NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Attorney Professionalism.

In 1997, the New York court system adopted Standards of Civility as an appendix to the then-Code of Professional Responsibility, 22 NYCRR Part 1200 (now the Rules of Professional Conduct). The Standards are intended to be "principles of behavior to which the bar, the bench and court employees should aspire" and are not intended to be used for sanctioning or disciplining attorneys. The adoption of standards originally was proposed in a November 1995 report by the Chief Judge's Committee on the Profession and the Courts; in a report presented to the House of Delegates in January 1996 and approved in principle, the NYSBA Review Committee on the Profession and the Courts endorsed the adoption of civility standards.

Last year, the Committee on Attorney Professionalism undertook a review of the Standards with a view toward updating and modernizing them. Attached is the committee's proposed revision of the Standards; as the committee notes, the tone and format of the revision is unchanged, but the Standards are modernized, particularly with respect to communication. In a change, however, the committee proposes the addition of a second section, applicable to non-litigation settings. The committee notes that this section is intended to be read in conjunction with the existing Standards.

The report was presented to the Executive Committee on an informational basis at the January 2019 meeting and was posted in the Reports Community on February 11. No comments have been received with respect to this report, although as noted in the report the Committee on Professional Ethics commented on an earlier draft of the revised standards.

Andrew L. Oringer, chair of the Committee on Attorney Professionalism, together with committee member Robert I. Kantowitz, will present the report at the April 13 meeting.

Report of the
NewYork State Bar Association ("NYSBA")
Committee on Attorney Professionalism

on

Revision of the N.Y. Standards of Civility

February 8, 2019

This Report of the Committee on Attorney Professionalism (the "CAP") relates to proposed changes to the N.Y. Standards of Civility (the "Standards").[*]

I. Introduction

Approximately 20 years ago, the Chief Judge of the N.Y. Court of Appeals promulgated the Standards for the legal profession. As stated in the Preamble of the Standards:

> The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [as then known], or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

In 2016, the Chief Judge and the then-chair of the CAP, Lillian Moy, had discussions regarding whether the Standards should be updated, modernized or amended in any way. Those discussions led to the establishment of the Subcommittee on Civility of the CAP and, more generally, the CAP's consideration of possible revisions to the Standards. Attached hereto is a proposed revision of the Standards (the "Proposed Revision"), and a second copy thereof marked to show changes from the existing Standards.

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[*] The primary authors of this Report are Andrew L. Oringer, chair of the CAP, and Robert Kantowitz, chair of the Subcommittee on Civility of the CAP. Helpful comments were received from Richard Rifkin.

II. The Proposed Revision

A. In General

The CAP is aware of the considerable negotiation and effort that resulted in the existing Standards. Thus, the tone, format and content of the Proposed Revision generally are essentially unchanged from the existing Standards. However, much has changed in the over 20 years since the initial adoption of the standards, and efforts have been made to modernize the Standards in several places - in particular regarding communications, where technological advances have been substantial.

B. Application to Non-Litigation Settings

There is a significant addition, which appears towards the end of the Proposed Revision. The new section addresses transactional and other non-litigation work. The new section is intended to be read in conjunction with the Standards as a whole such that all the provisions of the Standards are to be used both together as a source of guidance in the non-litigation context.

In deciding to address the non-litigation context, the CAP had become aware of efforts by certain other bar associations to cause civility (or civility-type) standards to be applicable outside of the litigation process. In addition, it is noted that the President of the NYSBA has expressed support for the expansion of the Standards to non-litigation settings, and, indeed, has advocated for the effectuation of that expansion in a manner that is contained directly within the text of the Standards (rather than, for example, by attaching a supplement to the Standards).

III. Process

It would seem worthwhile to discuss briefly the process that resulted in the Proposed Revision. The Proposed Revision is the product of the work that the Civility Subcommittee of CAP undertook over the past two years. The process was a rigorous one. The drafting involved numerous drafts and evolved substantially over the course of the CAP's robust discussions. As a general matter, the CAP ultimately chose to pursue surgically a series of minor refinements rather than a course of major change, essentially to tweak and modernize the standards.

When the draft got to the initial vote within the Committee, there were three dissenting votes. We proceeded to solicit comments from a variety of other NYSBA committees, and reflected those comments in the drafting to varying degrees. As a result of changes made during that phase, a revised draft received the unanimous approval of the Committee (among those voting), with one express abstention. Thus, the draft was not produced lightly, and eventually consensus was achieved.

