Nassau Academy of Law

CIVILITY MATTERS

Tuesday, May 15, 2012

15th & West Streets
Mineola, New York 11501
516.747.4464

Presented By
The Theodore Roosevelt Inn of Court and
The Judicial Section of the Nassau County Bar Association

"Civility Matters" Program

Presented by The Theodore Roosevelt Inn of Court and The Judicial Section of The Nassau County Bar Association

May 15, 2012

Panel Participants:

Hon. Steven M. Jaeger
John Brickman, Esq.
George DeHaven, Esq.
Elizabeth Kase, Esq.

Marilyn Genoa, Esq.
Hon. Tricia Ferrell

Civility Matters Program - Outline

Introduction by Susan Katz Richman, President, NCBA

Opening Remarks by Hon. Timothy Driscoll

J. JAEGER 1. Welcome / Introduction of panel - Moderator, Judge, Plaintiff and Defense Attorneys (5 minutes)

Play "Civility Matters" video (5 minutes)

JOHN **2. Introduction to the issue of civility — (5 minutes)**
A. What does it mean to be "civil?"

- How to serve your client in a very competitive and adversarial arena but in a civil manner?
- Does being "civil" require that you always agree with your opponent?
- Does it mean you are a weak or soft lawyer?

B. What does it mean to be "uncivil?"

- Are "uncivil" lawyers more successful?
- What impact does "incivility" have on the impression of the legal system and lawyers?

J. JAEGER C. The importance of Civility and Professionalism - **(5 minutes)**

Plaintiff's Attorney and Defense Attorney- (10 minutes)

LIZ - Avoiding the downward spiral of incivility by not taking the bait;

Taking the high ground; creating the upward spiral of cooperation.

GEORGE - Civility can make you a lot of money; fighting costs a lot of money

JOHN Shakespeare, The Taming of the Shrew, Act I, Scene 2:

"And do as adversaries do in the law,

Strive mightily, but eat and drink as friends."

J. JAEGER 3. Brief explanation of materials - (5 minutes)

- ABOTA's Principles of Civility, Integrity and Professionalism
- ABOTA's Code of Professionalism

• NY Standards of Civility, Part 1200, App.A

• NYS Court Rules on Courtroom Decorum- First and Second Departments

• Second Department "Orientation to the Profession" Materials

• NY Rules of Professional Conduct

J. JAEGER **4. Introduce Panel discussion of real-life situations and what to do about them: One panelist leads by presenting the question and summarizing the answer; all 4 panelists contribute. Examples of bad conduct will be presented. Questions and corresponding rules will be presented on power point slides. (5 minutes)**

WARNING: Profanity will be used in the examples, but it is all real.

REMINDER: Read the introductory questions first, then do the video example or role playing to illustrate uncivil conduct, then discuss it, and finally tie it to a civility guideline or rule.

JOHN **A.** "Is lack of civility a problem? **-(5 minutes)**

• Lossing v. Superior Court (1989) 207 Cal.App.3d 635

• AD 1 case

• Scorched earth sanction, Montgomery v. Etreppid Technologies, 2009.

LIZ **B.** "What do you do if your client insists that you play 'hardball' with opposing counsel?" **(5 minutes)**.

• Discussion

• NY Standards of Civility, I(B), VII(B)
• NY Rules of Professional Conduct, 1.2

C. The Uncivil Boss: **(7 minutes).**

GEORGE "What do you do if your boss is uncivil and that is the style or practice in your office?"

LIZ "What do you do if your boss, or your opponent refuses extensions

of time or other expected courtesies?"

J. FERRELL & MARILYN

• **ROLE PLAY #1** (Partner / Associate Vignette)

ABOTA Principles of Civility, Integrity, and Professionalism, #10

ABOTA Principles of Civility, Integrity, and Professionalism, #13

ABOTA Principles of Civility, Integrity, and Professionalism, #14

ABOTA Principles of Civility, Integrity, and Professionalism, #15

NY Standards of Civility, I, VI, VII(B)

NY Rules of Professional Conduct, 3.1 and 3.3

JOHN **D.** "What do you do at a deposition if your opponent improperly objects, coaches the witness, or insults you or the witness?" - **(10 minutes)**.

J. FERRELL & MARILYN

• **ROLE PLAY #2-** Deposition excerpt :"You're an idiot."

• "I'm thinking" **VIDEO**

• Marking Opponent's computer **VIDEO**

Discussion

ABOTA Principles of Civility, Integrity, and Professionalism, #20

NY Rules of Professional Conduct, 1.2, 3.1, 3.2

"Hand in front of face" **VIDEO**

Discussion

LIZ **E.** "What do you do if your client is uncivil to your opponent during a deposition?" **(5 minutes)**.

J. FERRELL & MARILYN

ROLE PLAY #3- Deposition excerpt "Slimy son-of-a-b_____"

Bill Gates **VIDEO**

"F___ you" **VIDEO**

"Fraud" **VIDEO**

Discussion

NY Standards of Civility, I
NY Rules of Professional Conduct, 1.2

GEORGE **H.** "What should you do if you receive argumentative, nasty emails, letters, or voicemails from your opponent? **(10 minutes).**

Toxic emails

Responses to toxic emails / letters

"Fax letter"

"Houston letter"

Toxic Voicemail- "Voicemail" **Audio**

Discussion

NY Standards of Civility, I(A), VII
NY Rules of Professional Conduct, 1.2

GEORGE **J.** "What if your opponent overlooks or misses a deadline?" - **(5 minutes).**

Discussion

ABOTA Principles of Civility, Integrity, and Professionalism, #17

NY Standards of Civility, II(A), III(A,B,C)

J. JAEGER **K.** "What are the minimum requirements in the courtroom,

aka courtroom etiquette?" —**(5 minutes).**

Discussion- NYS Court Rules on Courtroom Decorum

Judges' Top 10 Pet Peeves

Top Rules to know:

1. Respect for the court in general

• Timeliness, what to wear, telephone etiquette for court call and cell phone usage

2. Respect for the judge

• Addressing the judge, when to sit / stand, what to say, interruption, tone of voice, learning his / her pet peeves.

3. Respect for the court staff

• Clerk, reporter, court officer

• Law Secretary or Court Attorney

4. Respect for the jury

• Where to stand, how to address

5. Respect for opponent

• Civility and comportment

ALL **4. Food For Thought — (if time) THE PANEL.**

We hope that "CIVILITY MATTERS" has raised and addressed some issues you had not yet considered. We would like to explore some of these areas a little further.

• *How many of you have clerked? Have any you who have worked with any attorneys who talked about the importance of being civil. Or promoted incivility as a way to get ahead?*

1. In the real world, do you make more money being uncivil?

2. Does being civil mean you have to agree with your opposition, just to get along amicably? Alternatively, does being uncivil mean that you are mean or openly hostile to your opposition?

3. If an opponent falsely accuses you of wrongdoing or insults you or your client, how do you deal with that situation?

4. Your opponent asks for an extension of time. You would prefer not to extend the time. How should such matters be handled? Are there both civil and uncivil reasons for refusing that courtesy?

5. Your opponent openly objects at deposition to proper questions and regularly coaches the witness, influencing the answers. What options are available?

6. The lawyers in the case are not getting along. Both sides claim the other side is trying to mislead the court. What can the court do? What should the lawyers do?

7. One party seeks sanctions against the other for various kinds of uncivil tactics, and the evidence confirms there is merit to the claim. How do courts deal with situations like that and what can a lawyer do who wants to work things out?

8. In your experience, do lawyers who are uncivil win more or settle more than lawyers who are civil?

9. Do you feel that there are any more generalized benefits or advantages that flow from lawyers embracing civility as a fundamental rule of practice?

10. What recommendations, in general, would you give to lawyers who are trying to create a civil situation, where the opposing lawyer is clearly motivated in the opposite direction?

11. Why should a new lawyer make an effort to develop a civil style?

Questions

Acknowledgments

Thank you

Use of the program and materials courtesy of The American Board of Trial Advocates, The American Inns of Court, and the JAMS Foundation.

Program Materials

Principles of Civility, Integrity and Professionalism
Code of Professionalism
American Board of Trial Advocates

22 NYCRR Part 1200, App. A
New York State Standards of Civility

22 NYCRR Part 1200 Rules of Professional Conduct

Orientation to the Profession- Excerpt
Appellate Division, Second Department

22 NYCRR Part 700 Court Decorum
Rules of the Appellate Division, Second Department

22 NYCRR Part 604 Special Rules Concerning Court Decorum
Rules of the Appellate Division, First Department

22 NYCRR Section 130-1.1 Costs, Sanctions
Rules of the Chief Administrator

22 NYCRR Part 221
Uniform Rules for the Conduct of Depositions

Professionalism
by Justice Sandra Day O'Connor

The Role of the Judiciary in Fostering Professionalism and Civility
by Judge Jesse G. Reyes

Civility in the Legal Profession- Our Common Goal
by Justice Donald W. Lemons

If Incivility Strikes...
by the Professionalism, Ethics and Civility Committee of ABOTA

Bios of Program Panel

Acknowledgments

Principles of Civility, Integrity and Professionalism

American Board of Trial Advocates

Preamble

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.

As a member of the American Board of Trial Advocates, I will adhere to the following Principles:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.

2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.

3. Never, without good cause, attribute to other counsel bad motives or improprieties.

4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.

6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.

7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.

8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.

9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.

10. Never use any form of discovery scheduling as a means of harassment.

11. Make good faith efforts to resolve disputes concerning pleadings and discovery.

12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.

13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.

15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.

16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.

17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.

18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.

19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.

20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.

21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.

23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.

24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.

25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.

27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.

28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.

29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

When In Court I Will:

1. Always uphold the dignity of the court and never be disrespectful.

2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.

