

69th Annual NECPUC Symposium
ETHICS IN ADMINISTRATIVE
PROCEEDINGS

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OVERVIEW OF TOPICS

- Framework for Lawyers' Professional Conduct Rules
- Rules Relevant to Administrative Proceedings
- Hypothetical Analysis/Discussion
- Resources
- Contacts

FRAMEWORK

- Purpose of Lawyers' Professional Conduct Rules
 - Establish boundaries of permissible conduct
 - Ensure integrity of legal process and profession
 - Govern lawyer conduct as private advocates and public officers/employees
- ABA Model Rules of Professional Conduct/State Rules
- ABA Standards for Imposing Lawyer Sanctions
- Disciplinary Authorities/Reciprocal Discipline
- Bar Ethics Committees (NH Committee has no disciplinary role)
- Overlay statutes, rules and agency/commission policies

RELEVANT RULES

- Duty to Legal System as Advocate
 - Candor Toward the Tribunal (Rule 3.3)
 - Fairness to Opposing Party and Counsel (Rule 3.4)
 - Impartiality of the Tribunal (Rule 3.5)(Ex Parte Communications)
 - Advocate in Nonadjudicative Proceedings (Rule 3.9)
- Non-Client Transactions
 - Communications with Represented Persons (Rule 4.2)
 - Dealing with Unrepresented Persons (Rule 4.3)
- Client/Lawyer Relationship
 - Special Conflicts of Interest for Current/Former Government Attorneys (Rule 1.11)

Candor Toward Tribunal



R. 3.3 Prohibits

- Representations by Lawyer
 - Knowingly misstating anything to “tribunal” (R. 1.0(m))
 - Applies to fact or law, material or immaterial
 - Compare Rule 4.1 (false statements of material fact or law)
 - Knowledge can be inferred (R. 1(f))



Candor Toward Tribunal

(R. 3.3 Prohibitions cont'd)

- Legal Argument
 - Failing to disclose directly adverse, controlling legal authority not disclosed by opposing counsel
- Remedial Measures
 - Failing to correct false statement of material fact or law
 - Failing to take reasonable remedial measures if material evidence is discovered to be false, including disclosure to tribunal, if necessary

Candor Toward Tribunal

R. 3.3 Scope and Duration

- Extends to ancillary proceedings (depositions)
- Extends to representative capacity in non-adjudicative legislative/agency proceedings (policy or rulemaking) by way of R. 3.9
- Extends until case is affirmed on appeal or appeal period expires





Candor Toward Tribunal

R. 3.3 Practice tips

- Client consultation/counsel withdrawal
- Remedial obligation trumps Rule 1.6 confidentiality
- Settlement negotiations do not necessarily suspend obligations
- Only reasonably necessary disclosure of otherwise protected information
- Distinguish legal authority if both controlling and adverse



Fairness to Opposing Party and Counsel

R. 3.4 Prohibits

- Obstructing access to evidence
- Assisting in false testimony
- Making frivolous discovery requests
- Failing to make reasonably diligent effort to respond to proper discovery
- At trial, alluding to irrelevant or unsupportable (non-record) matters
- Asserting personal knowledge or opinion on cause or witness credibility
- Disobey rules of tribunal



Fairness to Opposing Party and Counsel

R. 3.4 Practice Tips

- Permitting client to testify falsely or dodge questions (*Feld's Case*, 149 N.H. 19 (2002))
- Asking non-client witness to refrain from testifying for opponent can be a violation



Impartiality of Tribunal

R. 3.5 Prohibits:

- Improper influence of adjudicator
- Communicating ex parte with adjudicator during the proceeding unless authorized by law or court order
- Communicating with jurors under certain circumstances
- Engaging in conduct to disrupt tribunal (including depositions)

Impartiality of Tribunal (cont'd)

R. 3.5 Ex Parte Proceedings:

- Note Rule 3.3(c) obligation to inform tribunal of all material facts known to lawyer (whether or not adverse facts) to enable informed decision





Impartiality of Tribunal (cont'd)

Related Statutory Prohibitions

- Commissioners may also be subject to statutory requirements
- E.g., NHRSA 363:12 - Ethical Conduct Required includes mandate to avoid all ex parte communications concerning a case pending before the commission. NHRSA 363:12, III.



Impartiality of Tribunal (cont'd)

Statutory exceptions

- E.g., NHRSA 363:34 prohibits ex parte communications on any issue in a proceeding with persons or parties by any “Decisional Employees” (including commissioners and staff members assigned to a matter, but not including staff advocates) without notice to all parties
- Statutory exception for communications between and among commissioners, decisional employees and assistants/legal counsel

Advocate in Nonadjudicative Proceeding

R. 3.9 requires disclosure of representative capacity in:

- Non-adjudicative proceedings
- Before legislative body or administrative agency

Also requires lawyer to conform in such proceedings to:

- R. 3.3(a), (b) and (d)(candor to tribunal)
- R. 3.4(a) through (c) (fairness to opposing party and counsel)
- R. 3.5 (ex parte communications)

Advocate in Nonadjudicative Proceeding (cont'd)

Practice Tip

- Rule applies only to official hearings or meetings, not to negotiations, license applications, investigations or reports





Represented Persons

R. 4.2 prohibits lawyer communications with represented persons:

- About the subject of the representation
- If the lawyer knows the person is represented by another lawyer in the matter
- Unless person's lawyer consents
- Unless authorized by law or court order

Represented Persons (cont'd)

Practice Tips

- Lawyer may not conduct prohibited communications through the act of another.
 - See R. 8.4(a).
- When an organization (e.g., corporation or agency) is represented, certain organizational personnel will be “off limits” under R. 4.2, depending on controlling test in jurisdiction.