An exception to the CAP's narrow approach involves the expansion of the standards to the non-litigation setting, noted above. It is acknowledged that this proposed expansion has drawn a negative comment from the Committee on Professional Ethics (the "CPE"). The CPE notes that there are rules that cover the kinds of aspirational standards we have here. The CAP's view is

that the CPE's comments argue against having civility standards at all. In this regard, it is noted that the Court of Appeals has already approved the existing Standards.

The final draft of the Proposed Revision was presented to the Executive Committee by CAP representatives on January 17, 2019 at the NYSBA's 2019 annual meeting.

IV. Conclusion

The CAP is grateful to have the opportunity to participate in this important project. Representatives of the CAP are to be available at the April 2019 meeting of the House of Delegates to present the Proposed Revision and answer any questions.

DRAFT – 10/15/18

STANDARDS OF CIVILITY

PREAMBLE

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. (The term "court" as used herein also may refer to any other tribunal, as appropriate.) They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Rules of Professional Conduct or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The Standards of Civility are divided into two main sections, one that is generally applicable but also contains a number of items specifically directed to the litigation setting, and one that is more specifically directed to transactional and other non-litigation settings. The first section, in turn, is divided into four parts: lawyers' duties to other lawyers, litigants, witnesses and others; lawyers' duties to the court and court personnel; court's duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants. There is also a Statement of Client's Rights appended to the Standards of Civility.

As lawyers, judges, court employees and officers of the court, and as attorneys generally, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

SECTION 1 – GENERAL STANDARDS

LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS WITNESSES AND CERTAIN OTHERS

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court and other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. Responding to communications.

A lawyer should promptly return telephone calls and electronic communications and answer correspondence reasonably requiring a response, as appropriate. (For the avoidance of doubt, the foregoing refers to communications in connection with matters in which the lawyer is engaged, not to unsolicited communications.) A lawyer has broad discretion as to the manner and time in which to respond and need not necessarily follow the same means or format as the original communication or the manner requested in the original communication.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, depositions and conferences, and make reasonable efforts to prevent clients and witnesses from causing disorder or disruption.

C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

SECTION 2 - STANDARDS FOR TRANSACTIONAL/NON-LITIGATION SETTINGS

INTRODUCTION

Section 1 of the Standards of Civility, while in many respects applicable to attorney conduct generally, in certain respects addresses the practice of law in the setting of litigation and other formal adversary proceedings, where conduct is governed by a variety of specific procedural rules of order and may be supervised by a judge or other similar official. This Section 2, which is more directed to transactional and other non-litigation settings, should be read with Section 1 as one integrated whole for a profession that has multiple facets and spheres of activity.

The differences in practice between lawyers' roles and the expectations in litigation and other settings can sometimes be significant. Although fewer formal rules of conduct and decorum apply outside of the litigation setting, lawyers conducting transactional work should keep Section 1 of Standards of Civility in mind, along with the following additional items.

ADDITIONAL TRANSACTIONAL/NON-LITIGATION STANDARDS

I. A lawyer should balance the requirements and directions of the client in terms of timing with a reasonable solicitude for other parties. Unless the client specifically instructs to the contrary, a lawyer should not impose deadlines that are more onerous than necessary or appropriate to achieve legitimate commercial and other client-related outcomes.

II. A lawyer should focus on the importance of politeness and decorum, taking into account all relevant facts and circumstances, including such elements as the formality of the setting, the sensitivities of those present and the interests of the client.

III. Where an agreement or proposal is tentative or is subject to approval or to further review by a lawyer or by a client, the lawyer should be careful not to proceed without proper authorization or otherwise imply that authority from the client has been obtained when such is not the case.

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.

2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).

3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.

4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.

5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.

6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.

7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).

8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.

9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Rules of Professional Conduct.

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

AMY K. KENDALL, ESQ.
September 23, 2019
New York State Bar Association
Environmental & Energy Law Section
Fall Meeting

I WALK THE LINE

SCENARIO 1

I KEEP MY EYES WIDE OPEN ALL THE TIME

You represent a user of aqueous film-forming foam (AFFF) in federal multi-district litigation. Discovery is ongoing and you have submitted a response to document demands stating that your client has no documents demonstrating that its use of AFFF has impacted local drinking water supplies. Your client wanted to fund scientific research concerning the fate and transport of PFAS in the watershed and asked you to hire the consultant. You did, and the research proceeds. The research concludes that your client's use of AFFF resulted in contamination of local drinking water sources.

