

# 70<sup>th</sup> Annual NECPUC Symposium

## Emerging Legal Ethics Challenges

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# Overview of Topics

- Framework of Professional Conduct Rules
- Emerging Issues on Lawyers' Roles
- Communications with Represented/Unrepresented Persons
- Organization as Client
- Cyber Risk for Law Firms
- New Model Rule on Discrimination/Harassment

# 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 of Professional Conduct Vary
- Disciplinary Authorities
- Overlay statutes and agency/commission policies

# Emerging Issues for Lawyers

- Who can I communicate with as I practice law?
- Are my communications limited by my client?
- Who is my client?
- Do I have to be a technology expert and know all about new developments that I do not understand in order to practice law?
- Are the ethics rules practical or just aspirational?

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# Navigating Communications with 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
  - authorized by law or court order



# Navigating Communications with Represented Persons (cont'd)

## R. 4.2

- 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.

# Navigating Communications with Represented Persons - Hypotheticals

1. As in-house counsel for an intervenor at a PUC ratemaking proceeding for Utility represented by outside counsel, what would you do if:
  - During a technical session, Utility counsel starts a side conversation with your company's staff. They appear to be discussing substantive issues.
  - Utility counsel steps away from the technical session for a moment and you want to ask a Utility employee a simple question about his data.



# Navigating Communications with Represented Persons – Hypotheticals (cont'd)

- After the technical session, you realize that you did not write down a critical number provided by a Utility accountant. You want to call the accountant for the one piece of missing information without having to bother others.
- You need to ask PUC staff a question about whether they intend to conduct some analyses that you would like to see before the hearing. Do you need to present your question to PUC counsel, even after she told you to direct any procedural questions directly to staff?



# Navigating Communications with Represented Persons – Hypotheticals (cont'd)

2. You work in a law firm that would like to represent a Company already represented by counsel on energy matters. You see the head of Company at a business conference and strike up a conversation on a pending administrative proceeding in which the Company's petition was filed by other counsel.
  - Can you mention some of the ways that you think you would approach the case?

# Navigating Communications with Represented Persons – Hypotheticals (cont'd)

3. As counsel for the state in an administrative proceeding, you decide to send a letter to the petitioner company's president to ask about a particular issue in the proceeding that the company addressed in recent press interviews.
  - Is this acceptable?
  - What if you copied the company's legal counsel?

# Communicating with 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's role
- 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 - Hypotheticals

1. You are counsel for a municipality in an energy facility siting proceeding, where many intervenors are pro se. You receive a call from an unrepresented intervenors with a question on a filing deadline

- Can you answer the question and, if so, how would you answer?
- Would it make a difference if you were public counsel for the state or counsel for the petitioner?

2. You are outside counsel for the petitioner and one of the unrepresented intervenors calls you to ask whether she should simply sell her property to your client rather than fight the project.

- How should you respond?

# Organization as Client

- Rule 1.13 makes clear that the Organization is the client.
- Organization can be corporation, government, association.
- Rule specifically requires lawyer to “proceed as is reasonably necessary in the best interest of the organization” when confronted with acts in violation of “a legal obligation to organization” or law.
- Rule requires going up the chain of command, including the “highest authority that can act on behalf of the organization.”
- If all else fails, lawyer can “reveal information relating to the representation” regardless of Rule 1.6, “but if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”

# Special Considerations for Organizational Clients

- Organizations act through people (officers, directors, shareholders, employees, other “constituents”).



- Same basic lawyer-to-client duties, but complicated by organization’s ability to speak and act through many people.

# Special Considerations for Organizational Clients

- Decisions ordinarily must be accepted by the lawyer even if imprudent.
- Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province, unless "violation of legal obligation" or law.
- Constituent-lawyer communications are protected if constituent is acting in organizational role.

# Organizational Clients - Hypotheticals

1. You are in-house counsel for a utility. A project engineer confides of a sizeable oil spill during a delivery that was not reported to authorities. When asked why, he stated that the plant manager gave the instruction to clean up the spill and to keep quiet.

Issues? Next steps?

2. Plant manager later tells you the utility CEO blessed the plant manager's instructions as a common sense approach to the problem with no real harm to anyone.

Issues? Next steps?



# Organizational Clients – Hypotheticals (cont'd)

3. Manager asks Lawyer to investigate possible harassment by several employees.

Is communication privileged? Is Manager the Lawyer's client?

If lawyer speaks to alleged harassers, does privilege apply?

