LEGAL ETHICS IN THE EMERALD CITY: WHAT THE RULES OF PROFESSIONAL CONDUCT SAY ABOUT BRAINS, HEART, AND COURAGE

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The Wizard of Oz follows the story of Dorothy Gale, Toto the Dog, the Scarecrow, the Tin Man, and the Cowardly Lion as they travel down the Yellow Brick Road to the Emerald City in search of the Wizard of Oz. In some respects, the Scarecrow's quest for a Brain, the Tin Man's quest for a Heart, and the Cowardly Lion's quest for Courage have parallels found in the ABA Model Rules of Professional Conduct (the "Rule" or "Rules"). This Ethics CLE Panel Presentation, and these written materials (including the attached articles) explore each of these areas. It is intended that, long the way, the attendee will:

(1) gain a better appreciation about counseling their clients on the boundaries created by the lawyer's ethical obligations under ABA Model Rules 1.2(d) and 1.4(a)(5) when, for example, the client expects assistance from the lawyer that is not permitted by the Rules of Professional Conduct or other law;

(2) be reminded of their ethical obligations to maintain the confidentiality of information relating to the representation of their clients, but also learn to appreciate circumstances under ABA Model Rules 1.6(b) and Rule 1.13 when a lawyer is permitted disclose (or, with respect to Rule 1.13(b), may be required to report "up the ladder" of the organizational client) information that would otherwise be protected from disclosure by Rule 1.6(a);

(3) learn how, under ABA Model Rule 1.1, they have an ethical obligation to maintain competence; and be reminded that, under Rule 1.2(a), the client is the ultimate decision-

maker, but that it the lawyer's duty to communicate with the client, under Rule 1.4, so that the client can make informed decisions about the representation; and

(4) will be reminded of their ethical obligations, under ABA Model Rule 6.1, to aspire to provide voluntary pro bono publico service to those unable to pay for the lawyer's legal services, and what types of services qualify under the Rule; and be reminded that, under Rule 8.4(g), it is professional misconduct to engage in conduct related to the practice of law that the lawyer knows, or reasonably should know, is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Along the way, the Panel will provide attendees with practical advice they can take home with them, whether that be in the Land of Kansas or elsewhere.

I. "If I Only had a Brain": The Scarecrow's Quest; Competence under Rule 1.1, Rule 1.6 Confidentiality and the Attorney-Client Privilege; the Client as Principal and the Attorney as Agent under Rule 1.2; and Communicating with the Client under Rule 1.4.

It is perhaps no coincidence that the very first substantive Rule of Professional Conduct – Rule 1.1 – is "Competence." The Rule itself is short and appears fairly straightforward: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And yet there are eight (8) Comments addressing the Rule, broken down into four identified categories: Legal Knowledge and Skill; Thoroughness and Preparation; Retaining or Contracting with Other Lawyers; and Maintaining Competence.[1]

The backbone of the competency requirement of Legal Knowledge and Skill is found in Rule 1.1, Comment [1]: " In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances." Thus, the requisite level of knowledge and expertise for a particular representation can be learned – or as other Comments recognize – the lawyer can associate themselves with another lawyer who is experienced in that area of practice. From both a legal ethics and a risk management standpoint, perhaps the most important things for a lawyer to remember is to be honest with themselves and to be honest with their client or potential client about whether the lawyer currently has the requisite knowledge or expertise to meet the client's needs or what might be necessary for the lawyer to do to provide the services the client needs. In that regard, Rule 1.1, Comment [2]

[1] Panelist Jasmine Smith has prepared the attached outline identifying and setting forth the applicable Rules of Professional Conduct implicated in this discussion and identifying some of the issues presented and certain ethics opinions that address this topic.