3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.

4. Never engage in conduct that brings disorder or disruption to the courtroom.

5. Advise clients and witnesses of the proper courtroom conduct expected and required.

6. Never misrepresent or misquote facts or authorities.

7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.

8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

Conduct Expected of Judges

A lawyer is entitled to expect judges to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.

2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.

3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.

4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.

5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.

6. Make all reasonable efforts to promptly decide matters under submission.

7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.

8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.

9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.

10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.

11. Require court personnel to be respectful and courteous toward lawyers, parties, and witnesses.

12. Abstain from adopting procedures that needlessly increase litigation time and expense.

13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Ever wonder what happened to the ideals of civility, integrity, and professionalism to which you aspired in law school? They are alive and well in the American Board of Trial Advocates. Admittedly, these principles are difficult to define. Nevertheless, the legal profession as a whole and each individual lawyer and judge must adopt and practice these concepts so that the members of our profession will again be looked upon as the greatest protectors of our life, liberty and property.

Please join ABOTA in making these principles a reality once again.

American Board of Trial Advocates

Code of Professionalism

As a member of the American Board of Trial Advocates, I shall

Always remember that the practice of law is first and foremost a profession.

Encourage respect for the law, the courts, and the right to trial by jury.

Always remember that my word is my bond and honor my responsibilities to serve as an officer of the court and protector of individual rights.

Contribute time and resources to public service, public education, charitable and pro bono activities in my community.

Work with the other members of the bar, including judges, opposing counsel, and those whose practices are different from mine, to make our system of justice more accessible and responsive.

Resolve matters and disputes expeditiously, without unnecessary expense, and through negotiation whenever possible.

Keep my clients well-informed and involved in making decisions affecting them.

Achieve and maintain proficiency in my practice and continue to expand my knowledge of the law.

Be respectful in my conduct toward my adversaries.

Honor the spirit and intent, as well as the requirements of applicable rules or codes of professional conduct, and shall encourage others to do so.

Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, All Departments
Part 1200. Rules of Professional Conduct (Refs & Annos)
Appendix A. Standards of Civility

N.Y.Ct.Rules, Pt. 1200, App. A
Currentness

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. 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, 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 are divided into four parts: lawyers' duties to other other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; judges' duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.

As lawyers, judges and court employees, 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.

Lawyers' Duties to Other Lawyers, Litigants and Witnesses

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 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 their clients' 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 or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

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, at depositions and at conferences, and, to the best of their ability, 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 other persons involved in the litigation process.

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

D. 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

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

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.

Current with amendments received through 9/15/11

End of Document

22 NYCRR 1200.0

Section 1200.0. Rules of Professional Conduct

Terminology

Rule 1.0: Terminology

Client-lawyer Relationship

Rule 1.1: Competence

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.3: Diligence

Rule 1.4: Communication

Rule 1.5: Fees and division of fees

Rule 1.6: Confidentiality of information

Rule 1.7: Conflict of interest: current clients

Rule 1.8: Current clients: specific conflict of interest rules

Rule 1.9: Duties to former clients

Rule 1.10: Imputation of conflicts of interest

Rule 1.11: Special conflicts of interest for former and current government officers and employees

Rule 1.12: Specific conflicts of interest for former judges, arbitrators, mediators or other third-party neutrals

Rule 1.13: Organization as client

Rule 1.14: Client with diminished capacity

Rule 1.15: Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property

Rule 1.16: Declining or terminating representation

Rule 1.17: Sale of law practice

Rule 1.18: Duties to prospective clients

Counselor

Rule 2.1: Advisor

Rule 2.2: [Reserved]

Terminology

Rule 1.0: Terminology.

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matters" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, **professional** corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(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.

(j) "Informed consent" denotes the agreement by a person to a proposed course of **conduct** after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of **conduct** and reasonably available alternatives.

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a **professional** legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "**Professional** legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to **conduct** by a lawyer, denotes the **conduct** of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwritting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Client-Lawyer Relationship

Rule 1.1: Competence.

(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.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 1.2: Scope of representation and allocation of authority between client and lawyer.

(a) Subject to the provisions herein, 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 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.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(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.

(e) A lawyer may exercise **professional** judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the 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.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all **professional** commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Rule 1.3: Diligence.

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for **professional** services, but the lawyer may withdraw as permitted under these Rules.

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.

Rule 1.5: Fees and division of fees.

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Rule 1.6: Confidentiality of information.

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, 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 exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Rule 1.7: Conflict of interest: current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's **professional** judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8: Current clients: specific conflict of interest rules.

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise **professional** judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent **professional** judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is **conducting** for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

(i) as a condition of entering into or continuing any **professional** representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any **professional** representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Rule 1.9: Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 1.10: Imputation of conflicts of interest.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

Rule 1.11: Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Rule 1.12: Specific conflicts of interest for former judges, arbitrators, mediators or other third-party neutrals.

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator,

mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13: Organization as client.

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(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, 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.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14: Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15: Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; record keeping; examination of records.

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Rule 1.16: Declining or terminating representation.

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, **conduct** a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(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;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, **conducting** the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of **conduct** which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Rule 1.17: Sale of law practice.

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been **conducted.**

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for **professional** misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

Rule 1.18: Duties to prospective clients.

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

Counselor

Rule 2.1: Advisor.

In representing a client, a lawyer shall exercise independent **professional** judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Rule 2.3: Evaluation for use by third persons.

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

Rule 2.4: Lawyer serving as third-party neutral.

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Advocate

Rule 3.1: Non-meritorious claims and contentions.

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's **conduct** is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the **conduct** has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Rule 3.2: Delay of litigation.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

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.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous **conduct**;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in **conduct** intended to disrupt the tribunal.

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;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal **conduct** or **conduct** contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the **professional** services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Rule 3.5: Maintaining and preserving the Impartiality of tribunals and jurors.

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give

or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) **conduct** a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper **conduct** by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

Rule 3.6: Trial publicity.

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity

of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.7: Lawyer as witness.

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8: Special responsibilities of prosecutors and other government lawyers.

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

Rule 3.9: Advocate in non-adjudicative matters.

(a) A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Transactions with Persons other than Clients

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.

Rule 4.2: Communication with person represented by counsel.

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the

representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Rule 4.3: Communicating with unrepresented persons.

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4: Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Rule 4.5: Communication after incidents involving personal injury or wrongful death.

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

Law Firms and Associations

Rule 5.1: Responsibilities of law firms, partners, managers and supervisory lawyers.

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific **conduct** or, with knowledge of the specific **conduct**, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such **conduct** at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the **conduct** so that reasonable remedial action could have been taken at a time when the consequences of the **conduct** could have been avoided or mitigated.

Rule 5.2: Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of **professional** duty.

Rule 5.3: Lawyer's responsibility for conduct of nonlawyers.

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for **conduct** of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific **conduct** or, with knowledge of the specific **conduct**, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such **conduct** at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the **conduct** so that reasonable remedial action could have been taken at a time when the consequences of the **conduct** could have been avoided or mitigated.

Rule 5.4: Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's **professional** judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the **professional** judgment of a lawyer.

Rule 5.5: Unauthorized practice of law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal **profession** in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Rule 5.6: Restrictions on right to practice.

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Rule 5.7: Responsibilities regarding nonlegal services.

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the **professional** judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

Rule 5.8: Contractual relationship between lawyers and nonlegal professionals.

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent **professional** judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the **profession** and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent **professional** judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal **profession** and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal **professional** or nonlegal **professional** service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal **professional** services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the **profession** of the nonlegal **professional** or nonlegal **professional** service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal **professional** or nonlegal **professional** service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal **professional** service firm, or to any client of the nonlegal **professional** service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each **profession** on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal **profession** or nonlegal **professional** service firm, upon a determination that the **profession** is composed of individuals who, with respect to their **profession**:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the **profession** by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical **conduct** that is reasonably comparable to that of the legal **profession**;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal **professional** or non-legal **professional** service firm.

Public Service

Rule 6.1: Voluntary pro bono service.

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 20 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons.

(b) Pro bono legal services that meet this goal are:

(1) **professional** services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) **professional** services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

Rule 6.3: Membership in a legal services organization.

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

Rule 6.4: Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interest of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.

Rule 6.5: Participation in limited pro bono legal service programs.

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Information About Legal Services

Rule 7.1: Advertising.

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other **professional** societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide **professional** ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal **professional** or nonlegal **professional** service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertise shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefore;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case.

(3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or

(4) be made to resemble legal documents

(d) An advertisement that complies with subdivision (e) of this section may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in subdivision (d) of this section provided:

(1) its dissemination does not violate subdivision (a) of this section;

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated;

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein

until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for **professional** publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

Rule 7.2: Payment for referrals.

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal **professional** or nonlegal **professional** service firm pursuant to a contractual relationship with such nonlegal **professional** or nonlegal **professional** service firm to provide legal and other **professional** services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent **professional** judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Rule 7.3: Solicitation and recommendation of professional employment.

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by realtime or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) **professional** cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computeraccessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

Rule 7.4: Identification of practice and specialty.

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall

not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law;"

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

Rule 7.5: Professional notices, letterheads, and signs.

(a) A lawyer or law firm may use internet web sites, **professional** cards, **professional** announcement cards, office signs, letterheads or similar **professional** notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a **professional** card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A **professional** card of a law firm may also give the names of members and associates;

(2) a **professional** announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the **professional** offices of a lawyer or law firm or any nonlegal business **conducted** by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business **conducted** by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar **professional** reference on stationery of a client if the lawyer or the firm devotes a substantial amount of **professional** time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a **professional** corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the

term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal **professional** or nonlegal **professional** service firm pursuant to Rule 5.8 to provide legal and other **professional** services on a systematic and continuing basis include in its firm name the name of the nonlegal **professional** service firm or any individual nonlegal **professional** affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in **professional** notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in **professional** notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

Maintaining the Integrity of the Profession

Rule 8.1: Candor in the bar admission process.