4. CEO asks Lawyer for advice on compensation package offered by board.

Conflict? Waivable under Rule 1.7?

# Cyber Risk

- USDOE says U.S. grid “faces imminent danger” of cyberattack
- In-House Utility Counsel face evolving cybersecurity issues
- Law Firms (and their clients) are characterized as “soft targets”
- Law firms maintain clients’ confidential financial or transactional information in electronic format
  - Hackers can monetize confidential information, *e.g.*, intellectual property, patents, negotiation strategy, financial data
  - Panama Papers, Oleras (48 law firms)
  - Smaller firms being targeted



# Cyber Risk

Cyber-Methods include phishing, spear phishing and ransomware

- Targeted emails to lawyers/employees to obtain login/password information that allows hacker access to or control over all electronic files
- Ransomware encrypts digital files and demands ransom to release them (WannaCry attack)
- Firms/companies may not be aware that confidential information has been compromised

# Cyber Risk for Lawyers

- Relevant Professional Conduct Obligations (ABA Model Rules)
  - Rule 1.1 – Competence
  - Rule 1.4 – Client Communication
  - Rule 1.6 – Confidentiality of Information
  - Rule 5.1 – Responsibilities of Partners, Managers, Supervisors
  - Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistance

Rules generally require lawyers to take reasonable steps to protect client confidential information, to ensure that employees and non-lawyer assistants do the same, and to communicate inadvertent information releases to affected clients.

# Competence and Communications

## R. 1.1 requires competent representation

Legal competence includes:

- Assurance that matter is completed with no avoidable harm to client's interest
- Maintaining requisite knowledge and skill
- ABA Model Rule Cmt. 8 includes in maintenance obligation staying abreast of changes, benefits and risks in relevant technology

## R. 1.4

- Lawyers must keep clients reasonably informed
- Lawyers must explain “legal and practical aspects of a matter” and “alternative courses of action” when necessary to allow informed decisions on representation

# Confidential Information

## R. 1.6

- Lawyers cannot reveal client information without informed consent
- Covers all information related to the representation
- Lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to client confidential information

**CONFIDENTIAL**

# Lawyers' Supervisory Obligations

## R. 5.1

- Partners/managers must make reasonable efforts to ensure measures are in place to reasonably assure employee compliance with Rules
- Lawyers can be responsible for another lawyer's Rule violation if specific conduct is ordered or ratified
- Managing lawyers are responsible if they fail to take reasonable remedial measures after learning of conduct when consequences can still be avoided

# Non-Lawyer Assistance

## R. 5.3

- Requires lawyers with managerial authority to ensure nonlawyers working on a client matter act consistently with professional conduct rules
- Lawyers are responsible for non-lawyer conduct if know of specific conduct that would violate professional conduct rules and orders or ratifies conduct
- Managing lawyers are responsible for non-lawyer conduct if fail to take reasonable remedial action after learning of conduct



# Cyber Risk Issues

- What steps do the Rules require in light of increased prevalence of hacking incidents?
- What constitutes “reasonable efforts” to prevent the inadvertent or unauthorized disclosure of, or access to, confidential client information?
- Can “reasonable efforts” vary by:
  - Sensitivity of information
  - Likelihood of disclosure if additional safeguards are not employed
  - Difficulty in implementing safeguards
  - Whether safeguards adversely affect client representation

# ABA Opinion 477R - Securing Client Information

1. Understand the Nature of the Threat
2. Understand How Client Confidential Information is Transmitted and Where It Is Stored
3. Understand and Use Reasonable Electronic Security Measures
4. Determine How Electronic Communications About Clients Matters Should Be Protected
5. Label Client Confidential Information;
6. Train Lawyers and Non-lawyer Assistants in Technology and Information Security
7. Conduct Due Diligence on Vendors Providing Communication Technology

# Best Cyber Defense



- Assess and manage risks beyond IT Department
- Prepare written cybersecurity plans
- Annual security assessments and penetration testing/drills
- Adapt and update technology to protect data
- Educate employees on risks
- Establish mechanisms for vetting third party contractors
- Address issue in retainer letters (if client has not already)
- Develop Client Notification and Reporting protocols

# Cyber Risk Practice Tips

- Never click on email links (insert URL address in browser and do not copy/paste)
- At least hover over links to observe address before clicking
- Never respond to emails requesting personal/login information
- Do not open attachments you have not requested
- Use different passwords for computer/mobile devices
- Conduct highly sensitive discussions away from computers and mobile devices
- Notify management and others

