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Truth or Dare: The Rules of Professional Conduct and Stretching the Discovery Boundaries - Mississippi Bar v. Land

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TRUTH OR DARE: THE RULES OF PROFESSIONAL CONDUCT AND STRETCHING THE DISCOVERY BOUNDARIES

Mississippi Bar v. Land

653 So. 2d 899 (Miss. 1994)

Katherine A. Smith

Hell is truth seen too late — duty neglected in its season.[1]

I. INTRODUCTION

> Suppose that you are at a deposition and your client is asked if he was 'wearing glasses' at the time of the car crash ('his license says he's got to'). Your client answers yes and produces them. He later tells you that the glasses were not his but his son's and a 'mile too weak.' He had worn them by mistake.[2]
>
> Now suppose that you have come across a witness who can supply a factual piece of evidence harmful to your client's case. You conclude that if you make a motion for summary judgment you would win because the opposing counsel has not been able to present an affidavit on a vital point. However your secretly-discovered witness could supply this essential link in the opposition's evidentiary chain. The witness has not been contacted by the opposing party, and you assume no one else knows of his existence.[3]

Unfortunately, problems such as these are not rare. Lawyers are confronted every day with the ethical dilemma of zealously representing a client and the duty of candor toward the court and opposing counsel. Despite the guidelines given in the Model Rules of Professional Conduct and in its predecessor, the Model Code of Professional Responsibility, there is no rule that clearly gives an answer in all situations.

This Note briefly examines the history and purpose behind the Model Rules of Professional Conduct. This Note then examines the Mississippi Supreme Court's basis for its decision in *Mississippi Bar v. Land*[4] by looking at the existing precedent in Mississippi and studying similar decisions in other jurisdictions. This Note also questions the court's application of relevant factors in sanctioning Jack Land.

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1. Attributed to TRYON EDWARDS, A DICTIONARY OF THOUGHTS 225 (1891).
2. Taken substantially from Stephen Gillers, *Truth or Consequences*, 80 A.B.A. J. 103 (Feb. 1994).
3. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 228 (5th ed. 1991).
4. Mississippi Bar v. Land, 653 So. 2d 899 (Miss. 1994).

II. FACTS AND PROCEDURAL HISTORY

A. The Underlying Case

On May 26, 1990, Plaintiff Billy Ray Stephens received an eye injury while driving past the home of Jim Guthrie in Petal, Mississippi.[5] Doctor John Pendergrass reported in a letter to the plaintiff's attorney, Michael B. McMahan, that Stephens was struck by a rock in the left eye, leaving him with a "significant loss of vision" and little chance of recovery.[6] He further commented, "[Stephens] believes that the rock may have come from someone mowing the grass on a nearby lawn as he drove past."[7] Stephens later testified in a deposition: "Whenever I went through there I heard a lawn mower and I looked over and I looked back ahead of me and then something hit me."[8]

Before Stephens filed suit, the Guthrie's insurance carrier representative, Rachel Cole, investigated the events leading to the plaintiff's claim of an eye injury.[9] In Cole's written report there was information that the Guthrie's son, David, and a friend had not only mowed the lawn, but had also shot a BB gun on the day the plaintiff was hurt.[10]

In a statement taken by Rachel Cole, Sherry Guthrie remembered staying inside the house the morning of May 26, 1990, while her son, David, mowed the lawn.[11] He was joined by a neighborhood friend, Ashley McAlexander, and they took turns with the lawn mower.[12] The boys came into the house for lunch, rested a little while, and then went back outside to play.[13] Later, Stephens' cousin came by the Guthrie's house and asked Mrs. Guthrie if she had heard any shots.[14]

David Guthrie himself recounted that after resting he and Ashley McAlexander went outside to play in their clubhouse, discovered a BB gun, and started "shooting across the road."[15] While shooting, the boys heard a car reduce speed.[16] They got scared, hid the BB gun, and ran inside the house.[17]

On July 17, 1990, Stephens' attorney McMahan wrote a letter to Jim Guthrie stating that a rock slung from a lawn mower in Guthrie's yard injured Stephens.[18] McMahan requested an opportunity to inspect the mower and owner's manual and to interview the mower operator.[19]

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5. *Id.* at 901. Stephens stated in a deposition that all the windows were down in the four-door Chevrolet Citation he was driving. Appellee's Record Excerpts at 24, 26.
6. Appellee's Record Excerpts at 8.
7. *Id.*
8. *Land*, 653 So. 2d at 901.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Mississippi Bar's Record Excerpts at 20.
15. Mississippi Bar v. Land, 653 So. 2d 899, 901 (Miss. 1994).
16. *Id.*
17. *Id.*
18. Appellee's Record Excerpts at 4.
19. *Id.*

McMahan wrote to Guthrie's insurance carrier, State Farm, on November 2, 1990, and again requested an interview with either Jim Guthrie or the mower operator.[20] McMahan offered to "freely exchange" information with State Farm and asked that both sides "lay everything out on the table."[21]

A complaint was eventually filed against Guthrie for $25,000 on February 21, 1991, in the Circuit Court of Forrest County, Mississippi.[22] The complaint alleged, on information and belief, that Stephens was injured by the negligent operation of Defendant Guthrie's lawn mower, causing it to throw a rock into Stephens' vehicle and severely injure his eye.[23]

On March 8, 1991, Attorney Jack W. Land wrote a letter to McMahan informing him that he had been hired to represent Jim Guthrie in this action.[24]

Land noticed Plaintiff Stephens' deposition for April 3, 1991, and McMahan requested permission to inspect and take photographs of the mower.[25] In Stephens' deposition, he did not ever mention the possibility that a BB had hit him in the eye.[26] In fact, Stephens testified with certainty that he remembered seeing and hearing a lawn mower in Guthrie's yard at the time of the injury.[27]

Stephens also recalled in his deposition that the eye injury occurred around 10:30 or 10:45 a.m.[28] However, he later amended his deposition to state that he was injured sometime around 12:30 or 1:00 p.m.[29] The hospital records show that Stephens arrived at Forrest General Hospital around 1:25 p.m.[30]

On April 19, 1991, Land filed a Motion for Protective Order seeking to prohibit Stephens from taking the deposition of Rachel Cole, the defendant's insurance representative, or obtaining the defendant's claim file.[31] Land claimed the file contained work product and trial preparation material which was not discoverable.[32]

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20. Mississippi Bar's Record Excerpts at 2.
21. *Id.*
22. *Id.* at 4.
23. *Id.*
24. Mississippi Bar v. Land, 653 So. 2d 899, 902 (Miss. 1994).
25. Appellee's Record Excerpts at 15, 16.
26. *Land*, 653 So. 2d at 902.
27. *Id.*
28. Appellee's Record Excerpts at 39.
29. *Id.* at 63.
30. *Id.*
31. Mississippi Bar v. Land, 653 So. 2d 899, 902 (Miss. 1994).
32. *Id.*