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Rule 8.2: Judicial officers and candidates.

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, **conduct** or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the

Chief Administrator of the Courts.

Rule 8.3: Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the **Rules of Professional Conduct** that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such **conduct.**

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

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;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in **conduct** that is a violation of applicable rules of judicial **conduct** or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of **professional** misconduct in a disciplinary proceeding; or

(h) engage in any other **conduct** that adversely reflects on the lawyer's fitness as a lawyer.

Rule 8.5: Disciplinary authority and choice of law.

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's

conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same **conduct**.

(b) In any exercise of the disciplinary authority of this state, the **rules** of **professional conduct** to be applied shall be as follows:

(1) For **conduct** in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other **conduct**:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular **conduct** clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that **conduct**.

Credits

Sec. filed Jan. 7, 2009 eff. April 1, 2009; amds. through Court Notices in the May 26, 2010 Register, eff. May 26, 2010; amds. through Court Notices in the May 18, 2011 Register, eff. Apr. 15, 2011.

Current through amendments included in the New York State Register, Volume XXXIV, Issue 11, dated March 14, 2012.

22 NYCRR 1200.0, 22 NY ADC 1200.0

End of Document

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ORIENTATION TO THE PROFESSION

Program Materials

Prepared by the Office of Special Counsel for Grievance Matters

August 18, 2010

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V. Civility and Professionalism

A. The Standards of Civility – 22 NYCRR part 1200, Appendix A

New York has promulgated a set of Standards of Civility to guide the conduct of all participants in the operation of the legal system. The thrust of the Standards is succinctly captured in this statement from its preamble:

> As lawyers, judges and court employees, 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.

The preamble explains that the Standards are aspirational in nature. They are not intended as rules to be enforced by sanction or disciplinary action. However, attorneys must be aware that similar standards are provided in the Rules of Professional Conduct. The Standards are not intended to supplement or modify the Code of Judicial Conduct, the Rules of Professional Conduct, or any other applicable rule or requirement governing conduct. 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.

B. What does civility mean?

The Standards of Civility (22 NYCRR part 1200, Appendix A) encourage all lawyers to foster civility by:

- avoiding antagonistic or acrimonious behavior, including vulgar language, disparaging personal remarks, or acrimony towards opposing counsel, parties, or witnesses;
- supervising employees to ensure that they conduct themselves with courtesy and civility;
- promptly returning telephone calls and answering correspondence reasonably requiring a response;
- avoiding unnecessary motion practice or other judicial intervention through negotiation and agreement wherever practicable—this includes ensuring that the timing and manner of service of papers is not designed to cause disadvantage to the party receiving them;
- respecting the schedule and commitments of opposing counsel, consistent with the protection of the client's interests;
- allowing sufficient time to resolve disputes or disagreements by communicating with the adversary's counsel and imposing reasonable and meaningful deadlines;
- avoiding the use of any aspect of the litigation process, including discovery and motion practice, as a means of harassment or as a vehicle to unnecessarily prolong the length or costs of litigation;

- conducting oneself with dignity and refraining from engaging in acts of rudeness and disrespect in depositions, negotiations, and other proceedings;
- striving to uphold the honor and dignity of the profession, avoiding disorder and disruption in the courtroom, and maintaining a respectful attitude toward the court; and
- treating court personnel with courtesy and respect at all times.

C. Special rules of court decorum - Second Department

The Appellate Division, Second Department, has promulgated its own rules designed to foster proper courtroom behavior (*see* 22 NYCRR part 700). Similar rules exist for the Appellate Division, First Department (*see* 22 NYCRR part 604). The rules are designed to supplement, but not supersede, the Rules of Professional Conduct. Lawyers should familiarize themselves with these rules as they are applicable to all actions and proceedings subject to the jurisdiction of the Appellate Division. Section 700.4 of the rules, set forth in full below, details the obligations of an attorney as both an officer of the court and an advocate. Special note should be made of subdivision (f) of section 700.4, which mandates that no lawyer who has entered an appearance may withdraw from a case without the permission of the court.

§ 700.4 Obligations of attorneys

(a) Attorneys are both officers of the court and advocates. It is their professional obligation to conduct each case courageously, vigorously, and with all the skill and knowledge they possess. It is their obligation to uphold the honor and maintain the dignity of the profession. They must avoid disorder or disruption in the courtroom and must maintain a respectful attitude toward the court. In all respects attorneys are bound, in court and out, by the provisions of the Rules of Professional Conduct.

(b) Attorneys shall use their best efforts to dissuade their client and witnesses from causing disorder or disruption in the courtroom.

(c) Attorneys shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(d) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on any objection without such permission. However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he or she may respectfully request reconsideration thereof.

(e) Attorneys have neither the right nor duty to execute any directive of a client which is not consistent with the Rules of Professional

Conduct set forth in part 1200 of this Title. Nor may attorneys advise another to do any act or to engage in any conduct in any manner contrary to these rules.

(f) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without

(1) justifiable cause,

(2) reasonable notice to the client, and

(3) permission of the court.

(g) Attorneys are not relieved of these obligations by what they may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor are they relieved of these obligations by what they believe to be the moral, political, social, or ideological merits of the cause of any client.

D. Cases on civility

1. Court papers

Submitting an affidavit to the court from a client containing numerous accusations of perjury, subornation of perjury, and other charges against opposing counsel resulted in a three-month suspension (*see Matter of Wilson,* 248 App Div 388 [1st Dept 1936]).

Unjustified suggestions in motion papers that opposing counsel had ties to organized crime warranted public censure (*see Matter of Kavanagh,* 189 AD2d 521 [1st Dept 1993]).

An unprofessional and vituperative personal attack against an Assistant District Attorney in court documents warranted suspension from practice (*see Matter of Raskin,* 217 AD2d 187 [2d Dept 1995]).

2. Depositions

The use of vulgar, obscene and sexist epithets concerning an opposing counsel's anatomy and gender during a deposition warranted censure (*see Matter of Schiff,* 190 AD2d 293 [1st Dept 1993]).

An attorney's rude, uncooperative, and harassing behavior while being deposed as the party-plaintiff in a civil action was so lacking in professionalism and civility that dismissal of the action was the only appropriate remedy (*see Corsini v U-Haul Intl.,* 212 AD2d 288 [1st Dept 1995]).

An attorney was suspended for six months for (1) making abusive, obscene, and insulting statements made during the course of an examination before trial in the presence of witnesses, both to and about his opposing counsel, (2) striking his opponent, and (3) preparing an affidavit for his client's signature in support of a motion containing serious and scandalous charges that were wholly irrelevant (*see Matter of Simon,* 32 AD2d 362 [1st Dept 1969]).

3. Criminal contempt

Conviction of an attorney for criminal contempt of court and engaging in undignified and discourteous conduct which was degrading to a tribunal in a criminal case warranted a public censure (*see Matter of Giampa,* 211 AD2d 212 [2d Dept 1995]; *Matter of Werlin,* 170 AD2d 77 [2d Dept 1991]; *Matter of Kunstler,* 194 AD2d 233 [1st Dept 1994]; *Matter of Castellano,* 46 AD2d 792 [2d Dept 1974]).

A conviction of criminal contempt based upon an attorney's extrajudicial statement warranted a suspension from practice (*see Matter of Cutler,* 227 AD2d 8 [1st Dept 1996]).

4. Miscellaneous

An attorney was censured for assaulting opposing counsel (*see Matter of Clark,* 193 AD2d 116 [2d Dept 1993]).

An attorney's harassment of a former girlfriend in her personal and professional life resulted in a six-month suspension (*see Matter of Muller,* 231 AD2d 296 [1st Dept, 1997]).

E. Sanctions - 22 NYCRR 130-1.1

Monetary sanctions may be imposed upon attorneys who engage in "frivolous conduct" and can be assessed in an amount up to $10,000 for each incident. In addition, costs and attorney's fees can be awarded to an adversary in the form of reimbursement for actual expenses reasonably incurred, where frivolous conduct occurs.

Conduct is frivolous if it (1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it involves the assertion of material factual statements that are false (22 NYCRR 130-1.1[c]).

In the case of *Principe v Assay Partners* (154 Misc 2d 702, 704 [Sup Ct, NY County 1992]) the plaintiff's counsel made abusive and insulting remarks, accompanied by disparaging gestures, to a female attorney during the discovery phase of litigation. The trial court found that counsel's conduct constituted frivolous conduct undertaken primarily to harass or maliciously injure another. "[T]he words used here are a paradigm of rudeness, and condescend, disparage, and degrade a colleague upon the basis that she is female" (*Principe v Assay Partners, supra* at 704).

F. Criticism of the judiciary

Criticism of the judiciary by attorneys is not an unfettered right, and a false accusation may have consequences (*see* RPC 8.2[a] [A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to a judicial office]).

A lawyer may make public criticism of a judge that is well founded, provided the action is no longer pending, the lawyer is not knowingly making a false accusation, and

strives to voice criticism in a temperate and dignified manner (*see* Assn of Bar of City of NY Op 1996-1 [1996]).

Cases regarding criticism of the judiciary

An attorney's comments that were designed to inflame and arouse contempt for a federal court by alleging that the judge had engaged in corrupt action resulted in his censure (*see Matter of Markewich,* 192 App Div 243, [1st Dept 1920]).

The filing of affidavits containing unwarranted and irresponsible attacks accusing a Surrogate of prejudice, and also attacks on opposing counsel's firm that were made with knowledge of falsity, with reckless disregard of the truth, and that were malicious in their intent and purpose warranted a six-month suspension (*see Matter of Baker v Monroe County Bar Assn.,* 34 AD2d 229 [4th Dept 1970]), *affd* 28 NY2d 977 [1971]).