# New ABA Model Rule 8.4(g) - Discrimination

- ABA did not admit women until 1918; African-Americans until 1962
- Only 35% of licensed attorneys are women (50% students)
- Only 11% of licensed attorneys are members of a racial minority (28% students)
- Model Rule 8.4(g) passed by ABA House of Delegates in 2016 to eliminate bias and enhance diversity in the legal profession
- Replaces the 1998 ABA Comment to Rule 8.4 prohibiting discriminatory behavior



# ABA Model Rule 8.4(g)

- ABA Model Rule 8.4 now provides that it is professional misconduct for a lawyer to engage in conduct the lawyer “knows or reasonably should know” is harassment or discrimination on the basis of “race, sex, religion, national origin, ethnicity, disability, age sexual orientation, gender identity, marital status or socioeconomic status” in conduct related to the practice of law
- Does not limit ability to accept, decline or withdraw from representation (Rule 1.16)
- Does not preclude “legitimate advice or advocacy consistent with these Rules”

# ABA Model Rule 8.4(g) – State Rules



- Twenty-four states, including Massachusetts, Rhode Island and Vermont, and Washington, D.C. already have anti-discrimination rules
- Twelve states, including Maine and Connecticut, have a comment in their professional conduct rules
- Fourteen states, including **New Hampshire**, have no rule and no comment on discrimination or harassment in the practice of law

# ABA Model Rule 8.4(g) – NH Review

- Stay tuned in New Hampshire - Supreme Court's Advisory Committee on Rules reviewing Ethics Committee proposal
- Differs from ABA Rule
- NH Ethics Committee Comment: “the substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of [the rule]” but statutory exemptions are not relevant
- Rule 1.16 declination/withdrawal still applicable



# ABA Model Rule 8.4(g) – Issues

- Will lawyers be strictly liable for harassment/discrimination?
  - Harassment includes derogatory or demeaning verbal or physical conduct and sexual harassment such as unwelcome sexual advances
  - Mens rea requirement for both harassment and discrimination
  - Knowledge attributed to lawyer of reasonable prudence (Rule 1.0(f))
- What is the reach of the new rule if “related to the practice of law?”
  - Clients and others while engaged in practice
  - Bar association, business or social activities in connection with practice

# ABA Model Rule 8.4(g) – Issues

- Why add an ethics rule if there is substantive law under which complaints can be filed?
- Will the rule encourage a new wave of attorney discipline complaints?
- Will the rule suppress the ability to speak freely?
- Why not let employment laws address harassment issues?
- Should a lawyer's license be placed at risk?

## ABA Model Rule 8.4(g) - Cases

- A male lawyer tells opposing counsel that raising her voice during a contentious deposition “don’t raise your voice at me. It’s not becoming of a woman or an attorney who is acting professionally....” *Claypole v. County of Monterey*, 2016 WL 145557 (N.D. Cal. 2016)
- Indiana Supreme Court disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the fact that the mother was not a U.S. citizen. *In re Campiti*, 937 N.E.2d 340 (2009)

## ABA Model Rule 8.4(g) - Cases

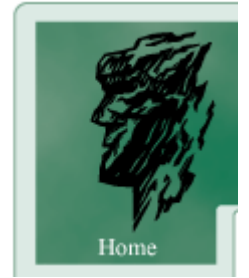
- Wisconsin Supreme Court disciplined a district attorney who repeatedly texted the victim of domestic abuse with messages like he wished she was not his client and that she was pretty. *In re Kratz*, 851 N.W. 2d 219 (2014)
- Minnesota Supreme Court disciplined a lawyer/adjunct professor who engaged in unwelcome physical contact with law students and attempted to convince a student to recant her complaint to authorities. *In re Griffith*, 838 N.W. 2d 792 (2013)

# ABA Model Rule 8.4(g) - Hypotheticals

- You arrive at the PUC with your female colleague. Opposing counsel compliments her appearance and whispers to you “did you bring her to distract the witnesses?” What to do, if anything?
- You are asked to speak at a Women’s Bar Association event. You are not sure whether men are invited. Is your license to practice at risk?
- You take a client to lunch and start chatting about current events, where you say that you are not surprised that people are afraid of Muslims in light of what is going on in the world. Any problem?

# Resources

- 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](http://www.americanbar.org/groups/professional_responsibility.html)



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