B. The Bar's Formal Complaint

The Mississippi Bar charged Attorney Jack Land with violating the Rules of Professional Conduct based upon Land's answers to Stephens' Interrogatories[33] and the following facts.[34]

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33. On April 15, 1991, Land objected to the plaintiff's request for production of any statements taken or investigative reports made concerning the accident. *Id.* The following information was included in the response:

> *REQUEST NO. 4*: A copy of any statements taken, concerning the accident, by you or anyone acting on your behalf.
>
> *RESPONSE*: Defendant objects on the ground that any statements taken are work product, trial preparation and contains mental impressions and conclusions of Defendant's insurer and indemnifier. . . .
>
> *REQUEST NO. 5*: A copy of any investigative report made by you or anyone acting on your behalf.
>
> *RESPONSE*: Defendant objects on the same ground as to Request No. 4 above.
>
> *REQUEST NO. 6*: A copy of any photograph or motion picture, made by you or anyone acting on your behalf, which in any manner relates to this lawsuit, including a photograph taken of the subject lawn mower as it appeared on May 26, 1990.
>
> *RESPONSE*: Will produce.

Id.

On April 15, 1991, Land answered Stephens' interrogatories for his client, Guthrie. *Id.* Land stated that he sent Guthrie copies of his answers to discovery and requested that Guthrie notify him immediately if any answer was incorrect. *Id.* The following answers were given by Guthrie to the interrogatories:

> *INTERROGATORY NO. 2*: Please identify the name and address of each and every person known to you to have been involved in or observed any part of the accident in question.
>
> *ANSWER*: I have no knowledge of anyone involved in or having observed any such accident. The lawn mower was in operation on the date of the alleged accident by David Nelson Guthrie and he was assisted by neighbor's son, Ashley McAlexander, under the supervision of my wife, Sherrye Guthrie, at my direction. Excepting that I had not sanctioned Ashley's presents [sic] or use of my lawn mower.
>
> *INTERROGATORY NO. 3*: Please identify all persons, whether you or anyone acting on your behalf, who obtained statements from or interviewed anyone during the course of investigating this case and for each statement, please state when, where, and to whom the statement was made and what was said.
>
> *ANSWER*: State Farm Representative, Rachel Cole, and attorneys.
>
> *INTERROGATORY NO. 6*: Please state the name, age, and address of the person operating the lawn mower at the time of the accident.
>
> *ANSWER*: [Same response as No. 2].
>
> *INTERROGATORY NO. 11*: Please state whether or not the results of the investigation, if any, were reduced to writing. If so, please furnish the name, address and employment of the person or persons having possession of such a report.
>
> *ANSWER*: I have no personal knowledge of any written reports.
>
> *INTERROGATORY NO. 12*: Please describe the conclusions, if any, reached by you or anyone acting on your behalf, as a result of your investigation as to the cause of the accident.
>
> *ANSWER*: I have no information that convinces me that the alleged accident occurred.
>
> *INTERROGATORY NO. 13*: Please state whether you or anyone acting on your behalf made any photographs or motion pictures and, if so, please state when such photographs or motion pictures were taken and describe what each purports to depict.
>
> *ANSWER*: Rachel Cole inspected the lawn mower in the Fall of 1990 and took a picture of it.

Id. at 902, 903.

34. *Id.* at 903. The Bar contended Land violated the following Rules of Professional Conduct:

> 1. Rule 3.3(a)(1) (making a false statement of material fact or law to a tribunal);
>
> 2. Rule 3.3(a)(2) (failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client);
>
> 3. Rule 3.4(a) (unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value, or counseling or assisting another person to do such act); and
>
> 4. Rule 8.4(c & d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaging in conduct prejudicial to the administration of justice).

Id. at 903, 904.

On March 9, 1991, Land made a "marginal notation" in the Guthrie case file next to two pictures of the BB gun taken by the Guthrie's insurance representative.[35] The notation read: "Gun does not relate to civil action as worded in Complaint! Do not produce."[36]

Guthrie answered Stephens' Interrogatories on April 15, 1991.[37] The Answers to Interrogatories were not prepared until after Stephens' deposition of April 3, in which he reiterated that he was hit in the eye while driving past the Guthrie residence where he saw a lawn mower in operation.[38]

Interrogatory Number Six asked who was operating the lawn mower at the time of the accident.[39] Guthrie responded that his son David, and a neighbor's son, Ashley McAlexander, were operating the lawn mower on May 26, 1990, but that he had no knowledge of an accident.[40] The Bar complained that Guthrie's response was misleading because "it tends to admit that the lawn mower was in use at the time of the accident."[41]

When asked by Interrogatory Number Eleven whether any reports of the accident were made, Guthrie responded that he had no "personal knowledge of any written report."[42] Land in fact knew that the insurance representative had written a report containing information of the BB gun.[43]

Interrogatory Number Twelve asked for "the conclusions, if any, reached by [Defendant Guthrie] or anyone acting on [his] behalf, as a result of [his] investigation as to the cause of the accident."[44] In response, Guthrie stated that he had "no information that convince[d] [him] that the alleged incident occurred."[45] The Bar argued that this answer omitted the fact that Defendant Guthrie and Land were aware that Guthrie's son and a friend had admitted shooting "across the road" on the day of the alleged incident.[46] In effect, the Bar claimed, this response gave the impression that Guthrie and Land "had no evidence of how Stephens was injured."[47]

In his response to Interrogatory Number Thirteen,[48] Guthrie answered that "Cole inspected the lawn mower in the fall of 1990 and took a picture of it."[49] Guthrie did not mention that Cole also took pictures of the BB gun and that these pictures were given to Land.[50]

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35. *Id.* at 903.
36. *Id.* Guthrie was not due to answer discovery until April 8, 1991. *Id.*
37. *Id.*
38. *Id.*
39. Mississippi Bar's Brief at 5.
40. *Id.*
41. *Id.*
42. Mississippi Bar v. Land, 653 So. 2d 899, 903 (Miss. 1994).
43. *Id.*
44. *Id.*
45. *Id.*
46. Mississippi Bar's Brief at 6.
47. *Id.*
48. Interrogatory No. 13 asked whether Guthrie or "anyone acting on [his] behalf made any photographs or motion pictures and, if so . . . what each purports to depict." Mississippi Bar v. Land, 653 So. 2d 899, 903 (Miss. 1994).
49. *Id.*
50. *Id.*

On April 19, 1991, Land's runner mistakenly delivered Land's file on the case to Plaintiff's attorney McMahan.[51] The runner had been instructed to deliver the file to Land's partner, who practiced in another office in Hattiesburg, Mississippi.[52]