An unprofessional and vituperative personal attack against a judge warranted public censure (*see Matter of Herman,* 37 AD2d 315 [2d Dept 1971]).

A false, public allegation made by a District Attorney, accusing a judge of wrongdoing, resulted in discipline. The "actual malice" standard applicable to press coverage did not apply. The test is not subjective, but objective, i.e., what a "reasonable attorney" would believe or know in similar circumstances (*see Matter of Holtzman,* 78 NY2d 184 [1991]).

An attorney was publicly censured for making reckless statements to a judge which were unprofessional, discourteous, and degrading to the judge (*see Matter of Golub,* 190 AD2d 110 [1st Dept 1993]).

An attorney's unsubstantiated claims against a judge, his law secretary, and the defense counsel that they had conspired to fix the case, and other accusations of illegality made against another judge, resulted in a six-month suspension (*see Matter of Mordofsky,* 232 AD2d 863 [1st Dept 1996]).

Calling a judge "corrupt" during a telephone status conference was derogatory, undignified, and inexcusable, warranting a three-month suspension from practice (*see Matter of Dinhofer,* 257 AD2d 326 [1st Dept 1999]).

Accusing a judge of dismissing an action in the judge's self-interest, and "bullying litigants with threats of irrational behavior" resulted in a censure (*see Matter of Delio,* 290 AD2d 61 [1st Dept 2001]).

VI. Confidentiality

Lawyers confronted with issues regarding client confidentiality must bear in mind that the controlling rules are derived from two separate sources: (1) the law of attorney client privilege governed by statute in CPLR 4503(a), and (2) RPC 1.6. The provisions of RPC 1.6 are much broader than the more narrow CPLR 4503(a). They may apply without regard to the nature and source of the information, even to information already in the public domain or shared with others.

Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, Second Department
Part 700. Court Decorum

N.Y.Ct.Rules, § 700.1

§ 700.1. Application of Rules

Currentness

These rules shall apply in all actions and proceedings, civil and criminal, in courts subject to the jurisdiction of the Appellate Division of the Supreme Court in the Second Judicial Department. They are intended to supplement, but not to supersede, the Rules of Professional Conduct set forth in part 1200 of this Title and the Rules of Judicial Conduct set forth in part 100 of this Title. In the event of any conflict between the provisions of these rules and the Rules of Professional Conduct and/or the Rules of Judicial Conduct, the Rules of Professional Conduct and/or the Rules of Judicial Conduct shall prevail.

<Parts 1100 to 1510 (§ 1100.1 et seq.) have been promulgated as joint rules of the Appellate Divisions and are set out following Appellate Division, Fourth Department, Part 1040, post.>

Current with amendments received through 9/15/11

End of Document

Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, Second Department
Part 700. Court Decorum

N.Y.Ct.Rules, § 700.2

§ 700.2. Importance of Decorum in Court

Currentness

The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.

<Parts 1100 to 1510 (§ 1100.1 et seq.) have been promulgated as joint rules of the Appellate Divisions and are set out following Appellate Division, Fourth Department, Part 1040, post.>

Current with amendments received through 9/15/11

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Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, Second Department
Part 700. Court Decorum

N.Y.Ct.Rules, § 700.3

§ 700.3. Disruptive Conduct Defined

Currentness

Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.

<Parts 1100 to 1510 (§ 1100.1 et seq.) have been promulgated as joint rules of the Appellate Divisions and are set out following Appellate Division, Fourth Department, Part 1040, post.>

Current with amendments received through 9/15/11

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Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, Second Department
Part 700. Court Decorum

N.Y.Ct.Rules, § 700.4

§ 700.4. Obligations of Attorneys

Currentness

(a) Attorneys are both officers of the court and advocates. It is their professional obligation to conduct each case courageously, vigorously, and with all the skill and knowledge they possess. It is also their obligation to uphold the honor and maintain the dignity of the profession. They must avoid disorder or disruption in the courtroom and must maintain a respectful attitude toward the court. In all respects attorneys are bound, in court and out, by the provisions of the Rules of Professional Conduct.

(b) Attorneys shall use their best efforts to dissuade their client and witnesses from causing disorder or disruption in the courtroom.

(c) Attorneys shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(d) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on any objection without such permission. However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he or she may respectfully request reconsideration thereof.

(e) Attorneys have neither the right nor duty to execute any directive of a client which is not consistent with the Rules of Professional Conduct set forth in part 1200 of this Title. Nor may attorneys advise another to do any act or to engage in any conduct in any manner contrary to these rules.

(f) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without

(1) justifiable cause,

(2) reasonable notice to the client, and

(3) permission of the court.

(g) Attorneys are not relieved of these obligations by what they may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor are they relieved of these obligations by what they believe to be the moral, political, social, or ideological merits of the cause of any client.

<Parts 1100 to 1510 (§ 1100.1 et seq.) have been promulgated as joint rules of the Appellate Divisions and are set out following Appellate Division, Fourth Department, Part 1040, post.>

Current with amendments received through 9/15/11

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Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, Second Department
Part 700. Court Decorum

N.Y.Ct.Rules, § 700.5

§ 700.5. Obligations of the Judge

Currentness

(a) In the administration of justice the judge shall safeguard the rights of the parties and the interests of the public. The judge at all times shall be dignified, courteous, and considerate of the parties, attorneys, jurors, and witnesses. In the performance of his duties, and in the maintenance of proper court decorum the judge is in all respects bound by the Canons of Judicial Ethics.

(b) The judge shall use his judicial power to prevent disruptions of the trial.

(c) A judge before whom a case is moved for trial shall preside at such trial unless he is satisfied, upon challenge or sua sponte, that he is unable to serve with complete impartiality, in fact or appearance, with regard to the matter at issue or the parties involved.

(d) Where the judge deems it appropriate in order to preserve or enhance the dignity, order and decorum of the proceedings, he shall prescribe and make known the rules relating to conduct which the parties, attorneys, witnesses and others will be expected to follow in the courtroom.

(e) The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

(f) The judge is not relieved of these obligations by what he may regard as a deficiency in the conduct of any attorney who appears before him; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological deficiencies of the cause of any party.

<Parts 1100 to 1510 (§ 1100.1 et seq.) have been promulgated as joint rules of the Appellate Divisions and are set out following Appellate Division, Fourth Department, Part 1040, post.>

Current with amendments received through 9/15/11

End of Document

Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, First Department
Part 604. Special Rules Concerning Court Decorum

N.Y.Ct.Rules, § 604.1

§ 604.1. Obligation of Attorneys and Judges

Currentness

(a) Application of Rules. This Part shall apply to all actions and proceedings, civil and criminal, in courts subject to the jurisdiction of the Appellate Division of the Supreme Court in this Judicial Department. It is intended to supplement but not to supersede, the Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) and the Rules Governing Judicial Conduct as promulgated by the Administrative Board of the Judicial Conference. In the event of any conflict between the provisions of this Part and the Rules of Professional Conduct or the Rules Governing Judicial Conduct, the Rules of Professional Conduct and the Rules Governing Judicial Conduct shall prevail.

(b) Importance of Decorum in Court. The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.

(c) Disruptive Conduct Defined. Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.

(d) Obligation of the Attorney.

(1) The attorney is both an officer of the court and an advocate. It is his professional obligation to conduct his case courageously, vigorously, and with all the skill and knowledge he possesses. It is also his obligation to uphold the honor and maintain the dignity of the profession. He must avoid disorder or disruption in the courtroom, and he must maintain a respectful attitude toward the court. In all respects the attorney is bound, in court and out, by the provisions of the Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200).

(2) The attorney shall use his best efforts to dissuade his client and witnesses from causing disorder or disruption in the courtroom.

(3) The attorney shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(4)(i) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission.

(ii) However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof.

(5) The attorney has neither the right nor duty to execute any directive of a client which is not consistent with professional standards of conduct. Nor may he advise another to do any act or to engage in any conduct which is in any manner contrary to this Part.

(6) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without (i) justifiable cause, (ii) reasonable notice to the client, and (iii) permission of the court.

(7) The attorney is not relieved of these obligations by what he may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological merits of the cause of any client.

(e) Obligations of the Judge.

(1) In the administration of justice, the judge shall safeguard the rights of the parties and the interests of the public. The judge at all times shall be dignified, courteous, and considerate of the parties, attorneys, jurors, and witnesses. In the performance of his duties and in the maintenance of proper court decorum the judge is in all respects bound by the Rules Governing Judicial Conduct.

(2) The judge shall use his judicial power to prevent disruptions of the trial.

(3) A judge before whom a case is moved for trial shall preside at such trial unless he is satisfied, upon challenge, or sua sponte, that he is unable to serve with complete impartiality, in fact or appearance, with regard to the matter, or parties in question.

(4) Where the judge deems it appropriate in order to preserve or enhance the dignity, order and decorum of the proceedings, he shall prescribe and make known the rules relating to conduct which the parties, attorneys, witnesses and others will be expected to follow in the courtroom.

(5) The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

(6) The judge is not relieved of these obligations by what he may regard as a deficiency in the conduct of any attorney who appears before him; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological deficiencies of the cause of any party.

Current with amendments received through 9/15/11

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Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, First Department
Part 604. Special Rules Concerning Court Decorum

N.Y.Ct.Rules, § 604.2

§ 604.2. Judicial Exercise of Contempt Power

Currentness

(a) Exercise of the Summary Contempt Power.

(1) The power of the court to punish summarily contempt committed in its immediate view and presence shall be exercised only in exceptional and necessitous circumstances, as follows:

(i) Where the offending conduct either

(a) disrupts or threatens to disrupt proceedings actually in progress; or

(b) destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business in an appropriate way; and

(ii) The court reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum.