QUESTIONS FOR CONSIDERATION

(1) You just received the report from the expert. You are aware of the scientific research linking PFAS to certain types of cancer and other health impacts. **What is the first thing you do? Review the relevant information and state of the law.**

> **RULE 1.1: COMPETENCE**[1] (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
>
> **Relevant Comments (NYSBA)**
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> [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An

[1] References to New York Rules of Professional Conduct, 22 NYCRR § 1200 with comments: http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671

agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

(2) What is the second thing you do? Tell your client.

RULE 1.4: COMMUNICATION (a) A lawyer shall: (1) promptly inform the client of: (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers. (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with a client's reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(3) The client says not to reveal the information. What is your obligation in the litigation? Does your analysis change if your client is scheduled to be deposed?

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

* * *

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

Relevant Comment:

Illegal and Fraudulent Transactions

[9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. *See* Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. *See* Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See* Rule 1.6(b)(3); Rule 4.1, Comment [3].

RULE 3.3: CONDUCT BEFORE A TRIBUNAL (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Relevant Comment

There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See also Rule 8.4(b), Comments [2]- [3].

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL A lawyer shall not: (a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce; (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein; (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

(3) What is your obligation regarding the contamination?

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

RULE 1.6: CONFIDENTIALITY OF INFORMATION.

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Part, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5)

(i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rule 1.6, 1.9(c), or 1.18(b).

"Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water

> **will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims." Comment 6 to ABA's Model Rules of Professional Conduct[2]; Simon's Rules of Professional Conduct Annotated (2017 Edition), Comment 6A on Rule 1.6, p. 239.**

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 366 (1992) (authorizing a lawyer to withdraw from a representation and to "disaffirm documents prepared in the course of the representation" where the lawyer "knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud")[3].

SCENARIO 2[4]

AS SURE AS NIGHT IS DARK AND DAY IS LIGHT

You represent a very large oil company. It's 2014. The company's shareholders have just won a lawsuit requiring the company to analyze and disclose financial risks to the company associated with greenhouse gas ("GHG") regulation. Your contact with the client (VP) wants you to draft a one-page summary for publication online stating that the company expects no significant regulation of carbon or GHG for the next 40 years. You are not stupid, and aware that (1) the US has put in place regulations mandating gains in fuel economy, (2) the EU has expanded GHG regulations, and (3) California has adopted a cap and trade system, among other things. You also are familiar with the IPCC reports tying specific deaths to impacts of climate change.

Questions for consideration:

(1) How do you advise your client about the proposed one-pager?

> **RULE 1.13: ORGANIZATION AS CLIENT**
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization,

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[2] *See* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/

[3] *See also*, John Leubsdorf, Using Legal Ethics to Screw Your Enemies and Clients, 11 Geo. J. Legal Ethics 831, 835 (1998)

[4] Victor B. Flatt, Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3340130

and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

* * *

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(2) What do you do if your client refuses to take your advice? Can you write it?

RULE 8.4: MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

> **Rule 1.0(i) :** ''Fraud'' or ''fraudulent'' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(b) Except as stated in paragraph (d), a lawyer **shall** withdraw from the representation of a client when: (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

SCENARIO 3[5]

I FIND IT VERY, VERY EASY TO BE TRUE
(or not)

You are an employee of a federal environmental agency working in the air policy office. Your politically appointed boss just advised you to work on a new rulemaking regarding the regulation of GHG in which you should assume that the social cost of carbon is only $1 per ton. You are aware of generally accepted economic data and prior guidance estimating the social cost at about $40 per ton.

Questions for consideration:

(1) Who is your client? Does it matter?

(2) Can you write the rulemaking?

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[5] Victor B. Flatt, Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3340130

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS: In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Illegal or Fraudulent Conduct by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. *See* Rule 1.16(c)(2). Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. *See* Rules 1.2(d), 1.6(b)(3).

RULE 8.4: MISCONDUCT A lawyer or law firm shall not:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

(3) Should you withdraw from representation? What does that mean?

