69th Annual NECPUC Symposium
ETHICS IN ADMINISTRATIVE PROCEEDINGS
June 6, 2016

Maureen D. Smith, Director
Orr & Reno, P.A. 45 S. Main Street
Concord, NH 03302
msmith@orr-reno.com
(603) 223-9166
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

• 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.

Maureen D. Smith, Director*
Orr & Reno, P.A.
45 S. Main Street
Concord, NH 03302
msmith@orr-reno.com
(603) 223-9166

*This presentation does not constitute legal advice.