McMahan went through the file and discovered the photographs and information concerning the BB gun shooting.[53] McMahan then associated Attorney William L. Denton of Biloxi, Mississippi, who filed an Amended Complaint which added Land and State Farm as defendants and alleged "negligent use of the BB gun, tortious interference with cause of action by allegedly concealing evidence and giving false discovery responses."[54] The Amended Complaint asked for $50,000 in actual damages and $10,000,000 in punitive damages.[55]

C. Disposition in the Complaint Tribunal

On July 7, 1992, the Mississippi Supreme Court appointed a Complaint Tribunal[56] to hear the Bar's complaint against Jack Land.[57] Hearings were held January 8 and June 4, 1993, in Jackson, Mississippi.[58] The Tribunal unanimously dismissed all allegations against Land after finding that he had violated none of the Rules of Professional Conduct.[59] The Bar appealed the Complaint Tribunal's dismissal of the action to the Mississippi Supreme Court.[60]

III. HISTORY AND LAW

The Model Rules of Professional Conduct had their genesis over 150 years ago.[61] In 1836, a Baltimore attorney named David Hoffman published the first code of legal ethics in the United States.[62] Hoffman's code consisted of fifty resolutions cautioning lawyers how to conduct themselves in practice.[63] In 1854, Judge George Sharswood lectured on legal ethics to a class at the University of Pennsylvania.[64] Sharswood's *Essay on Professional Ethics* was published that same year.[65]

The Alabama State Bar Association adopted the first code of professional ethics in 1887.[66] This code was based on Sharswood's lectures at the

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51. Appellee's Brief at 17.
52. *Id.* The runner mistakenly delivered the file to "Mike" McMahan instead of Land's partner "Mike" Randolph, who was supposed to appear at a hearing on the Stephens case for Land. *Id.*; Mississippi Bar's Brief at 7.
53. Mississippi Bar v. Land, 653 So. 2d 899, 903 (Miss. 1994).
54. *Id.*
55. *Id.*
56. The Complaint Tribunal was composed of a circuit judge, a chancellor, and a practicing attorney. Appellee's Brief at 2.
57. *Land*, 653 So. 2d at 904.
58. *Id.*
59. *Id.*
60. *Id.*
61. Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 953.
62. Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1064 (July 1978).
63. *Id.*
64. *Id.* at 1063.
65. *Id.*
66. Schwartz, *supra* note 61, at 954.

University.[67] The preamble to the Alabama Code quoted Sharswood: "There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."[68]

The American Bar Association [hereinafter ABA] promulgated its Canons of Professional Ethics in 1908 based on the Alabama ethics code.[69] In the following twenty years a majority of states adopted some conformation of the Canons.[70] The Canons, however, were unclear and the ABA's Committee on Professional Ethics and Grievances was kept busy interpreting its provisions.[71] Nevertheless, it was not until 1964 that a "Special Committee on Evaluation of Ethical Standards" was formed to review the adequacy of the Canons.[72]

The Special Committee produced a Code of Professional Responsibility that was unanimously adopted by the House of Delegates on August 12, 1969.[73] The Committee divided the Code into three distinct sections: Canons, Ethical Considerations, and Disciplinary Rules.[74] Ethical Considerations, which are "aspirational in character," are distinguished from the Disciplinary Rules, which are "mandatory in character," and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[75] The Ethical Considerations and Disciplinary Rules both derive from the Canons, which are simply "statements of axiomatic norms."[76]

Within ten years after the adoption of the Code, the "Commission on Evaluation of Professional Standards" was formed to evaluate the Code's effectiveness.[77] The American Bar Association accepted the Model Rules of Professional Conduct in 1980.[78] Unlike the Code, the Model Rules contain no ethical principles.[79] Instead, the Rules are intended to be adopted by the appropriate state institutions as enforceable law with attendant disciplinary penalties.[80] Mississippi adopted the Rules of Professional Conduct in July, 1987.[81]

B. Survey of Relevant Mississippi Supreme Court Precedents

The Mississippi Supreme Court manifested its resolve to sanction dishonest attorneys in the case of *Barfield v. Mississippi State Bar Ass'n.*[82] In *Barfield*, the defendant attorney falsified a classmate's law school transcript and used it in

67. Schwartz, *supra* note 61, at 954.
68. Armstrong, *supra* note 62, at 1063.
69. Armstrong, *supra* note 62, at 1064; Schwartz, *supra* note 61, at 954.
70. Armstrong, *supra* note 62, at 1064-65.
71. Armstrong, *supra* note 62, at 1065.
72. Armstrong, *supra* note 62, at 1069.
73. Armstrong, *supra* note 62, at 1069.
74. Armstrong, *supra* note 62, at 1069.
75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980).
76. *Id.*
77. Schwartz, *supra* note 61, at 955.
78. Schwartz, *supra* note 61, at 955.
79. Schwartz, *supra* note 61, at 955.
80. Schwartz, *supra* note 61, at 955.
81. Mississippi Bar v. Mathis, 620 So. 2d 1213, 1219 (Miss. 1993).
82. Barfield v. Mississippi State Bar Ass'n, 547 So. 2d 46 (Miss. 1989).

applying for a job with a large New Orleans firm.[83] Moreover, the defendant also represented to the firm that he had taken the Louisiana state bar examination when, in fact, the Louisiana State Bar had refused to give the defendant permission to take the exam.[84] When confronted with these misrepresentations, the defendant resigned from the law firm.[85] Affirming an order entered upon default, the state disbarred the defendant for acts involving "dishonesty, fraud, deceit, misrepresentations and moral turpitude."[86]

In 1991, the Mississippi Supreme Court heard *Culpepper v. Mississippi State Bar*,[87] in which the defendant was charged with making misrepresentations to his client during a divorce action.[88] The court found that Culpepper gave his client a different version of the settlement agreement reached between himself and opposing counsel than the one actually entered into the record in court.[89]

The court disbarred Culpepper after pointing out that Culpepper had been sanctioned before for similar misbehavior.[90] In 1984, Culpepper had represented Thomas Harvey in a divorce proceeding.[91] Culpepper told the judge that Mr. Harvey had agreed to a settlement.[92] In fact, Culpepper did not even have his client's permission to assent to a settlement.[93]

In *Underwood v. Mississippi Bar*,[94] the Mississippi Supreme Court held that an attorney who knowingly lies to his clients concerning the status of their case should be suspended for one year.[95] Attorney Underwood agreed to represent plaintiffs in a personal injury suit.[96] In 1989, Underwood falsely told his clients that defendant's insurance company had agreed to a settlement of all their claims.[97] Underwood then informed his clients that the insurance company had given him release forms for them to sign.[98] When confronted with the fact that the plaintiffs never acquired settlement checks, Underwood stated that the checks were in the mail.[99] Finally, after receiving no money, the clients filed a complaint with the Bar.[100]