recognizes, in part: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

The lawyer's awareness of their ethical obligations under Rule 1.6 to maintain the confidentiality of information relating to the representation of their client – and the practical understanding of the attorney-client privilege – is also important. It is important for the lawyer to know and appreciate that Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." This confidentiality obligation encompasses any and all information about the representation – no matter the source of the information. *See* Rule 1.6, Comment [3]. There is no "generally known" or "publicly available" exception to the lawyer's confidentiality obligations. In fact, the exceptions to Rule 1.6(a), which are found in Rule 1.6(b) – permit, but do not require – the lawyer to disclose otherwise protected information, but only if the purpose of disclosure fits within Rule 1.6(b)'s enumerated exceptions, and even then, the lawyer is only to disclose so much as is reasonably necessary to accomplish the purpose of the disclosure. As noted below, sometimes it takes "Courage" to do so.

Finally, Rule 1.6(c) highlights – in large part – the lawyer's ethical obligation as to confidentiality as it relates to the lawyer's use of technology. Rule 1.6(c) provides: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The addition of Rule 1.6(c) coincided with changes to Rule 1.1, Comment [8] regarding "Maintaining Competence," which added "including the benefits and risks associated with relevant technology": "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." *See* Rule 1.1, Comment [8].

Equally important, the lawyer should "have the smarts" to recognize what is – and is not – privileged, and how the evidentiary attorney-client privilege differs from the lawyer's ethical obligations to maintain confidentiality under Rule 1.6. On the one hand, the two concepts are related in that both are founded in maintaining confidentiality and both are fundamental to Anglo-American jurisprudence. But while the lawyer's ethical obligations under Rule 1.6 are seemingly all-encompassing, the attorney-client privilege is much narrower and the arena in which it can be asserted is also largely more limited to depositions, hearings, trials, and other, similar adjudicative settings. At its most basic, the attorney-client privilege protects from discovery confidential communications between a client and a lawyer (and their respective agents) made for the purpose of facilitating the lawyer providing legal advice or representation to that client. At the same time, unprivileged disclosures of otherwise privileged communications will destroy forever the opportunity to assert the privilege. As such, the lawyer needs to not only

know what the privilege is, the identity of the client who can assert the privilege and have an understanding of what constitutes waiver of the privilege. Importantly, having a more than basic understanding of the attorney-client privilege is not restricted to only litigators. The business lawyer and the in-house lawyer should also be versed well enough on the ins-and-outs of privilege to advise their clients on what privilege is, why it is important, how to protect it, and the possible ramifications of waiving it, including the unpredictable scope of the waiver. For example, the client may decide that it is ultimately in their interest to waive the privilege on any particular communication; however, as noted below, it is important that the lawyer advise the client about the likely pros and cons of such disclosure.

That is where Rule 1.2(a) comes into play. Rule 1.2 recognizes the client as the principal and the lawyer as the agent in the attorney-client relationship: "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." *See* Rule 1.2(a).

In a related vein, in order for the client – as principal – to be the one to make informed decisions, the lawyer is ethically obligated under Rule 1.4 to consult with the client. Specifically, Rule 1.4 provides:

> (a) A lawyer shall:
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> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> >
> > (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 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 the Rules of Professional Conduct 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.

Of interest for present purposes is knowing the extent to which an attorney must explain matters in order for the client's decision to be an informed one. Here, Rule 1.4, Comment [5] provides:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

In addition, while Rule 1.4 does not necessarily deal with the issue of "informed consent," that issue certainly has obvious parallels with the lawyer's more general obligation of providing the client with enough information to make an informed decision. *See* Rule 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.); Rule 1.0, Comment [6] ("… The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. … A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or

other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.”).

At the end of the day, the lawyer needs to be smart enough to know what is likely to be material to the decision the client is being asked to make, and in order to make that determination, the lawyer must have the requisite competence of the subject matter and, if there is sufficient time beforehand, a mastery of the underlying facts against which to apply the law.

II. “If I Only had a Heart”: The Tin Man’s Quest; Rule 6.1 regarding “Voluntary Pro Bono Publico Service”; and Rule 8.4(g) regarding discrimination and harassment constituting professional misconduct.

