant right to testify, and also because you cannot insert it, you cannot suborn perjury, you cannot encourage perjury, you cannot participate in perjury. As we see from our revised rule 3.3 100, we looked at earlier, you can't offer evidence you go as false. What the, what the Supreme Court said is balancing all these competing interests, what you can do is sit down at counsel table, allow your client to take the stand and testify by way of a narrative. Where you don't ask the client questions, you don't elicit false testimony. You allow the client to get up

there and hang himself or herself without your assistance. And that may sound harsh. But I think those of us who follow criminal cases, know that typically, the phaedo testifying on your own behalf is usually a bonehead move in a criminal case. And when we see someone getting up and testifying by way of the narrative, without the lawyers participation, that's usually sends that that's that's the thing that's quite a noisy withdraw, but it's sort of sort of noisy semi withdraw from representation, semi withdraw, where we sort of know what's going on here. With respect to that person's testimony, and archery savvy enough to know the difference? Well, I'm sure in these situations are probably jury instructions that are given to the jury that I'm not criminal defense lawyer, some of you may be maybe there's a criminal defense instruction criminal jury instruction says you cannot assume that the defendants testimony by way of a narrative means defense testimony is false. I don't know. It seems to me that jury instruction creates the very problem that it's trying to solve. Finally, we're gonna talk a little bit about malicious prosecution. The what happens and what happens at the beginning of the case, remember, we looked at the new version of 3.7 100 which is so getting used to the numbers 1.6.

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That's

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right, you cannot cannot represent a client. If you know or should know the client is bringing an action conducting a defense asserting a position in litigation just about anything without probable cause.

49:13
This issue was explored in his California Supreme Court case called the most versus Stroud in that case a lawyers lawyers brought an action fraud claims on behalf of the client against the client's former attorney based on the client's allegations that the lawyer made certain representations false representations to her to induce inducer to settle a lawsuit in the first action. So the client comes in the client tells her story of Whoa. We've all been in that place, and says this terrible lawyer made these false statements to me, to induce me to to enter into this bad settlement agreement. lawyers say to that's, that's terrible. Let's run out and file a lawsuit. So they do Then after the lawsuit was filed, the lawyers receive transcripts kind of reminds me of the case I talked my own war story. They received transcripts from hearings in the underlying case that effectively demonstrate the what the client is telling them was not true that in fact, none of these alleged misrepresentations were ever made. Defense says, Look at these transcripts, your clients not telling you the truth. The lawyers stubborn fellows, I suppose, fail to dismiss the action against the prior lawyer. They were ultimately found liable. And this is a case of went all the way to the

Supreme Court. For malicious prosecution, true kastelein said the malicious prosecution consists of filing an action, initiating an action without probable cause. But case law had never addressed the situation where you file the action thinking you have probable cause based on your clients representations. And you come to learn later that your client is lying to you. No case we talked about what happens. So in CMOS, the court reiterated the helpful general principle that you're entitled to rely on information provided by your client. When the client comes into your office and tells you their tale of woe. You in general can rely on that. But if you later after the exercise of due diligence, and to protect yourself from malicious prosecution live ability, you should also you should always do a certain measure of due diligence with your clients claims to be sure you do in fact, that problem will cause you need to at least ask the questions of the client. What evidence support your claims? What evidence do you know of any evidence that doesn't support your clients? You can rely on what they tell you. But you can't rely on it completely. You have some duty to undertake an investigation, to establish to be sure to protect yourself, to be sure your client isn't telling you a lie. Now they talk about two situations one situation where the adversary provides verifiable facts disproving the allegations made in a demand letter. That's one thing. But a letter from a litigation adversary merely suggesting that they disagree with the veracity of the allegations in the lawsuit. That's not sufficient to put the lawyer on notice of the falsity of a client's allegations. The mere fact the other side disputes with the client says that is not enough for you to conclude that your client is lying to you and you like probable cause. The object lesson here is that as much as we love our clients, as much as I love my brand new client when I went out on my own, pretty excited to be representing someone in private practice after being at the State Bar, you cannot completely rely on what they say, to protect yourself as much as you love your clients. I mean, I've said this a couple of weeks ago, or last week when we talked in my world, today's client is tomorrow's adversary. And you should always be thinking somewhere in the back of your mind. As much as I love this client as much as I'm sympathetic to their claims. Let me do my due diligence to protect myself from potential at least potential malpractice or malicious prosecution liability.

54:12

So with that, I will open the floor up to questions or comments. Anybody

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this thing on malicious prosecution seems to address matters involving the plaintiff. Right. And not the defendant. What if What if defense counsel in malicious prosecution actually discovers that his client who is engaged in active lying and deception? I mean, this doesn't The same holds true

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I think absolutely it does hold true. Well, because the porn of malicious prosecution only applies to the person prosecuted doesn't apply to the person defending now that the general principle and rule three dash two dash 300 and and reflected in our new Rule 1.6, that you can't under, you can't present a defense without some probable cause applies to the defense side as well. taking a position any position in litigation without probable cause, and for the purpose of maliciously injuring or harassing somebody, which I don't have a site for you. But I would say that if the plaintiff has a righteous claim, and you're asserting a frivolous or position without probable cause, in defense to defeat a righteous claim, it strikes me that you're probably violating three dash 200 every much as every bit as much as a plaintiff's lawyer. In practice, though, you don't really see that kind of analysis being made. Partly because there is no court of malicious defense. Some plaintiff's lawyers would probably like to see that. But so far, that we don't have that in our jurisprudence. Any more questions, comments?

56:02

If we have a defendant, right, then simply deny claims? Or do they have to basically confess to the action.