The Mississippi Supreme Court suspended Underwood from practice for one year.[101] The court first addressed Underwood's continuous deceptions to his

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83. *Id.* at 47.
84. *Id.*
85. *Id.*
86. *Id.* at 49.
87. Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).
88. *Id.*
89. *Id.* at 417.
90. *Id.* at 421.
91. *Id.*
92. *Id.*
93. *Id.*
94. Underwood v. Mississippi Bar, 618 So. 2d 64 (Miss. 1993).
95. *Id.* at 68.
96. *Id.* at 65.
97. *Id.*
98. *Id.* When the plaintiffs arrived at Underwood's office to sign these forms, he was not there. *Id.* Underwood had, however, left fake documents with his secretary for the plaintiffs to sign. *Id.*
99. *Id.*
100. *Id.* at 66.
101. *Id.* at 68.

clients over a period of two years.[102] Justice Pittman made clear that Underwood was not just guilty of neglect,[103] but had acted instead "without regard for the harm and inconvenience and mental anguish of the client."[104] Therefore, Underwood violated his obligation of honesty to his clients.[105]

Finally, in 1993, the court heard the case of *Mississippi Bar v. Mathis*[106] which concerned attorney misrepresentation to the court and opposing counsel.[107] Attorney Mathis filed suit against several insurance companies on behalf of Becky Laughlin for bad faith refusal to pay benefits after her husband's death.[108] In the course of discovery, defendant Mathis concealed the fact that an autopsy had been conducted on the body of his client's late husband, J.R. Laughlin.[109]

During the hearing before the Complaint Tribunal, Mathis stated that the autopsy was performed in relation to the possibility of a criminal suit being filed against Becky Laughlin.[110] Therefore, he felt no need to disclose the autopsy in response to discovery concerning his client's civil suit.[111] The Bar asserted that an attorney must not be allowed to determine for himself whether certain information is privileged.[112]

On appeal, the Mississippi Supreme Court imposed a one year suspension from practice on Mathis.[113] In response to Mathis' argument that the autopsy was work product, the court stated that whether a privilege existed was not meant to be decided by Mathis.[114] The court concluded that the need to restrain this type of attorney conduct was evident and necessary.[115] The reputation of the legal profession must be protected.[116]

C. Ethical Decisions From Other Jurisdictions

An examination of other cases and fact scenarios in which the courts have dealt with attorney dishonesty and misrepresentation demonstrates the diversity and range of conduct the judiciary has felt compelled to deter.

In re Neitlich[117] is a Massachusetts case involving attorney misrepresentation of the terms of a client's pending real estate sale.[118] Under the facts of the case, Defendant Neitlich was hired to represent his client in a post-divorce proceeding in which the client's former wife was attempting to gain security for a prior

102. *Id.* at 67.
103. *Id.*
104. *Id.*
105. *Id.* at 68.
106. Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993).
107. *Id.*
108. *Id.* at 1216.
109. *Id.* at 1217.
110. *Id.* at 1218.
111. *Id.*
112. *Id.*
113. *Id.* at 1222.
114. *Id.* at 1221.
115. *Id.* at 1222.
116. *Id.*
117. In re Neitlich, 597 N.E.2d 425 (Mass. 1992).
118. *Id.*

alimony order.[119] The court approved a $400,000 attachment on the client's condominium.[120] In 1987, the client accepted an offer to purchase the condominium for $395,000.[121] Defendant Neitlich drafted two separate purchase and sell agreements, one setting forth a $370,000 purchase price and the other covering the sale of personalty for $25,000.[122] After the defendant refused to give the wife's attorney a copy of the agreement, she informed him she could not agree to the sale.[123] However, at a hearing on the sale, at which opposing counsel was absent, the defendant told the judge that opposing counsel "was not really opposed" to the sale, but that she wanted an appraisal.[124] He also represented to the judge that the sale price of the condominium was $370,000.[125]

Later, the wife's attorney moved to vacate the order of the judge allowing the sale of the property.[126] At this hearing, the defendant again represented that the sale price was $370,000.[127] He then gave opposing counsel a copy of the agreement showing the price to be $370,000.[128] The wife's attorney subsequently learned of the second agreement for the sale of personalty.[129]

The Supreme Judicial Court of Massachusetts suspended Neitlich for one year.[130] The defendant argued before the court that his statements that the sale price of the condominium was $370,000 were "technically correct."[131] Because his affirmation of purchase price arose in the setting of a *real estate* proceeding, he had no duty to disclose the purchase price of the *personalty*.[132]

The court reasoned that the defendant went too far in the representation of his client.[133] To the defendant's argument that he faced a "conflicting duty" to the court and his client, the court responded:

> As an officer of the court, an attorney is a "key component of a system of justice," and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel. Where this duty is in seeming conflict with the client's interest in zealous representation, the latter's interest must yield. Were we to condone any action to the contrary, the integrity of the judicial process would be vitiated.[134]

Thus, an attorney may not deceitfully withhold information from the court or opposing counsel.[135]

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119. *Id.*
120. *Id.*
121. *Id.* at 425-26.
122. *Id.* at 426.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 427.
130. *Id.* at 430.
131. *Id.* at 428.
132. *Id.*
133. *Id.* at 428.
134. *Id.* at 428-29 (citations omitted).
135. *Id.* at 429.

In *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*,[136] a Michigan district court set aside a personal injury settlement on the basis that the plaintiff's counsel had not advised the opposing counsel of his client's death prior to entry of the settlement order.[137] The defendant argued that at no time was he asked by opposing counsel if his client was still alive.[138] Thus, he reasoned, he had no duty to offer that information.[139]

In addressing the conflict between advocacy of a client and the duty of candor to the court and opposing counsel, the court noted:

> [C]andor and honesty necessarily require disclosure of such a significant fact as the death of one's client. Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate.[140]

The court also expressed the idea that a lawsuit is not to be conducted like a game.[141] An attorney has a duty of candor when she controls essential information necessary to the fair disposition of a case.[142]

In 1976, the Supreme Court of North Dakota held in *In re Malloy*[143] that when an attorney promises to produce "all" documents and only produces some of them, there is a misrepresentation to opposing counsel that those are all the documents available.[144] The court addressed Malloy's contention that no harm was done since the papers were produced before or at the trial.[145] "[T]he greater harm is done to the judicial process, not to the parties. . . . [F]ailure to perform commitments made in open court damages the judicial process regardless of whether the parties are damaged."[146] *Malloy* holds, therefore, that where an attorney believes information is subject to a privilege, he has a duty to raise the objection to the court and state his reason.[147]