(2) Wherever practical punishment should be determined and imposed at the time of the adjudication of contempt. However, where the court deems it advisable the determination and imposition of punishment may be deferred following a prompt summary adjudication of contempt which satisfies the necessity for immediate judicial corrective or disciplinary action.

(3) Before summary adjudication of contempt the accused shall be given a reasonable opportunity to make a statement in his defense or in extenuation of his conduct.

(b) Exercise of the Contempt Power After Hearing. In all other cases, notwithstanding the occurrence of the contumacious conduct in the view and presence of the sitting court, the contempt shall be adjudicated at a plenary hearing with due process of law including notice, written charges, assistance of counsel, compulsory process for production of evidence and an opportunity of the accused to confront witnesses against him.

(c) Judicial Warning of Possible Contempts. Except in the case of the most flagrant and offensive misbehavior in which the court's discretion requires an immediate adjudication of contempt to preserve order and decorum, the court should warn and admonish the person engaged in alleged contumacious conduct that his conduct is deemed contumacious and give the person an opportunity to desist before adjudicating him in contempt. Where a person so warned desists from further offensive conduct, there is ordinarily no occasion for an adjudication of contempt. Where a person is summarily adjudicated in contempt and punishment deferred and such person desists from further offensive conduct, the court should consider carefully whether there is any need for punishment for the adjudicated contempt.

(d) Disqualification of Judge. The judge before whom the alleged contumacious conduct occurred is disqualified from presiding at the plenary hearing or trial (as distinguished from summary action) except with the defendant's consent:

(1) If the allegedly contumacious conduct consists primarily of personal disrespect to or vituperative criticism of the judge; or

(2) If the judge's recollection of, or testimony concerning the conduct allegedly constituting contempt is necessary for an adjudication; or

(3) If the judge concludes that in view of his recollection of the events he would be unable to make his decision solely on the basis of the evidence at the hearing.

(e) Preference for Appeals From Criminal Court Contempt Convictions. Any appeal by an attorney of his conviction for the misdemeanor of criminal contempt which is pending in any court in this judicial department, shall be granted a preference by the court.

Current with amendments received through 9/15/11

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Mckinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, First Department
Part 604. Special Rules Concerning Court Decorum

N.Y.Ct.Rules, § 604.3

§ 604.3. Conduct of Criminal Trial Threatened by Disruptive Conduct

Currentness

(a) Removal of Disruptive Defendant.

(1) If a defendant engages in disruptive conduct by word or action in the courtroom in the course of his trial, the trial judge may order the defendant to be removed from the courtroom and placed in custody, and the trial judge may proceed with the trial in the absence of the defendant.

(2) The trial judge may not exclude the defendant except after warning that further disruptive conduct will lead to removal of the defendant from the courtroom.

(3) The defendant shall be returned to the courtroom immediately upon a determination by the court that the defendant is not likely to engage in further disruptive conduct.

(b) Communication Between Defendant and Courtroom. If the defendant is removed from the courtroom under the provisions of paragraph (1) of subdivision (a) of this section, the trial judge shall make reasonable efforts to establish methods of communication linking the defendant with the courtroom while his trial is in progress. For such defendant the judge may provide methods of communication in any way suitable to the physical facilities of the courthouse and consonant with the goal of providing adequate communication to the courtroom and to defense counsel.

(c) Restraint of Defendant.

(1) If a defendant engages in disruptive conduct in the course of the trial, and the trial judge determines not to take action under subdivision (a) of this section, the trial judge may order the defendant to be physically restrained in the courtroom while his trial continues.

(2) The trial judge shall not apply the restraints authorized in the preceding subdivision unless he has warned the defendant, following disruptive conduct by the defendant, that further misconduct will lead to the physical restraint of the defendant in the courtroom.

(3) The physical restraint of the defendant shall be terminated immediately upon a determination by the court that the defendant is not likely to engage in further disruptive conduct.

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22 NYCRR § 130-1.1 Costs; Sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in Section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Uniform Rules for the Conduct of Depositions

22 NYCRR § 221.1 Objections at depositions
(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

22 NYCRR § 221.2 Refusal to answer when objection is made
A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

22 NYCRR § 221.3 Communication with the deponent
An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Professionalism

by:
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PROFESSIONALISM[*]

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It is a great pleasure to be here at Washington University to dedicate this magnificent new home for the law school. Winston Churchill once said that "[w]e shape our buildings and afterwards our buildings shape us."[1] Here you have shaped a beautiful site, commensurate with Washington University's reputation and equipped to meet the demands of contemporary legal education. I expect that this stunning facility will in turn inspire innovative scholarship, and nurture young lawyers with the finest legal skills and the highest professional standards.

As lovely as it is, what I would like to talk to you about today is not your new building. I would like to discuss my granddaughter. You see, I recently returned from an extended period of grandmother-granddaughter bonding--sort of a cross-generational in-the-family version of Thelma and Louise--and she is often on my mind. At one point during the visit, my granddaughter came to me, disappointed about having to perform some task or another. It was pointless, she said. Well, she didn't actually say "pointless." Pointless, in the vocabulary of a young child, is replaced by two words: "But why?" Her meaning was clear nonetheless. Her second objection was that it was "no fun."

"Pointless and no fun," one of my friends quipped. "If those were legitimate objections, we wouldn't have anyone practicing law." The comment seemed funny at that moment, but in retrospect it seems disconcerting. Is that what the practice of law has become--pointless and no fun? It seems that, in the eyes of many lawyers, it has. More than half of all practitioners report dissatisfaction with the profession.[2] According to one lawyer, the economic pressures of the legal marketplace have escalated workdays to a point where practice is "like drinking water from a firehose."[3] In this climate, attending to any professional obligations beyond billable hours seems impossible. Nor is dissatisfaction limited to those within the legal community. In society at large--that is among those we would call "non-lawyers"--lawyers are compared frequently, and unfavorably I might add, with skunks, snakes, and sharks. Few Americans recall the trust that our society once placed in its lawyers; it hardly seems possible that Alexis de Tocqueville, were he to come to America today, would

conclude that lawyers are our nation's "natural aristocracy."[4]

Partially responsible for this decline, I suspect, is a decline in professionalism. Dean Roscoe Pound said that a profession is "a group . . . pursuing a learned art as a common calling in the spirit of public service--no less a public service because it may incidentally be a means of livelihood."[5] And, while my granddaughter undoubtedly is a far more interesting subject, what I really want to talk about today--for a few minutes--is the obligations of professionalism: obligations in dealings with other attorneys; obligations toward legal institutions; and obligations to the public whose interests lawyers must serve. Personal relationships lie at the heart of the work that lawyers do. Even in the face of the vast technological advances of the information age, the human dimension remains constant, and these professional obligations will endure.

I

It has been said that a nation and its laws are an expression of the highest ideals of its people.[6] Unfortunately, the conduct of our nation's lawyers has sometimes been an expression of the lowest. Clients increasingly view lawyers as mere vendors of services, and law firms perceive themselves as businesses in a competitive marketplace.[7] As the number of lawyers in this country approaches one million, the legal profession has narrowed it focus to the bottom line, to winning cases at all costs, and to making larger amounts of money. Almost every complaint about the decline of ethics and civility "sounds the dirge of the profession turning into a trade."[8] Practice at the turn of the century, we are told, "promises to be nasty, brutish and, for some, short."[9]

One lawyer who recently stopped practicing law explained his decision to leave the profession in these bleak terms: "I was tired of the deceit. I was tired of the chicanery. But most of all, I was tired of the misery my job caused other people. . . . Many attorneys believe that zealously representing their clients means pushing all rules of ethics and decency to the limit."[10] This complaint is not unique. In a *National Law Journal* study, over fifty percent of the attorneys surveyed used the word "obnoxious" to describe their colleagues.[11]

Indeed, sometimes attorney conduct crosses over from rude to downright scandalous. Two lawyers from prominent New York firms recently turned a deposition into an actual brawl.[12] And attorneys have been spotted exchanging invectives and even engaging in shoving matches in front of various court clerks' offices, an image that recalls the description of modern-day litigation as ice hockey in business suits.[13] A sitting federal judge, who may deserve a medal, became so exasperated with a pair of lawyers in a case before him that he wrote an order noting that both counsel had violated the local lawyers' creed of civil conduct. The order stated:

> This is an aspirational creed not subject to enforcement by this court, but violative conduct does call for judicial disapproval at least. If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with lawyers of equally repugnant attributes.[14]

It is no wonder that one magazine has run an article entitled "Lawyers' Lot Not a Happy One."[15]

Most of us probably never encounter such outrageous conduct. I would hope that it is not that often that lawyers encounter even ordinary discourtesy. But a Seventh Circuit study conducted in 1991 revealed that forty-two percent of lawyers, and forty-five percent of the judges, in that circuit think that civility *is* a profession-side problem.[16] And the problem seems to be growing. In a 1996 survey of the C.C. Bar, sixty-

nine percent of the lawyers polled identified civility as a problem.[17] A recent survey of presidents of state and local bar associations produced an even more startling result: ninety percent of the respondents reported both problems with civility and diminished respect among lawyers in their jurisdictions.[18] These statistics mean that lawyers far too often breach their professional obligations to other lawyers--that many lawyers are caught up in a system of behavior that is "structurally, morally, and emotionally exhausted."[19] When the lawyers themselves generate conflict, rather than focusing on the dispute between the parties they represent, it distorts our adversarial system. More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers. We have lost sight of a fundamental attribute of our profession, one that Shakespeare described in *The Taming of the Shrew*. Adversaries in law, he wrote, "[s]trive mightily, but eat and drink as friends."[20] In contemporary practice, however we speak of our dealings with other lawyers as war--and too often we act accordingly.