Lawyers play an important role in society and we owe a duty of public service to the communities in which we live. The Rules of Professional Conduct specifically recognize this. Rule 6.1, Comment [1] states, in part: “Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”

The entirety of Rule 6.1 is worth noting, especially as it is a Rule often overlooked by the everyday lawyer. Rule 6.1 provides:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> > (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
> >
> > > (1) persons of limited means or
> > >
> > > (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
> >
> > (b) provide any additional services through:
> >
> > > (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the

organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Another aspect of professional service is the lawyer not engaging in conduct that is discriminatory or harassing. In fact, the Rules of Professional Conduct recognize that discriminatory or harassing actions can constitute professional misconduct that could subject the lawyer to discipline. Specifically, Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to: … (g) engage in conduct that 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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4, Comment [3] explains some of the behavior that constitute discrimination and harassment under Rule 8.4: "Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." In addition, Rule 8.4, Comment [4] helps define "conduct related to the practice of law" as addressed by the Rule: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."

III. “If I Only had the Nerve”: The Cowardly Lion’s Quest, Rules 1.2(b) regarding Undertaking Unpopular Clients and 1.4(a)(5) regarding Communicating with the Client about the Ethical and Legal Limits of a Representation, and Rules 1.6(b) and 1.13(b) and (c) regarding the Ability – or the Obligation – for the Lawyer to Disclose Client Information to Protect Others.

Sometimes a lawyer needs to be willing to take an unpopular position for a client or undertake a representation for a client with whom the lawyer has fundamentally different social or political opinions. Sometimes too, the lawyer must be willing to stand up to the client, and tell the client no, or sometimes the lawyer may be permitted (or required) to disclose information relating to the client in order to protect others. The Rules address these issues as well.[2]

First, just because a lawyer undertakes a representation of a client does not mean that the lawyer shares the client’s social or political views. As Rule 1.2(d) recognizes: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.” Granted, as a general rule, a lawyer need not undertake any particular representation of any particular client for any particular representation. And if the lawyer views the client’s political or social activities or beliefs to be so repugnant that it may materially limit the lawyer’s representation of the client, the lawyer needs to consider whether the lawyer must first secure the client’s informed consent under Rule 1.7 to undertake or continue the representation. But clients deserve legal representation and sometimes they need a strong lawyer to protect their interests. Just because a lawyer represents a client does not mean that the lawyer agrees with the client’s view or opinions.

Sometimes clients also need a lawyer to be strong enough tell the client “no.” Rule 1.4(a)(5) requires that a lawyer consult with a client who wants the lawyer to take action that is either illegal or contrary to the Rules of Professional Conduct. Likewise, Rule 1.2(d) prohibits a lawyer from advising the client to engage in a criminal or fraudulent act or with assisting the client in doing so. The lawyer may – and probably should – not only advise the client against such criminal or fraudulent action, but may advise the client about the possible adverse consequences of the client continuing down that criminal or fraudulent path.

Depending on the circumstances, the lawyer may also be permitted to disclose otherwise protected information relating to the representation of a client. As noted earlier, while lawyers have a duty under Rule 1.6(a) to maintain the confidentiality of any information related to the representation, Rule 1.6(b) provides certain enumerated exceptions to that confidentiality obligation. At least four of those exceptions permit disclosure either when third-parties are about to be harmed by the client’s actions or when the lawyer is required by other law or court order to make such a disclosure. *See* Rule 1.6(b)(1)(disclosure permitted to “prevent reasonably certain death or substantial bodily injury”); Rule 1.6(b)(2) (disclosure permitted to “prevent the client

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[2] Panelist Amy Richardson addresses these issues in greater detail in her attached materials entitled: “The Call to Courage in the Rules of Professional Conduct.”

from committing a crime or fraud" likely to inflict substantial financial injury when the client has used the lawyer's services to do so); Rule 1.6(b)(3) (similarly, disclosure permitted to prevent, mitigate or rectify the financial losses); and Rule 1.6(b)(6) ("to comply with other law or a court order."). At least under the Rules of Professional Conduct, if the situation fits within these enumerated circumstances, the lawyer is permitted – but not required – under the Rules to disclose only enough information as is reasonably necessary to accomplish the purpose behind the exception.