The California Supreme Court in *Sullins v. State Bar*[148] publicly reprimanded an attorney for failing to disclose a letter by the beneficiary of a will stating that he wanted no part of his aunt's estate.[149] Sullins was the lawyer for the executor of the Weber estate.[150] Mrs. Elizabeth Weber specifically disinherited her daughter, Mrs. Gladys Heitz, and left the entire estate to her nephew, Bradford Fick.[151]

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136. Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983).
137. *Id.* at 508.
138. *Id.* at 508-09.
139. *Id.* at 509.
140. *Id.* at 512.
141. *Id.*
142. *Id.*
143. In re Malloy, 248 N.W.2d 43 (N.D. 1976).
144. *Id.* at 46-47.
145. *Id.* at 46.
146. *Id.*
147. *Id.* at 47.
148. Sullins v. State Bar, 542 P.2d 631 (Cal. 1975).
149. *Id.* at 634.
150. *Id.* at 633.
151. *Id.*

Mrs. Heitz filed a petition in 1964 contesting the will.[152] Attorney Sullins then wrote to Fick informing him of the will.[153] Fick wrote back and stated that he wanted Mrs. Heitz to inherit the estate and that he would sign any papers necessary to turn the property over to her.[154]

Sullins never disclosed to the court or Mrs. Heitz that he had received a letter from Fick.[155] In 1967, moreover, Sullins petitioned the court for approval of a 50% contingency fee for his legal services in the matter without disclosing Fick's letter.[156] He stated to the court that the court-approved fee of 33 and 1/3% was insufficient because Mrs. Heitz's suit "had been and would continue to be fiercely contested."[157]

The California Supreme Court held that Sullins had "committed a fraud upon the Court."[158] The court refused to decide whether Sullins deceived the court for personal gain, because misleading conduct in itself required discipline.[159]

In *In re Nigohosian*,[160] the Supreme Court of New Jersey suspended the defendant for six months from the practice of law.[161] Plaintiff and defendant (in the underlying suit) agreed to a settlement in which the defendant promised to pay the plaintiff $2500.[162] If the defendant did not pay by July 1, 1975, the defendant was to give the plaintiff a second mortgage for $3000 on certain property he owned.[163] The defendant hired Attorney Nigohosian to have the settlement set aside.[164] Nigohosian did not disclose to the court that the property subject to the mortgage was no longer titled in the defendant's name but had been conveyed to a corporation newly formed by the defendant.[165]

The court held that Nigohosian breached his duty of candor to the court and opposing counsel by failing to reveal the true owner of the property.[166] "We continue to honor the premise that 'an attorney is under a duty, when the proper administration of justice so requires, to disclose all pertinent and relevant facts to the court so that it may act fairly.'"[167] Here, the status of the property was a "significant fact" which required disclosure to the court.[168]

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152. *Id.* at 634.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 638.
159. *Id.* at 639.
160. In re Nigohosian, 442 A.2d 1007 (N.J. 1982).
161. *Id.*
162. *Id.* at 1007-08.
163. *Id.* at 1008.
164. *Id.*
165. *Id.*
166. *Id.* at 1009.
167. *Id.* at 1010 (quoting In re Turner, 416 A.2d 894 (N.J. 1980)).
168. *Id.* at 1009.

IV. INSTANT CASE

A. The Majority

The Mississippi Supreme Court, in an eight-to-one opinion, held that Attorney Jack Land deliberately deceived opposing counsel and Plaintiff Stephens, thus prohibiting them from effectively pursuing their action.[169] Justice Smith, writing for the majority, rejected Land's claim that this case was a simple discovery dispute.[170] The court agreed that sanctioning Land was necessary to "maintain the integrity of our adversary process . . . ."[171] The majority, therefore, found that truth was more important than technicalities in the legal system.[172]

The court reasoned from the case of *Mississippi Bar v. Mathis*[173] that Land was guilty of misconduct.[174] In asserting that Land's conduct was analogous to Mathis' actions, the *Land* court noted:

> Although Mathis argued that he was not required to disclose any of this information because of attorney-client privilege and because the autopsy was his work product, these arguments are without merit. Even if such privileges were believed applicable by Mathis, it was not for him to determine that the privilege applied. The proper procedure would have been for him to object to the interrogatories and deposition question and affirmatively assert the privilege, leaving the matter to be decided by the court.[175]

The court went on to acknowledge that Land did act properly as to some aspects of discovery, but that his response to the plaintiff's Interrogatories was not simply an abuse of discovery.[176]

The majority noted that Land had information that David Guthrie and a friend shot at a target across the road on the day Stephens was injured.[177] In fact, on March 12, 1991, Jim Guthrie stated in a deposition that David admitted that the plaintiff's white vehicle was similar to the one that passed by as he and McAlexander shot the BB gun.[178] However, the court found that, rather than claiming a work product privilege or objecting to discovery on the grounds that plaintiff's requests were broad or vague, Land concealed the evidence relating to the BB gun.[179] Land's actions were improper, the court explained, because they

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169. Mississippi Bar v. Land, 653 So. 2d 899, 909 (Miss. 1994).

170. *Id.* at 910. Attorney Land argued that the court intended to provide attorneys with guidelines by limiting discovery to the "specific claims raised in the complaint and defenses in the answer." Appellee's Brief at 20. The comment to Mississippi Rules of Civil Procedure, Rule 26 (b)(1) states that "[d]iscovery should be limited to the specific practices or acts that are in issue. . . . MRCP 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery." *Land*, 653 So. 2d at 906.

171. *Land*, 653 So. 2d at 910.

172. *Id.*

173. 620 So. 2d 1213 (Miss. 1993). *See supra* notes 106-16 and accompanying text.

174. *Land*, 653 So. 2d at 910.

175. *Id.* at 907 (quoting Mississippi Bar v. Mathis, 620 So. 2d 1213, 1221 (Miss. 1993)) (emphasis omitted).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 908.

were "calculated to deceive" the plaintiff and to focus his attention only on the lawn mower.[180]

The court rejected Land's contention that information relating to the BB gun was not within the scope of plaintiff's discovery request.[181] In fact, the majority asserted, Land probably would have never revealed the BB gun incident, "no matter how any interrogatories were phrased."[182] The court reasoned that the BB gun evidence was relevant to the issue of what caused Stephens' eye injury.[183] Thus, Land was obligated to disclose the information in response to the Interrogatories as they were originally phrased.[184]

The majority also found fault with the timing of Land's Motion for Protective Order.[185] On April 18, 1991, the plaintiff's attorney McMahan filed a Motion for Protective Order.[186] The motion stated that the plaintiff wanted access to the insurance adjustor's investigation file.[187] Shortly thereafter, Land filed his own Motion for Protective Order, seeking to prohibit McMahan's access to the file.[188] The court felt it "significant" that Land did not make his motion *prior* to McMahan's request.[189] Even more important, the court stated, was that Land did not move for a protective order in response to plaintiff's Interrogatories.[190] To the majority, this conduct clearly eliminated any credibility Land had to maintain that this case was only a discovery dispute.[191]