But one need *not* envision litigation as war, argument as battle, or trial as siege. Argument, for example, can be thought of as discourse. I know that when I ask a question at oral argument, it is not meant as an attack; it is an invitation for counsel to address an area of particular concern to me. The most effective advocates respond accordingly, answering honestly and directly. Indeed, one good approach to oral advocacy is to pretend that each judge or justice really wants to vote your way--and will--but *only if* you can set the judge's concerns to rest by answering that question which the judge finds troubling.

Trial similarly can be envisioned as an investigation in which the jury must choose between competing versions of the facts. Ranting and raving in front of the jury probably does little to convince. A more persuasive technique is to present oneself as a reasonable person who wants to see justice done--it just so happens that justice is done by finding for your client, not opposing counsel's. All too often attorneys forget that the whisper can be more dramatic (and more compelling) than the scream. Justice Holmes, no slouch of an advocate, believed that "a lawyer [can] try [a] case like a gentleman"--or gentle woman, I would add--"without giving up any portion of his [or her] energy and force."[21] Hemingway used the vernacular. "Guts," he told us, "is grace under pressure."[22] Grace, however, is not a virtue many of today's lawyers choose to advertise, as underscored by one lawyer's characterization of his "marketing strategy": clients, he explained are "not looking for a guy who coaches Little League. They don't want a wimp. They want a lawyer who means business, an animal who's going to get the job done, whatever it takes."[23] It is appalling that any member of our profession would describe himself in these terms. "Getting the job done" should go hand in hand with courtesy; a lawyer can "mean business" without remaking himself as an "animal."

The common objection to civility is that it will somehow diminish zealous advocacy for the client. I see it differently. In my view, incivility disserves the client because it wastes time and energy--time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. According to an English proverb, "[t]he robes of lawyers are lined with the obstinacy of clients."[24] In our experience, the obstinacy of one lawyer lines the pockets of another; and the escalating fees are matched by escalating tensions. I suspect that, if opposing lawyers were to calculate for their clients how much they could save by foregoing what has been called "Rambo-style" litigation (in money *and* frustration), many clients, although not all, would pass in the pyrotechnics and happily pocket the difference. It is *not* always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don't have to.[25]

The bench and the bar have begun to address the issue of professionalism in lawyer-lawyer relations. Codes of ethics and professional conduct are good starting points and no doubt necessary. But they focus on what a lawyer should *not* do rather than teaching lawyers what they affirmatively *ought* to do. More recently, some jurisdictions have created so-called civility codes--unenforceable guidelines that articulate the basics of

common courtesy.[26] Unfortunately, civility is hard to codify or legislate. Discourtesy is notoriously subjective--you know it when you see it[27]--and assessing blame is somewhat akin to asking a pair of fighting fourth-graders "who started it." More important, without a fundamental change in attorney conscience, even the best codification of civility can become, to extend the war metaphor still more, just another battleground.[28] Lawyers simply take up the code of conduct and club each other with that, levying accusations of incivility and bringing motions for sanctions. One court has noted that complaints of this nature are "akin to static in a radio broadcast [that] tends to blot out legitimate argument."[29]

In the end, it is by deed rather than by decree that attorneys teach each other that it is possible to "disagree without being disagreeable." The first place where young lawyers can learn to disagree agreeably is right here--in law school. Although there may be no remedy for the competitive nature of the law school experience, schools can do something about how that experience shapes a young lawyer's approach to practice. Good professors may employ the Socratic method, but not in the interest of disparaging students; rather, they should engage the students in a dialogue which, although sometimes painful, helps students explore the law and develop critical thinking skills. And outside of class, students can learn collegiality from an atmosphere in which each person is treated with respect and understanding. Of course, some schools are more successful in this respects than others: I am sure the Washington University School of Law can stand tall.

Many law schools have moved beyond acculturation and have begun to meet the issue of professional conduct head on. "Being a lawyer," one professor points out, involves handling the inherent tension among the demands "of a client, fulfilling one's own interests, being an officer of the court, and engaging in fair play towards third parties."[30] Through its first-rate faculty, outstanding lawyering-skills program, and clinical opportunities, Washington University goes a long way toward preparing students for the tensions they will encounter in practice--and training them to respond professionally, but without sacrificing vigor or zeal. It is my hope that the bench and the bar, through example and further training, will reinforce that sense of professionalism, a sense that accrues to the benefit of all.

II

You may have noticed that although I have already spoken for a while, I have not yet met head-on my granddaughter's central question: "But why?" There is a common frustration in the legal community that all our long hours and hard work are not producing anything socially worthwhile. Indeed, there is an old joke to that effect. It involves two men on a balloon expedition who became hopelessly lost in a storm. When the storm cleared, they found themselves floating above a one-lane road, with nothing in sight but wheat fields. There was no one, absolutely no one, around. Finally, they spotted a woman walking down the road.

> [Calling down] "Hey!" they called out. "W-h-e-r-e a-r-e w-e?"
> To which the woman responded [calling up]:
> "You're up in a balloon, about twenty-five feet off the ground."
> "She's a lawyer," one man commented to the other.
> "How do you know?" companion asked.
> "Well," he responded, "her answer was clear, precise, perfectly accurate and totally useless."[31]

I think we can all agree that perfect accuracy in the interest of utter futility is not the highest calling of the profession; nor is it, in my opinion, the answer to why lawyers do what they do. In my view, "[b]oth the special privileges incident to membership in [our] profession and the advantage those privileges give [us] in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. *That*

goal is public service."[32] It is this aspect of professionalism--service to the public--that I want to touch upon last.

Lawyers have in their possession the keys to justice under a rule of law--the keys that open the courtroom door. Those keys are not held for lawyers' own private purposes; they are held in trust for all those who would seek justice, rich and poor alike. We can be proud of the strides the legal community has made toward fulfilling that trust. The bar has never before been involved in greater amounts and more diverse types of *pro bono* work. Never before have law schools contributed so greatly by providing opportunities for their students to represent and advise those who, but for the students, would have no access to legal advice or legal remedies. My law clerks tell me that those who participate remember their experiences long after they leave the law school; that in practice, they feel both an obligation and a desire to donate a portion of their time and learning to public service.

Yet, despite progress and innovations, a great and crying need for legal services for the poor remains. The most recent estimates suggest that as many as eighty-five percent of the poor's legal needs go unmet.[33] And there is evidence--tragic costly evidence--that a substantial number of citizens believe that equality is but an unrealized slogan; that justice is for "just us"--the powerful, the educated, the privileged. If that perception is to be changed and the factors that created it eliminated, the legal community must dedicate an even greater portion of its time and resources to public service. The ever-increasing pressure on the billable hour, combined with the tremendous emphasis on the bottom line, has made fulfilling the obligation to public service quite difficult. But public service marks the difference between a business and a profession. A business can focus only on profits. A profession cannot. It must focus first on the community it is supposed to serve. And that community needs more legal help now than ever before.

The notion that lawyers have a responsibility to their community, and that they are uniquely capable of making a contribution, is nothing new. Lawyers were a critical group in the building of our own Constitution: at the Convention in 1787, thirty-three of the fifty-five participants were lawyers.[34] And when it proved necessary to drastically revise that document after the Civil War, once again lawyers were the dominant force: at least nine of the fifteen drafters of the Fourteenth Amendment were lawyers.[35] It was lawyers who helped express our society's highest ideals in law then. It is lawyers who now must ensure that those ideals are realized and realizable now--not just for the wealthy, but for the poor, for the disenfranchised, and for the disadvantaged.

CONCLUSION

I wanted to finish where I started--with my granddaughter. However, she has yet to produce a great quote about professionalism appropriate to this occasion. (Give her time--she's still young). Accordingly, I will close instead with the words of John W. Davis, a former U.S. Solicitor General and (unsuccessful) candidate for president, who reminded the legal community of its sometimes humble but always professional role: "True, we build no bridges," he said.

> We raise no towers. We construct no engines. We paint no pictures. There is little of all that we do which the [human] eye . . . can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men and women's burdens and by our efforts we make possible the peaceful life of men and women in a peaceful state.[36]

At the Court on which I sit, we do not render advisory opinions. But today, I make an exception and offer one specific piece of advice. As you begin to use this splendid new building, I urge you to focus on the broader moral and ethical implications of your work. You should make it the Law School's commitment to teach the

importance of doing good while doing well.

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[*] Remarks at the dedication of Anheuser-Busch Hall, Washington University School of Law, St. Louis, Missouri, on Sept. 26, 1997.

[**] Associate Justice, Supreme Court of the United States.

[1.] 393 PARL. DEB., H.C. (5th ser.) 403 (1943).

[2.] *See* Michael J. Hall, *Fax Poll Finds Attorneys Aren't Happy with Work,* L.A. DAILY J., Mar. 4, 1992, § 1, at 3 (reporting 52% of responding lawyers were unhappy); *see also* Edward A. Adams, *Lawyers' Lot Not a Happy One, ABA Finds,* N.Y. L.J., Aug. 13, 1991, at 1 (reporting only about 30% of responding lawyers were very satisfied with their jobs); Susan Skiles, *ABA Survey Shows More Lawyers are Becoming More Dissatisfied,* CHI. DAILY L. BULL., Aug. 20, 1991, at 1.

[3.] *Life on a Treadmill,* AM. LAW., Oct. Supp. 1996, at 11, 12.

[4.] John W. Frost, II, *The Topic is Civility--You Got a Problem with That?,* FLA. B.J., Jan. 1997, at 6, 8.

[5.] *Quoted in* Douglas W. Hillman, *Professionalism--A Plea for Action!,* 69 MICH. B.J. 894, 895 (1990).