Furthermore, when a lawyer representing an organization or entity, it may be necessary – and required – for that the lawyer report "up the ladder" when a client constituent is engaging or about to engage in conduct that either violates the law or violates a legal obligation of the organizational client – and such conduct is likely to result in substantial injury to the client. *See* Rule 1.13(b). That reporting "up the ladder" may need to go all the way to the client's Board of Directors. And should the Board of Directors or other authority in the organization not act, and their inaction is reasonably likely to result in substantial injury to the client, the lawyer may – but is not required – disclose information outside the organization to prevent the injury. *See* Rule 1.13(c).

It takes courage to stand up to the client and tell the client no. But sometimes it has to be done, as the Rules of Professional Conduct themselves recognize.

The Call to Courage in the Rules of Professional Conduct

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Robert F. Kennedy said: "Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law school. It can never be de-limited, dated or outworn, and it should pervade the heart, the halls of justice and the chambers of the mind." Lawyers are often called not just to big moments of courage, but to display courage in everyday occurrences. For example, lawyers must tell their clients that their goals - while important - are not achievable under the law. The Rules of Professional Conduct reflect these acts of courage and provide the mechanisms by which an attorney can or must act.

Rule of Professional Conduct 1.2(b)

Rule 1.2(b) states that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 1.2(b) recognizes that not all representations of clients are popular or even consistent with a lawyer's personal belief system. However, as officers of the Court and members of the justice system, some lawyers take on controversial or unpopular representations to ensure that all parties receive zealous representation.[1]

Comment [5] to Rule 1.2 further expands on this recognition, stating:

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Rules of Professional Conduct 1.4(a)(5) and 1.2(d)

Lawyers are also required by the Rule of Professional Conduct to counsel their clients on the boundaries of what lawyers can and cannot do. While lawyers often seek to achieve their clients' objectives, lawyers are also required to set and explain the boundaries created by the ethics rules that govern our conduct. Boundary-setting conversations with clients can be productive, but they can also be uncomfortable and even frustrating for a client.

[1] Rule 1.7(a)(2) counsels that if a lawyer's personal beliefs are so deeply held that it is creates a conflict between a lawyer and client that impacts the lawyer's ability to fully represent the client, *i.e.*, a "material limitations" conflict.

Rule 1.4(a)(5) provides that lawyers must "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 the Rules of Professional Conduct or other law." Rule 1.4(a)(5) is mandatory in that it states a lawyer must – not may – consult with her client in this way.

If a client pushes a lawyer to cross those boundaries, additional requirements from the Rules of Professional Conduct step in. For example, Rule 1.2(d) takes an active step forward to prohibit a lawyer from counseling:

> a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

<u>Rule of Professional Conduct 1.6</u>

During a client representation that runs up against the boundaries mandated in the Rules of Professional Conduct, a lawyer may be faced with some difficult decisions, including whether she needs to withdraw from representing a client or even disclose confidential information about her representation of the client. *See* ABA Formal Ethics Opinion 92-366. ABA Rule of Professional Conduct 1.6 requires that a "lawyer shall not reveal information relating to the representation of a client" unless a client consents, authorization is implied, or an exception created under section (b) of the rule applies. This required confidentiality covers not just information protected by legal privilege, but everything relating to the lawyer's representation of the client.

Pursuant to Rule 1.6(b), a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to address specific enumerated circumstances. This exception to mandatory confidentiality is styled as being permission and giving a lawyer discretion. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Rule 1.6(b), Comment [17]. Disclosure may be required, however, by other Rules such as Rule 1.2(d). *Id*.