Unrepresented Persons

- Rule 4.3 restrains dealings with unrepresented persons on behalf of a client
- Lawyer cannot state or imply disinterest and must make reasonable efforts to correct any misunderstanding about lawyer role



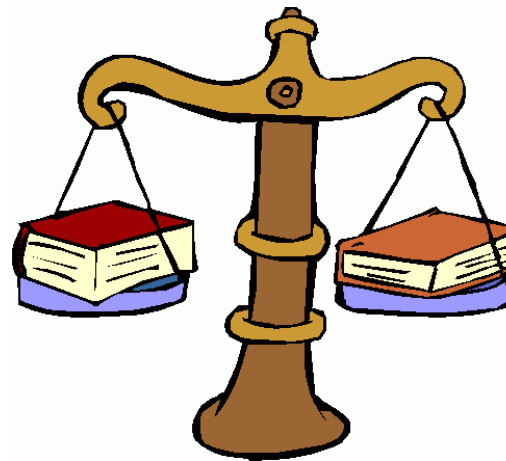
Unrepresented Persons (cont'd)

- Lawyer cannot give legal advice other than advice to secure counsel if client interests conflict
 - “Legal advice” applies particular facts to applicable law and advises person of analysis
 - “Legal information” is factual statement with no interpretation
- Lawyers can communicate with and enter settlements with unrepresented persons, as long as lawyer explains representation is limited to client with adverse interests

Unrepresented Persons (cont'd)

Practice Tips

- Providing any legal answers may constitute prohibited “legal advice” regardless of interpretation, e.g., statutory language on filing deadline
- Consider effect on client interests



Special Conflicts: Revolving Door

- Rule 1.11 Disqualification Rules for Former and Current Government Attorneys
- Balances risk of unfair advantage from using governmental power to advantage of clients against need for flexibility in employment options in public and private sectors.



Special Conflicts: Revolving Door (cont'd)

R. 1.11(a)-(b) Former public officers/employees

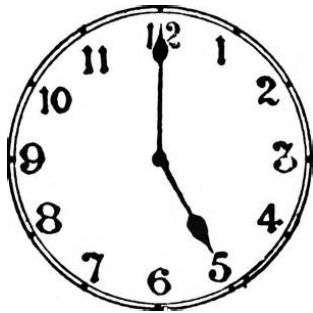
- Disqualified from representing a client on a *matter* in which the lawyer participated *personally and substantially* unless government agency gives informed, written consent
- Subject to Rule 1.9(c) prohibiting disclosure or use of former client's confidential information
- Disqualification extends to entire firm unless former employee is *timely screened* from participation in the matter, is apportioned no part of fee and gives prompt notice to appropriate agency

Special Conflicts: Revolving Door

(cont'd)

R. 1.11(c) Former public officers and confidential information

- Former public officer/employee who acquired confidential government information about a person
 - May not represent a private client with adverse interests in a matter where information could be used to person's material disadvantage
 - Lawyer must know information is confidential government information (gov't authority, not publicly disclosed)
 - Even if disqualified, may be *timely screened*/receive no fee to allow firm to avoid disqualification



Special Conflicts: Revolving Door (cont'd)

R. 1.11(d) Government Attorneys

- Cannot participate in a matter if *personally and substantially* involved while in private practice without informed written consent from agency
- Cannot negotiate for private employment with a party/lawyer in a matter in which lawyer is participating *personally and substantially* (with exceptions for law clerks, others)
- Are subject to Rules 1.7, 1.9 (concurrent conflicts, former client conflicts)

Special Conflicts: Revolving Door (cont'd)

What is “personally and substantially”?

- Both form and function count
- Factors can include primary and supervisory responsibility, substantive review

What is a “matter”?

- Judicial or other proceeding involving parties (applications, ruling requests, contracts)
- Any matter covered by “conflict of interest rules of the appropriate government agency”
- Not general proceedings like rulemaking

Special Conflicts: Revolving Door (cont'd)

What is “timely screening”?

- Isolation from any participation through timely imposition of reasonably adequate procedures
- Removes imputation of conflict of interest from one lawyer to entire firm and allows firm to take on or continue representation
- Agency conflict of interest policies may determine agency’s ability to consent to representation

“Confidential information” is not otherwise publicly available information

- Test is whether information “could be used” to adverse party’s material disadvantage if former public officer is not screened from client representation

Special Conflicts: Revolving Door (cont'd)

Practice Tips

- Review internal policies for Commissioners/staff that may be more restrictive.
- Commissioners can provide list of firms/matters to clerk for purposes of recusal from particular matters.
- Exploratory contacts by government lawyers for private employment may be off limits unless recused.



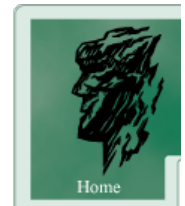


HYPOTHETICAL DISCUSSION

- Hypotheticals (Handout #1)
- Relevant Rules (Handout #2)
 - Rules 1.0(f), (k) and (m)
 - Rules 1.11, 1.13
 - Rules 3.3, 3.4, 3.5 and 3.9
 - Rules 4.2 and 4.3

RESOURCES

- The NHBA website contains all Ethics Committee opinions, articles and publications at www.nhbar.org/legal-links/ethics1.asp.
- ABA resources include *Annotated Model Rules of Professional Conduct*; *ABA Standards for Imposing Lawyer Sanctions*; *ABA Ethics Opinions* and *ABA Model Rule Comments* at http://www.americanbar.org/groups/professional_responsibility.html



CONTACTS

Lawyers admitted to practice in New Hampshire may contact the New Hampshire Bar Associate Ethics Committee for guidance on prospective conduct by emailing reknippers@nhbar.org or calling the Committee's administrative staff at **603-715-3259**.

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*This presentation does not constitute legal advice.