[6.] This concept, although not this language, can be found in G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT ¶¶ 260-62, at 282-86 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821).

[7.] *See* John Stuart Smith, *Civility in the Courtroom from a Litigator's Perspective,* N.Y. ST. B.J., May/June 1997, at 28, 29.

[8.] N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism,* 26 CUMBER. L. REV. 923, 931 (1996).

[9.] Jonathan L. Kirsch, *Times Will Get Tougher for Litigators,* CAL. LAW., Jan. 1990, at 40, 40.

[10.] Sam Benson, *Why I Quit Practicing Law,* NEWSWEEK, Nov. 4, 1991, at 10, 10.

[11.] *See* Katherine Schweit, *Law Too Tension-Filled, Survey of Lawyers Shows,* CHI. DAILY L. BULL., May 21, 1990, at 1.

[12.] *See* David A. Kaplan & Ginney Carroll, *How's Your Lawyer's Left Jab?,* NEWSWEEK, Feb. 26, 1990, at 70.

[13.] *See* Frost, *supra* note 4, at 8.

[14.] Krueger v. Pelican Prod. Corp., No. CIV 87-2385-A (W.D. Okla. Feb. 24, 1989) (Judge Wayne E. Alley) (order denying motion to dismiss action), *quoted in* Hon. Earl E. O'Connor, *Civility at the Bar,* J. KAN. B. ASS'N, Sept. 1990, at 11, 12.

[15.] *See* Adams, *supra* note 2, at 1; *see also* Lawrence A. Dubin, *Professionalism Among Lawyers: The Law School's Role,* 68 MICH. B.J. 850 (1989). Patrick Leighton, President of the State Bar of Minnesota,

concluded that one reason for the decline in fun is lack of civility: "For many of us the task of dealing with another who refuses to display a minimum degree of civility is simply an unpleasant job. It can transform what otherwise would be a pleasant professional function into one which we would prefer to avoid." *Id.*

[16.] Seventy-nine percent of those citing civility as a problem indicate that civility problems arise most frequently in lawyers' relations among themselves. *See* INTERIM REPORT OF THE COMMITTEE IN CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 9 (Apr. 1991).

[17.] *See* DISTRICT OF COLUMBIA BAR, FINAL REPORT OF THE DISTRICT OF COLUMBIA TASK FORCE ON CIVILITY IN THE PROFESSION, at 10 & app. c (1996); *see also* Daniel Wise, *Remedies for "Uncivil" Litigation Weighed,* N.Y. L.J., Nov. 7, 1991, at 1, 4 (reporting informal survey findings that 37 of 38 of New York lawyers had encountered incivility in their dealings with other lawyers).

[18.] *See* N. Lee Cooper, *Courtesy Call: It Is Time to Reverse the Decline of Civility in Our Justice System,* A.B.A. J., Mar. 1997, at 8.

[19.] Scott Hunter, *Fear and Loathing in the Law Office,* N.J. L.J., Sept. 4, 1995, at 25.

[20.] WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act I, sc. 2, l. 275.

[21.] JUSTICE OLIVER WENDELL HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 128-29 (Harry C. Shriver ed., 1936).

[22.] *Quoted in* James A. George, *A Plea for Civility: Lawyer's 10-Point Pledge,* TRIAL, May 1988, at 65, 65.

[23.] Frost, *supra* note 4, at 10-11 (internal quotation marks omitted).

[24.] LEONARD LOUIS LEVINSON, BARTLETT'S UNFAMILIAR QUOTATIONS 152 (1971).

[25.] *See* John Koslov, *Courtly Behavior: Observing Decorum is Not Just Good Manners--Its Successful Advocacy,* CAL. LAW., July 1990, at 54, 56; *see also* Gary Taylor, *Rambo or Dumbo?,* NAT'L L.J., May 7, 1990, at 2 (questioning the efficacy of an attorney's aggressive tactics).

[26.] *See* Dubin, *supra* note 15, at 854.

[27.] *See* Geoffrey Hazard, *Change the Rules to `Civilize' the Profession,* NAT'L L.J. Apr. 17, 1989, at 13, 14.

[28.] Professor Hazard warns that additional professional norms without more "may only intensify the civil wars now endemic in the profession." Geoffrey Hazard, *Civility Code May Lead to Less Civility,* NAT'L L.J., Feb. 26, 1990, at 13, 14.

[29.] Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

[30.] Dubin, *supra* note 15, at 852.

[31.] There are other indications that society has come to view a lawyer's work as less than valuable. In economics, lawyers are referred to as creating dead-weight-loss, not an altogether flattering term. And on the street, the terms used (*e.g.*, sponge) are less flattering still.

[32.] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting).

[33.] *See* Donald W. Hoagland, *Community Service Makes Better Lawyers, in* THE LAW FIRM AND THE PUBLIC GOOD 104, 122 (Robert A. Katzmann ed., 1995); Ted Gest, *Doing Good Is Doing Well,* U.S. NEWS & WORLD REP., Mar. 22, 1993, at 60, 61 (quoting experts' estimates that only 20% of indigents' legal needs as being met).

[34.] *See* Hillman, *supra* note 5, at 895.

[35.] *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 155-97 (1914) (giving biographies of each member of the committee).

[36.] *Quoted in* Hillman, *supra* note 5, at 897.

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| Quarterly Home Page | Quarterly Issues |

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The Role of the Judiciary in Fostering Professionalism & Civility

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The Role of the Judiciary in Fostering Professionalism & Civility

By Judge Jesse G. Reyes

"And do as adversaries do in law,
Strive mightily, but eat and drink as friends."

—THE TAMING OF THE SHREW

Every day in courtrooms throughout our country judges interpret, apply, and through precedent, develop the laws which we, as a society, are expected to abide by in order to co-exist in a civil manner. Our system of justice was formed and developed by our Founding Fathers in order to form a more perfect union. Our nation's courtrooms were established as the venue where individuals could peacefully and rationally resolve their disputes. However, social commentators have suggested that the public forum where this noble experiment is conducted is far from a civil and professional environment. In fact, the common perception is that the advocacy which takes place in our courthouses is fraught with unprofessional and uncivil behavior. In 2002, the American Bar Association published a study where the public expressed an unflattering view of the legal profession and lawyers. The ABA's report revealed that many of those surveyed perceived lawyers as driven by profit and self-interest rather than the client's interest and as manipulators of both the system and truth.

For many outside of the legal profession, the law has become much more a profit-making business than an honorable profession. A common characterization of the conduct of lawyers is that they are rude, discourteous, and abrasive. For confirmation of this public perception one only need look to popular culture's depiction of the modern-day lawyer in film, television and print. In the movie *The Firm*, a young lawyer, Mitch McDeere, joins a prestigious law firm that turns out to be a front for a crime syndicate and where partners authorize the murders of their own associates. In recent years many fictional novels such as *The Rainmaker*, *A Civil Action*, and *The Runaway Jury* depict lawyers as dishonest and despicable. Perhaps the negative portrayal of lawyers in popular culture is one of the reasons there is such a disgust and distrust of attorneys. These depictions do not positively promote the image of lawyers nor does it serve to enhance the public's confidence in the profession. However, we should be mindful that lawyers in America were not always considered the shysters of society but actually were viewed as dignified members of the community. In fact, during most of America's history, people thought that lawyers could be trusted and that the profession had considerable prestige. Former U.S. Supreme Court Justice Sandra Day O'Connor wrote in her memoirs, "Few Americans can even recall that our society once sincerely trusted and respected its lawyers." So how do we return to the days of the popular lawyer heroes? How do we return to the era of Atticus Finch, Perry Mason, and Henry Drummond?

One way of accomplishing this goal is for the members of the judiciary to take a more active role in fostering professionalism and civility within the legal profession. Tradition dictates that we as judges have an obligation to participate in this type of endeavor. The English Inns of Court have a time-honored tradition and practice of "pupillage"—the sharing of wisdom, insight, and experience of seasoned judges and lawyers with newer practitioners. Today, this same tradition is carried out in the American Inns of Court in this country. Furthermore, as members of the judiciary we are uniquely positioned to undertake this task. As judges we have a sworn duty to perform this service to the profession and to the public. Because in carrying out this effort, we will be contributing and advancing the administration of justice. We should remember it is our profession that is under attack and we have a responsibility to future generations to protect it. Whether or not the public's perception is entirely accurate, we must acknowledge that it exists. Therefore, we should not idly stand by while the screenwriters, novelists and stand-up comics continue to disparage our profession. The time to act is at hand and passivity is no longer the word of the day.

The best means by which to perform this task is for judges to quite clearly communicate what it is they what. This can be accomplished through their words and by their conduct on and off the bench. Specifically, we should propose adherence to three basic values: Respect, Reliability, and Reputation. We can call them the three "Rs" of the profession.

Respect

"People seldom improve when they have no other model but themselves to copy after."

—OLIVER GOLDSMITH

As jurists we should set the standard and example for the lawyers to follow. As a young lawyer I would arrive early to court and observe the various judges in our courthouse while they were on the bench. I would take note of how they would conduct themselves and how they ran their courtrooms. We

Continued on next page.

The Judiciary's Role *continued from page 9.*

should keep in mind that there are young lawyers who are now observing us and we should conduct ourselves accordingly. We should demonstrate and communicate respect by treating the litigants and the lawyers with civility and personal courtesy. We should maintain control of all proceedings which are conducted before the bench. We should define civility in the courtroom with leadership marked by a deep commitment and respect of the law. Accordingly, we should encourage lawyers in our courtrooms to adhere to these same standards. Through our own conduct and words, we should encourage lawyers to always be cordial, courteous, and civil to one another. In stressing respect of the process we should emphasize that we will not permit personal attacks of any kind. Nor will we allow disparaging remarks to be made regardless of the context. The lawyers who appear before us must realize we will not allow counsels to interrupt each other unless to make an appropriate objection. One of the best opportunities for lawyers to either shine or tarnish their image before the court is in their choice of language and use of tone. Therefore, lawyers should refrain from using words that will most likely elicit an emotional response or reaction from opposing counsel. By doing so the lawyer has definitely taken the high road and not the bait. "The character of every act depends upon the circumstances in which it is done." —Oliver Wendell Holmes. In showing respect to the court lawyers should also strive to be courteous to the judge's staff being mindful to remember that they are an extension of the court.