The court followed the *Mathis* precedent and gave Land a one year suspension.[192] The majority concluded that Land intentionally concealed evidence concerning the BB gun incident.[193] To hold that Land's case should be regarded as a discovery dispute, the court continued, would be approving a system where the common goal is not the truth, but that of technical accuracy.[194]

B. The Dissent

In a lone dissent, Justice Lee denounced the majority for establishing "a dangerous precedent — one that allows attorneys to use the Mississippi Rules of

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 909.
186. *Id.* at 908.
187. *Id.*
188. *Id.* at 909.
189. *Id.*
190. *Id.* The court felt that a request for a protective order was just as appropriate in response to the Interrogatories as it was in response to plaintiff's attempt to gain access to the insurance representative's claim file. *Id.*
191. *Id.*
192. *Id.* at 910. Sanctions are decided on a case-by-case basis. *Id.* at 909 (citing Clark v. Mississippi State Bar Ass'n, 471 So. 2d 352 (Miss. 1985); Brumfield v. Mississippi State Bar Ass'n, 497 So. 2d 800 (Miss. 1987); Mississippi State Bar v. Young, 509 So. 2d 120 (Miss. 1987)). Factors generally considered, however, include:
(1) nature of the misconduct, (2) the need to deter similar misconduct, (3) preservation of the dignity and reputation of the profession, (4) protection of the public, and (5) sanctions imposed in similar cases.
Id. at 909 (citing Steighner v. Mississippi State Bar, 548 So. 2d 1294, 1297-98 (Miss. 1989)).
193. *Id.* at 910.
194. *Id.*

Professional Conduct (hereinafter MRPC) as a weapon by which one attorney may coerce or blackmail his opponent into a settlement."[195] The dissent accused the majority of rewarding those attorneys who draft broad and poorly worded discovery requests, while penalizing attorneys who narrowly interpret these vague requests.[196] To the dissent, this position plainly disregarded the lawyer's duty of confidentiality to his client.[197]

The dissent argued that the court's holding was unfair to Land, who had used the discovery process in the way intended by the Mississippi Rules of Civil Procedure.[198] Justice Lee stressed that the specific issue in the Stephens' suit was whether Guthrie negligently operated the lawn mower, thereby injuring the plaintiff.[199] All discovery requests propounded by Stephens were tailored to the lawn mower allegation and did not seek to discover any additional theories as to how the plaintiff was injured.[200]

By requiring attorneys to engage in sweeping disclosure, the dissent explained, the court seeks to force a lawyer "to disclose all of his client's confidences during the course of discovery."[201] The majority's holding was incorrect, argued the dissent, because it applied virtually an ex post facto law to Land's conduct in answering the plaintiff's Interrogatories.[202] The dissent maintained that Mississippi had never before required broad disclosure.[203] Therefore, attorneys, including Land, are entitled to advance notice before the court dictates a stricter standard in a disciplinary proceeding.[204]

The dissent then implied strongly that perhaps it was the plaintiff's attorney who was incompetent in not discovering the information about the BB gun incident.[205] Guthrie gave plaintiff's attorney McMahan the names of all the people who were involved in or observed the accident.[206] Moreover, Guthrie told McMahan that State Farm representative Rachel Cole had investigated the accident.[207] Through the use of these answers, Justice Lee argued, Attorney McMahan could have asked all involved whether there were any other possibilities as to how the plaintiff was injured.[208] According to the dissent, then, McMahan could have discovered the BB gun shooting "had he chosen to exercise some amount of diligence."[209]

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195. *Id.* (Lee, J., dissenting).
196. *Id.*
197. *Id.*
198. *Id.* at 911. Mississippi Rule of Civil Procedure 26(b)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the *issues* raised by the claims or defenses of any party." *Id.* (emphasis added).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*

Turning to the majority's assertion that the Land case was simply another *Mathis* case, the dissent questioned the court's reliance upon facts which were inconsistent with Land's conduct.[210] The court found Attorney Mathis lied to opposing counsel and to the lower court concerning the results of an autopsy.[211] Justice Lee felt, in contrast, that Land did not lie in his responses to the plaintiff's discovery requests, and thus, Mathis should not be used as precedent.[212] Land did not attempt to hide information.[213] Instead, the dissent argued, Guthrie answered the discovery questions as they "related to the specific act at issue, i.e., the alleged lawn mower accident."[214]

V. ANALYSIS

A. Public Citizen or Advocate (Or Is There a Difference?)

Basing its decision on the Rules of Professional Conduct, the Mississippi Supreme Court rejected the argument that Land was simply engaged in aggressive discovery and that he should be sanctioned only by Rule 37 of the Rules of Civil Procedure, if at all. By viewing the case in this manner, the court was able to easily dismiss Land's claim that he had an ethical dilemma between opposing counsel and his client. Defense lawyers are probably not pleased with the broad overtones of this decision. On the other hand, those who believe that truth has lately been ranked below that of the idea of the adversary system must be relieved. The differing views on the usefulness of the adversarial process are demonstrated by the majority and dissenting opinions in *Land*. The opinions reach different conclusions because they are based on different premises about the way the legal system should function. In the majority's view, because Jack Land never claimed a privilege or objected to the interrogatories, his conduct was misleading and therefore harmful to the judicial process.[215] On the other hand, the dissent took a more lenient approach and held that Land did exactly what he was taught to do in law school — that is, Land interpreted the plaintiff's interrogatories in a way that enabled him to protect his client.[216]

The difficulty, of course, is deciding what the ethical standard should be for the advocate. The Mississippi case of *Singleton v. Stegall*[217] noted:

> [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disci-

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210. *Id.* at 912.
211. Mississippi Bar v. Mathis, 620 So. 2d 1213, 1222 (Miss. 1993); *see supra* notes 106-16 and accompanying text.
212. Mississippi Bar v. Land, 653 So. 2d 899, 912 (Miss. 1994).
213. *Id.*
214. *Id.*
215. *Id.* at 907.
216. *Id.* at 912.
217. Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991).

> plinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.[218]

The dissent in *Land* pointed out that, technically, the plaintiff's interrogatories were framed only by the prior pleadings which solely mentioned the possibility of injury by negligent operation of a lawn mower.[219] The ramification of allowing sanctions for attorney conduct such as Land's, the dissent argued, is that lawyers will now "use the Mississippi Rules of Professional Conduct as a weapon" against opposing counsel.[220]

Perhaps Dean Monroe Freedman best expounded the view expressed by Justice Lee in the *Land* dissent. Dean Freedman disagreed with those jurists who claim that the adversary system is harmful to the truth.[221] Indeed, Dean Freedman underscored the point that "in a society that respects the dignity of the individual, truth-seeking cannot be an absolute value, but may be subordinated to other ends, although that subordination may sometimes result in the distortion of the truth."[222] This opinion is perfectly consistent with Justice Lee's conclusion that Land's duty to protect his client's confidences was higher than his duty of candor to opposing counsel.[223]

It is notable that Justice Lee's view of the adversarial process is shared by Professor Samuel Williston.[224] In Professor Williston's autobiography, he recounted an incident in which he was counsel for the defendant.[225] Williston had possession of all of his client's correspondence.[226] Opposing counsel had filed several interrogatories, but had never asked any questions concerning the letters.[227] No proof concerning the letters or the facts contained therein was made at trial.[228] The court held for the defendant.[229] Williston wrote:

> In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time.
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> . . . .
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> The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in

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218. *Id.* at 1245 n.4.
219. Mississippi Bar v. Land, 653 So. 2d 899, 911 (Miss. 1994).
220. *Id.* at 910.
221. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1061 (1975).
222. *Id.* at 1065 (footnote omitted).
223. *Land*, 653 So. 2d at 912.
224. SAMUEL WILLISTON, LIFE AND LAW, AN AUTOBIOGRAPHY 270-72 (1940).
225. *Id.* at 270-71.
226. *Id.* at 271.
227. *Id.*
228. *Id.*
229. *Id.*

> turning against his client by exposing injurious evidence entrusted to him.[230]

Thus, Professor Williston clearly thought an advocate's primary obligation was to protect his client's confidences.

Although controversial, the decision in Land was a sound one. The majority upheld the view that truth is the ultimate goal of the adversary process. This approach was substantiated by a survey which catalogued the increasingly evasive and dilatory practices of trial lawyers.[231] The lawyers interviewed agreed that the rules of discovery are capable of being effective.[232] However, they noted, the rules are also easily susceptible to abuse if not patrolled by other lawyers and the judiciary.[233]

The most negative conduct cited by the survey is the practice of evasion in answering interrogatories, the same practice for which Jack Land was suspended from the practice of law.[234] Sixty-one percent of the attorneys surveyed complained about evasion.[235] This practice is most commonly associated with interrogatories.[236] The author of the survey stated that the most obvious kind of evasion is "the habit of manipulating the definitions of opponents' words, interpreting their interrogatories, document demands, or deposition questions as narrowly, broadly, or selectively as possible for the purpose of serving a client's adversarial interests."[237]

The dissent, therefore, was clearly wrong in approving Land's behavior on the basis that he was correct in placing a narrow interpretation on Rule 26 of the Mississippi Rules of Civil Procedure.[238] No matter which approach one adheres to, that of truth-above-all-else or client confidentiality, Jack Land's conduct was still blameworthy. As the majority aptly states, "Land's proceeding to respond to interrogatories rather than also submitting the issues to be decided by the trial court defeats his argument regarding misconduct on this point . . . ."[239]

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230. *Id.* at 271-72.

231. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789.

232. *Id.* at 796.

233. *Id.*

234. *Id.* at 828-29.

235. *Id.* at 829.

236. *Id.*

237. *Id.*

238. Mississippi Bar v. Land, 653 So. 2d 899, 910 (Miss. 1994). MISS. R. CIV. P. 26(b)(1) provides:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. at 910-11. The dissent also argued that the comments to MISS. R. CIV. P. 26(b)(1) state that "[d]iscovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy, but MRCP 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery." *Id.* at 911.

239. *Id.* at 907.

Consider, for instance, Land's response to plaintiff's request for production Number Six, which asked for "[a] copy of any photograph or motion picture . . . which in any manner relates to this lawsuit."[240] Land responded, "Will Produce."[241] No matter how the interrogatory was worded, Land's reply misleads opposing counsel to believe that he is getting all of the pictures in Land's possession.

Again, consider Interrogatory Number Thirteen and Land's answer. In response to Interrogatory Number Thirteen, Land replied that "Rachel Cole inspected the lawn mower in the Fall of 1990 and took a picture of it," without raising an objection to the discoverability of the pictures of the BB gun which were also in Land's file.[242]

How far, however, does the *Land* Court propose a trial advocate must go in this quest for the truth? The *Land* opinion has only served to raise problems and uncertainty; the court's broad holding has engendered confusion. For instance, how will a lawyer know that he has complied with his discovery obligations? By what criteria can an attorney evaluate his responsibility to disclose information to opposing counsel or the court?

Although the holding in *Land* is less than clear, the majority does focus its opinion on the responses to interrogatories filed by Land.[243] The court stated that Land "knowingly concealed potentially significant facts and evidence in his possession."[244] Moreover, the court states that *Mississippi Bar v. Mathis* is particularly compelling.[245] In *Mathis*, the defendant attorney was sanctioned for not asserting a privilege in response to interrogatories and deposition questions.[246] This decision by the *Land* Court, therefore, is an attempt to give attorneys a strong incentive to fairly and accurately answer discovery requests without stretching interpretative boundaries.

A clear result of this case is that an attorney should always resolve uncertainties in favor of disclosure or the claim of privilege when evaluating discovery requests on the basis of Mississippi Rule of Civil Procedure 26(b). This court would also more than likely sanction an attorney who failed to volunteer significant information to the court which was never even asked for by opposing counsel.[247] The difficult question, of course, is what is a significant fact. Obviously, facts relevant to the outcome of the case are included. This question, however, may not be easily evaluated at the beginning of an action when the issues in the pleadings have not yet become narrowly focused. Thus, *Land* simply leaves us with an unsettled feeling and an old cliche' — "when in doubt, err on the side of caution."

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240. *Id.* at 902.
241. *Id.*
242. *Id.* at 903.
243. *Id.* at 907.
244. *Id.* at 910.
245. *Id.* at 906-07.
246. Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993); *See supra* notes 110-20.
247. *See, e.g.*, example given in note 2.

B. Appropriateness of the Remedy

Having decided that Jack Land violated the Rules of Professional Conduct, the Mississippi Supreme Court suspended him from the practice of law for one year.[248] This punishment was clearly excessive in light of Land's conduct and past case precedent.

Although sanctions are decided by the court on a case-by-case basis,[249] the court generally considers the "(1) nature of the misconduct, (2) the need to deter similar misconduct, (3) preservation of the dignity and reputation of the profession, (4) protection of the public, and (5) sanctions imposed in similar cases."[250]

In Land's case, the "nature of the misconduct" is particularly important. Land's responses in discovery did tend to mislead the plaintiff. However, Land's conduct was not clearly egregious. Land did not seek to hide witnesses who had knowledge of the BB gun incident.[251] Likewise, Land disclosed the name of the insurance agent who investigated the plaintiff's injury and the BB gun shooting.[252] The dissent, therefore, is correct when it states that the plaintiff could have easily discovered the BB gun incident, or other possible reasons for the plaintiff's injury by using the information already given to him by Land.[253]

Additionally, the Complaint Tribunal *unanimously* dismissed all claims of ethical violations against Jack Land.[254] The Tribunal even chastised the Bar for bringing the action: "Now, further, for the record, unanimously it's being stated by this Tribunal that this Tribunal also is concerned with the direction that the Bar is taking regarding these complaints, because this Bar — this Tribunal completely disagrees with this cause of action."[255] Thus, it is plain that the nature of Land's conduct was not such that everyone would even agree he was guilty of ethical violations, much less that he should be suspended for a year.