56:13

Now, they can certainly deny that they can't, they can't assert a position. ie, you know, let's go back to the rule. Three dash 700. A word you shall not represent, or shall withdraw from representation if the client knows or reasonably should know, the client is bringing action, malicious prosecution, conducting a defense asserting a position in litigation or taking an appeal without probable cause. He specifically includes conducting a defense. If you know your client has no defense, and the purpose of asserting the defense is harassing or maliciously injuring any person, theoretically, under this rule, you should be this prosecuted for violating well, former rule three dash 200 do rule one point 16? I say theoretically, because it doesn't we don't see it happen. But theoretically, it should. And in fact, if you know, under this rule, if you know your client has no defense, and if you know your clients purpose is harassment or maliciously injuring any person, you have a duty to withdraw. Are you saying that if you believe plaintiff cannot read it? You can't take any action? No, not second. I'm not saying that. I'm saying that the rule says that applies equally to asserting a defense to making a claim. Now, is this and is this Oh, and why do I say it hardly ever happens for the very reason I think you identified because the way our adversarial system works is we put the burden of proof on the plaintiff, not the burden of proof on necessarily on the defendant. So, to some degree f the ethical rules. They're wonderful statements of what should happen, but in the real world. They run afoul of how we practically go about designing things.

58:38
I'm still having trouble wrapping my hands around your concept. If you have a criminal defendant. I'm not talking about a criminal defendant. necessarily. Well, if you have a criminal defendant has an absolute right to object to the charge, right?

58:55
burden of proof.

58:57
Can't can't do anything if the guy is guilty.

59:02
You can do anything if the guy is guilty? Well, you could draw that conclusion from the rule. I know I can't explain it. Can I you know, this is this is where the FFC the limit. You see what happens when you try to write these rules. And you try to come up with principles under these rules. They don't translate automatically to what happens or needs to happen in the real world. That is why that is why I like to come and ask you for your experiences. Because as an F as an ethics lawyer, I know to some degree I live in a bubble where these ethical concepts don't always translate to what's going on out there. No absolutely criminal defendant and there there's actually in the BMP code. There's a corollary, if you look at 6068. See, that says, that essentially restates what this rule says, but but in the statutory rule, it says does not apply in the defense of a person charged with a public offense. That's take a look at 6068. See, when it's 606, ac and campuses, that very idea that you can't assert a frivolous defense, except in the case of someone charged with a crime, where but for constitutional reasons, you can assert defenses that may be frivolous. I've tried to assert that in state bar actions, saying, well, State Bar lawyer charged is just like a criminal defendant charged with a public offense 6068. c. This is the fun of legal ethics, because we got the concepts that are in perfectly expressed by rules and concepts that sometimes are contradicted by other parts of what the rules are supposed to be.

1:01:00
I think a lot of times they want for their client to attack prosecutions, right? Please get this wrong? Or is this piece of evidence isn't really that reliable? Listen to that. If you go through all that, even if they know their clients, their clients guilty, and that's different than right. presentation and false testimony or evidence, you're

1:01:29
right, consider consider a defense based entirely on attacking the prosecution's case. Contrast that with a defense based on an alibi, or an alibi witness, you know, Where, where, obviously, if you didn't believe the alibi witness, then you've got a potential ethical problem. But just attacking the other side's case, is not quite the same thing as asserting a defense at least in the criminal world.

1:01:58
I had represented a client in chapter 11 bankruptcy case. Yeah. We kind of deal with what's called an adequate protection order, okay. I have a paid client, once a month, a certain amount of money for profit, right, and have been delivered to my client. My client would fail to go to his mailbox the week the payment was due. Right. And then he'd want me to file a declaration saying the default. One of the problems was the client had also gone to law school. Okay. And when I wouldn't put it forward file declaration and staff, he threatened me that he was going to do his own declaration put forward. Okay. I mean, I got a backup and I tried to withdraw such things. But if I were just going out there, I have a duty to the court to let him know that this declaration he was submitted was false.

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Well, the question is, in a bankruptcy case, where the clients not happy with counsels, performance or counsels presentation of the evidence, the bankruptcy client wants to, to to essentially file his own declaration, I assume he is his own counsel.

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I was I was accounts as a creditor. creditor, okay. Right. He would pay him Oh, I see. He would claim he didn't get the payment. Right, just because he didn't go look in his mailbox to get the payment. Okay. And he went to file a declaration because I wouldn't that the, the debtor had defaulted by failing to make the payment, when in fact, the debtor had made the payment, my client just didn't go down.

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Okay, so there's a difference the sort of a nuance as to whether the default had occurred or not. He said, the default I know the default occurred because I didn't check my mail. Right. He's not gonna say that. Anyway, my hands. Well, did you withdraw from representation? No. But he didn't follow the next one, right. Yeah. Well, yeah, I've had similar clients, they say, I don't like I don't

know, I don't like the way you're representing my set of facts to the court. And, you know, the traditional dividing line is clients are entitled to decide what the objectives of the representation are. But lawyers are entitled to decide what the means are to those objectives. And that's a useful rule to keep in mind when clients not want to dictate not only objectives, but also means to achieve those objectives. The client is stepping outside outside their sphere of what they're supposed to control. And if you don't have sights on that, but it's a pretty established principle. So that's, that's that's a warning sign when the client who went to law school wants to be his own lawyer. That can lead to problems. And that's potentially course that's all my clients just about. Though sometimes you wonder if they want them lasco are not that's always a problem when the client wants to usurp the reins of control over means and that's a good time to think about withdrawing because life's too short to deal with problem problem clients like that, who want to be their own Lori's they want to be their own lawyers not not themselves out. We're well over our hour so but I'm happy to say as long as people have questions