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(b) Except as stated in paragraph (d), a lawyer **shall** withdraw from the representation of a client when: (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law….

2019 NYSBA ETHICS OPINIONS
http://www.nysba.org/CustomTemplates/EthicsOpinionList.aspx?id=27987

***Digests quoted directly**

Opinion No. 1160

Digest: Not proper for a New York attorney to affiliate and share fees with a lawyer who, though resident in New York, is not admitted to practice in New York, if the solicitation of clients, sharing of fees, and any other services performed, would as a matter of law constitute the unauthorized practice of law.

Opinion No. 1161

Digest: When a lawyer rather than a broker prepares a real estate contract, the lawyer may not disclose the contract to the broker without the client's informed consent, which must include disclosure of any personal, financial, or business interest of the lawyer in responding to the broker's request for disclosure of the information.

Opinion No. 1162

Digest: A lawyer who forms a tax credit business may not pay referral fees to other lawyers unless the lawyer or his law firm could pay such referral fees under Rule 1.5(g) or 7.2. A lawyer who is an employee of a tax credit business owned by non-lawyers may receive a referral fee from the business if none of the lawyer's activities as an employee constitute the practice of law. A lawyer who is a non-employee consultant to a tax credit business may receive a referral fee if the lawyer is not involved in the underlying transaction, obtains informed client consent, and satisfies Rule 1.8(f); if the lawyer is involved in the underlying transaction, then the lawyer must advise the client of the referral fee and credit the client with that fee.

Opinion No. 1163

Digest: A lawyer represented a defendant who later defaulted in making payments under a settlement agreement, who cannot be now located by the lawyer, and who is facing a motion before a court based on the failure to make such payments, may inform the court that the lawyer no longer represents the defendant if the prior representation ended and the prior action before the court had ended. If the representation of the client had not concluded or the prior matter before the court had not been closed, the lawyer will have to seek permission from the court to withdraw from the representation, after using reasonable efforts to locate the client.

Opinion No. 1164

Digest: A lawyer has an interest in maintaining a copy of client-owned documents provided to the lawyer during a representation, but in certain instances that interest must yield to a client's legitimate request to destroy those copies. To protect the lawyer's exposure to later suit, the lawyer may condition compliance on the client's request on receipt of certain protections that are reasonable in light of all the facts and circumstances attending the client's request.

Opinion No. 1165

Digest: Lawyer may not remove amounts from client's trust account if in dispute. Lawyer may only charge reasonable interest if provided for in the engagement letter.

Opinion No. 1166

Digest: A New York lawyer who operates both a law firm and a consulting firm on intellectual property matters in multiple jurisdictions must determine the applicable ethical rules on a matter-by-matter basis, is not engaged in work distinct from the practice of law, may associate and share fees with a non-U.S. lawyer if certain criteria are met, may not share ownership or share fees with a person not thus qualified as a lawyer, and may not delegate the duty to supervise the work of a non-lawyer.

Opinion No. 1167

Digest: A lawyer who practices under the lawyer's full surname name may use a law firm name that omits a first name and includes only the lawyer's middle name and last name.

Opinion No. 1168

Digest: A lawyer affiliated with firm wholly owned by another lawyer may purchase the firm consistent with Rule 1.17 and may use the name of the seller's firm provided that doing so is not misleading. The meaning of "retired" for purpose of such a sale is as set out in Rule 1.17.

Opinion No. 1169

Digest: Subject to any law or regulation governing the office, a public official may engage in the private practice of law, provided that the public official does not represent any private client in a matter involving the official's jurisdiction, does not participate in any matter in which the lawyer participated personally and substantially while in private practice; does not negotiate for private representation on matters with the jurisdiction in which the official

would have a role; avoids the use of public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees in order to influence official conduct; and does not represent a private client with interests adverse to a person about whom the official acquired confidential government information in a matter in which the information could be used to that person's material disadvantage.

Opinion No. 1170

Digest: A Village Attorney who does not represent the Village in court or in criminal matters, may represent private clients in defense of traffic violations, criminal proceedings, or Town Ordinance violation cases brought in the same Town Court that adjudicates such matters arising from summonses issued and arrests that occurred within the Village boundaries, provided that the lawyer adheres to rules governing conflicts and current government employees.

Opinion No. 1171

Digest: A lawyer may not engage in deceptive conduct to help clients in foreign countries circumvent currency controls of that country.