Rule 1.6(b) provides seven reasons for disclosure, including seeking legal advice for compliance with the Rules of Professional Conduct to preventing reasonably certain death or substantial bodily harm. The Comments to the Rule 1.6 counsel a lawyer considering disclosure to consider factors such as "as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." Rule 1.6(b), Comment [17].

Rule of Professional Conduct 1.13

In-house lawyers or lawyers for an organization, regardless of whether they are operating in a business capacity or a legal capacity, must comply with the Rules of Professional Conduct. Rule 1.13 addresses situations where an organization is the lawyer's client. Section (b) of Rule 1.13 addresses when the lawyer learns that someone associated with the organization is behavior that would harm the organization. Section (b) provides:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that 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. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Section (b) also addresses situations where a lawyer finds it necessary – in order to protect the client organization – to report to a higher authority in the organization. This obligation is mandatory and often referred to as "reporting up." As you can imagine, going to a higher authority is necessarily difficult as it could destroy a lawyer's internal relationships and challenge an organization's culture.

If despite the lawyer's efforts under section (b), the highest authority within the organization refuses to act, section (c) provides additional options. Section (c) allows a lawyer to reveal confidential information usually protected by Rule 1.6 if the disclosure is reasonably necessary to prevent "substantial injury to the organization." This permissive disclosure by the attorney, however, requires that the highest authority refuses to prevent or act to stop something that is a clearly a violation of law and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization. Rule 1.13(c). This permissive disclosure is often called "reporting out."

Rule 1.13 is designed to give a lawyer who is representing a corporation the ability to represent the organization – not just its constituents – in a way that protects the organization to the greatest extent possible. This ability is preserved even if the leadership or other constituents do not agree with or are actively working against the best interests for the corporation.

Conclusion

The Rules of Professional Conduct are the means by which lawyers self-govern. The Rules, as a result, reflect the characteristics that the legal professions want to protect and

encourage.   Courage is one of those values and the Rules above help encourage and protect courageous behavior by lawyers.

Legal Ethics in the Emerald City: What the Rules of Professional Conduct Say about Brains, Heart, and Courage
Materials for Jasmine D. Smith

RULE 1.1: COMPETENCE

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Relevant Comments:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[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 agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Issues to consider:

- 2012 comment- keeping up with all the new technology in your area of law
- To date, more states than not require attorneys to be "technologically competent" and stay abreast of changes relating to law practice and legal tech

RULE 1.6: CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) 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;
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Issues to consider:

- January 13, 2021- ABA provided guidance to practitioners on responding to negative online reviews while meeting the ethical obligation to maintain the confidentiality of any "information relating to the representation of a client"
- Risk management takeaways
- Unlike ABA Model Rule 1.6, some state's versions (including Connecticut's version) of the Rule does not expressly incorporate that restriction into the self-defense exception
- Ethics & Prof'l Responsibility, Formal Op. 477R (2017)- opinion providing guidelines that practicing attorneys should follow to ensure that communications with their clients are protected, and not subject to cybersecurity breaches
- ABA Formal Opinion 18-480- ethics opinion addressing lawyers' use of social media platforms, such as LinkedIn and Twitter, blogs, website postings, webinars and podcasts, and other online commentary

RULE 1.2(a): CLIENT AS PRINCIPAL AND ATTORNEY AS AGENT

Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Relevant Comments:
[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued,

the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

Issues to consider:

- When a material disagreement arises with a client or a client refuses to cooperate with sound legal advice, you should first determine if withdrawal is required.

RULE 1.4: COMMUNICATING WITH THE CLIENT

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(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 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 the Rules of Professional Conduct 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.

Issues to consider:

- Formal Opinion 481- “self-reporting” a material mistake to clients
- ABA Formal Opinion 500: A lawyer’s ethical duties to the client when there is a language or other barrier to communication

- Lawyers' Obligations After an Electronic Data Breach or Cyberattack, Formal Opinion 483