To satisfy the requirement of considering similar sanctions, the court cites the *Mathis* case as precedent for Land's one year suspension.[256] Although Land did mislead opposing counsel in discovery, it runs counter to logic to state that Mathis' and Land's actions were similar for purposes of imposing punishment. In *Mathis*, the defendant failed to reveal that he had actually had a body exhumed and autopsied.[257] In response to an interrogatory asking for information concerning any tests or inspections made of objects involved in the incident, Mathis replied that none were made.[258] Responding to a question asking for a

248. Mississippi Bar v. Land, 653 So. 2d 899, 910 (Miss. 1994).
249. *Id.* at 909 (citing Clark v. Mississippi State Bar Ass'n, 471 So. 2d 352 (Miss. 1985); Brumfield v. Mississippi State Bar Ass'n, 497 So. 2d 800 (Miss. 1987); Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987)).
250. *Id.* (citing Steighner v. Mississippi State Bar, 548 So. 2d 1294, 1297-98 (Miss. 1989)).
251. *Id.* at 911.
252. *Id.*
253. *Id.*
254. Appellee's Brief at 2.
255. Appellee's Record Excerpts at 2, 3.
256. Mississippi Bar v. Land, 653 So. 2d 899, 910 (Miss. 1994).
257. Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993). *See supra* notes 106-16 and accompanying text.
258. *Mathis*, 620 So. 2d at 1217.

list of names of persons having any relevant information, Mathis did not disclose the name of the medical examiner who performed the autopsy on the deceased.[259] Even more damaging, Mathis falsely told the district court, "No autopsy has been performed."[260]

Thus, although the court should seek to deter conduct similar to Land's, it was unfair to suspend Land for a year. Not even one member of the Complaint Tribunal believed that Land's conduct violated his ethical duty to opposing counsel. In addition, unlike Mathis, Land did not lie to the court nor did he attempt to conceal key witnesses.

C. *Unintentional Disclosure of Private Information*

An interesting question that arises from the *Land* case is whether the plaintiff's attorney McMahan is also guilty of an ethical violation in examining Attorney Land's client file.[261] Even though the Mississippi Supreme Court has not spoken to this issue,[262] the American Bar Association has addressed the duty a lawyer owes to opposing counsel not to inspect unauthorized materials.

In 1992, the ABA set out the framework to which an attorney should adhere after receiving confidential materials clearly not intended for the recipient.[263] An ethical lawyer "(a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition."[264] The ABA intended this three-part test to be used in situations where facsimile transmissions have been misdialed, where files have been misdelivered, or even where electronic mail has been sent to the wrong computer.[265] In reaching this conclusion, the ABA stressed the importance of confidentiality over competing tenets in the attorney/client relationship.[266] First, the ABA explained, loss of confidentiality is

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259. *Id.*

260. *Id.*

261. Mississippi Bar's Brief at 7. A runner from Land's firm inadvertently delivered Land's file concerning the Guthrie case to McMahan's office. *Id.* McMahan proceeded to inspect the contents of the file, where he discovered the photographs and other information related to the BB gun shooting. *Id.* McMahan then associated William L. Denton, who filed an amended complaint adding Land and State Farm as defendants. *Id.*

262. This issue was probably not addressed in *Land* because it has no relevance as to whether Land himself was guilty of violating the ethical rules.

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

264. *Id.*

265. *Id.*

266. *Id.* Model Rule 1.6 codifies the attorney obligation not to reveal confidential information of his client. Rule 1.6 mandates:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

too high a price to pay for punishing the carelessness of the sending lawyer.[267] Second, rules are already in place to encourage attorneys to be careful with confidential materials.[268] Punishing the sending attorney by forfeiture of confidential materials ignores the fact that all humans make mistakes.[269] Perhaps most importantly, the ABA rejected the argument that a lawyer's duty to zealously represent his client obligated him to use the confidential materials.[270]

Because the briefs of the parties only present a cursory sketch of the circumstances surrounding Attorney McMahan's examination of Jack Land's file, it is impossible to state whether McMahan actually violated an ethical duty. However, on the basis of the ABA's three-part test set forth above, McMahan clearly violated his duty to opposing counsel if the file, *on its face*, was not intended for him and he proceeded to review the materials. Moreover, even if it was not clear at first to McMahan that the file was not intended for him, he had a duty to notify Jack Land that he had mistakenly received the file once he realized the information was confidential.

The question of whether Attorney McMahan violated his duty to opposing counsel, however, cannot be answered solely on the basis of *his* behavior. Instead, the conduct of Jack Land in withholding discoverable information must also be considered.

In 1994, the ABA considered the lawyer's duty to opposing counsel when an unauthorized sender "intended for the receiving lawyer to receive and make use of the transmitted materials."[271] In this opinion, the Committee clarified that it did not endorse an absolute rule that prohibited a receiving lawyer from examining or using confidential information in all situations. Specifically, the Committee stated that a lawyer may be able to use materials that "should have been, but were not, produced by an adverse party in response to pending discovery requests."[272]

It is virtually impossible to evaluate how a court would rule on McMahan's actions based on the above ABA opinions. It may be that McMahan violated an ethical duty simply by looking inside Land's file, *if the file was clearly not intended for him*. However, the 1994 Ethics Opinion suggests that even if an attorney looks at confidential material, this conduct may not be unethical if opposing counsel improperly withheld the information.[273]

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

268. *Id. See, e.g.*, Model Rule 1.6.

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

270. *Id.* Canon 7 of the Model Code mandates that "a lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Although the Model Rules do not provide an equally strong edict, Rule 1.3 does state that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

271. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994).

272. *Id.* In this example, the Committee felt that a receiving lawyer satisfies his duty to opposing counsel by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed, (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer; or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Id.

273. *Id.*

VI. CONCLUSION

The Model Rules of Professional Conduct are, by their very nature, rules of ambiguity which must be interpreted in light of the facts of each case. The court's decision in *Land* has not alleviated any of this uncertainty. A proper reading of *Land*, however, is that a lawyer should seek to resolve any doubts in answering pleadings on the side of caution. The court will not condone discovery practices which exclude material based on a narrow reading of discovery requests.