As jurists we need to communicate through our actions and words that civility is not a sign of weakness but an indication of strength. Justice Anthony Kennedy remarked "civility is the mark of an accomplished and superb professional." Judge Rhesa Hawkins of the Fifth Circuit has stated "civility is the mark of a true lawyer, a true professional." Thus, conducting oneself through civility does not mean a lawyer cannot be an advocate. In fact, an attorney has an ethical obligation to represent their clients zealously. Thus, through our communications to counsels we must remind them that the essence of advocacy is persuading someone to alter their view or perception through effective persuasion. The use of civility will not only serve to enhance the advocate's effectiveness, it will also serve to restore the public's trust in the profession.

Reputation

"Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial."

—CASSIO IN *OTHELLO*

One of the repercussions from uncivil behavior is the damage to the lawyer's reputation. Here, judges as well can pave the way to a sound reputation through words and action. A judge establishes a reputation over time by communicating, directly or indirectly, the conduct that will be tolerated. Many judges have standing orders that set forth the procedures lawyers are to follow in court. Prior to trial some judges will provide verbal and written instructions on how counsels are to handle exhibits, witnesses, and themselves during the proceedings. By being clear in their communication, judges can establish a reputation of professionalism and civility and also outline what will be expected of the lawyers who appear in their courtrooms. Reputation is how counsels will be known in the legal community. Before entering the courtroom a judge will know by the lawyer's reputation who will be stepping up to the bench. What type of reputation it will be is entirely within the lawyer's control. We determine what our reputation will be in the community. When necessary the court should remind counsel that it is the lawyer and not the client who conducts the matter in court.

Reliability

"Watch your words, for they become actions."

—UNKNOWN

As judges we should set the standard for reliability by being prepared to preside over and commence the matter as scheduled. We must punctually and diligently hear all cases assigned and be thoroughly prepared to render judgment. Judges should act prudently but decisively and render rulings efficiently and without delay. Hearings, conferences, and trials should be scheduled with appropriate consideration to the schedules of lawyers, parties, and witnesses. Jurists should act judicially in the granting of continuances because unnecessary delays only add to the anxiety and cost of litigation. Lawyers should arrange their work schedules in order to achieve the maximum productivity. The pressures of the practice of law can be overwhelming but lawyers must find the means by which to complete their time sensitive work product. Otherwise, the lawyer's day before the judge may prove to be a very long one if the court imposed deadline has not been met. To avoid this dilemma stay with the task until it is completed. Judges learn very quickly upon whom they can rely. Along those lines lawyers should be reliable in their communications. If you make a commitment verbally or in writing to provide a document or produce a witness by a certain date then do so. In essence, reliability means following through on our commitments and doing what we say we will do. When we

Continued on page 14.

The Judiciary's Role *continued from page 10.*

are reliable, others can count on us, and by conducting ourselves accordingly we can count on each other to improve the image of our profession.

Justice Oliver Wendell Holmes once remarked, "Greatness is not in where we stand, but in what direction we are moving. We must sail sometimes with the wind, and sometimes against it—but sail we must. And not drift, nor lie at anchor."

We also should be cognizant of the fact that an individual judge can only address the unprofessional conduct that occurs in the jurist's courtroom. If we make a difference in the professional life of one attorney then there is one less attorney that the public can criticize. However, away from the bench a judge can have a significant impact by participating in outreach programs for the community at large and for the young people attending schools in the various communities in which we reside. Ultimately, the responsibility for fostering professionalism and civility can not solely be conducted by the members of the judiciary. This effort must be shared by the various institutions and entities that comprise the practice of law. Therefore, to enhance the image of our profession through professionalism and civility we must look to the law schools, law firms, bar associations, and the American Inns of Court, which make up the fabric of our profession. Together we may be able to stem the tide of public's negative view of our profession. Together we should strive to heed the words of William Shakespeare "And do as adversaries do in law, Strive mightily, but eat and drink as friends." The sooner we do so, the sooner the public may take notice and change their perception of our profession. ◆

The Honorable Jesse G. Reyes of Chicago, Illinois, is a judge in the Circuit Court of Cook County, currently assigned to the Chancery Division's Mortgage Foreclosure/Mechanics Lien Section. He is also a Master of the Bench in the Chicago AIC.

Civility in the Legal Profession — Our Common Goal

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First, as president of the American Inns of Court Foundation, I want to tell you what an honor it is for the American Inns of Court (AIC) to work closely with ABOTA and JAMS to bring to the legal profession the Civility Matters program. We truly believe the program will make a significant positive difference in the integrity and civility of members of our profession.

Second, I want you to know about the AIC movement. We are devoted to promoting professionalism, civility, ethics and excellent legal skills at the American bench and bar. From the founding of the first American Inn of Court in 1980, lawyers, judges, academics and students throughout the nation have been meeting on a monthly basis in a collegial setting in their local American Inn of Court for continuing education and mentoring. Today, more than 27,000 members participate on a regular basis in more than 350 chartered American Inns of Court. Since the founding, more than 100,000 members have contributed to, and benefited from, their involvement in this national movement.

Looking for a new way to help lawyers and judges rise to higher levels of excellence, professionalism, and ethical awareness, the American Inns of Court adopted the traditional English model of legal apprenticeship and modified it to fit the particular needs of the American legal system. American Inns of Court help lawyers become more effective advocates and counselors with a keener ethical awareness. Members learn side-by-side with the most experienced judges and attorneys in their community.

An American Inn of Court is not a fraternal order, a social club, a course in continuing legal education, a lecture series, an apprenticeship system or an adjunct of a law school's program. While an Inn has some of each of these features, it is quite different in aim, scope and effect.

Membership is composed of the following categories: **Masters of the Bench**—judges, experienced lawyers and law professors; **Barristers**—lawyers with some experience who do not meet the minimum requirements for Masters; **Associates**—lawyers who do not meet the minimum requirement for Barristers; and **Pupils**—law students. The suggested number of active members in an Inn is around 80.

Most Inns concentrate on issues surrounding civil and criminal litigation practice, and include attorneys from a number of specialties. However, there are several Inns that specialize in criminal practice, federal litigation, tax law, administrative law, white-collar crime, bankruptcy, intellectual property, family law, or employment and labor law.

I encourage you to explore our Web site. (www.innsofcourt.org). Read about the history of the American Inns of Court and its mission and goals. Examine the Professional Creed that articulates aspirational conduct for lawyers. Review our diversity policy.

If you are a member of an American Inn of Court, I thank you for your participation, and I invite you to let us know how we can continue to serve and support you. If you are not a member of an American Inn of Court, consider joining thousands of others who share a commitment to improving the legal profession and maintaining the values essential to the success of a noble profession.

Making Civility Contagious

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Abusive, bombastic, and antagonistic behavior are characteristics that reflect poorly upon the individual attorney and demean our legal profession.

These characteristics also impede communication and the open exchange of ideas and information.

In the field of conflict resolution, these characteristics are anathema to the orderly processes of ADR and reduce the opportunity for successful outcomes.

It is therefore important to JAMS that ABOTA's "Civility Matters" initiative is so successful that all lawyers who appear in future JAMS proceedings are inculcated with the principles of ethics and civility, the cornerstones of successful advocacy.

The JAMS Foundation is a non-profit organization solely funded through donations of JAMS neutrals and associate personnel. No donations are accepted from outside interests. The JAMS Foundation is dedicated to funding ADR-related programs designed to maximize the spread of effective dispute resolution programs and to improve the mechanisms for dispute resolution.

The JAMS Foundation's grant to the ABOTA Foundation's "Civility Matters" program is an investment in hammering home to law students, bar associations, Inns of Court, trade associations, and all manner, make, and kind of attorneys that advocacy in the courtroom, arbitration proceeding, special master hearing and mediation forum benefits from participants who embrace high ethics and civil conduct.

JAMS has a self interest in the success of the "Civility Matters" initiative because our neutrals have found that ADR processes are enhanced — and the percentage of successful, efficacious outcomes are increased — when the parties' advocates comport themselves to the highest standards of our profession. Professional-acting advocates make for pleasant ADR processes which in turn make for happy JAMS neutrals. Successful ADR outcomes make for happy clients who will avail themselves of ADR processes to resolve their future disputes.

In summary, behaviors affect outcomes. It is the JAMS Foundation's hope that the ABOTA Foundation's initiative will prove contagious among the members of the legal profession. Civility Matters!

If Incivility Strikes . . .

How Should You Respond With Civility In These Situations?

By the Professionalism, Ethics and Civility Committee of ABOTA

Civility problems can arise in a number of different ways. In an effort to provide some guidance, particularly to young lawyers, the members of the ABOTA Committee on Professionalism, Ethics and Civility have assembled a series of practical suggestions. While there is little question that civility requires maturity and patience, it does not require that you act or feel like a doormat. You can represent your client vigorously, without incivility. The next time you confront one of the following common situations, please consider the following civil options:

How should you respond to the nasty letter or toxic email sent by your opponent?

This is a common problem. Different approaches are available. Of course, one can always simply decline to provide any response where there is no substance which warrants one. Other times, you may feel it is necessary or prefer to respond to keep a strong profile. Suppose, after filing an appeal, your opposition writes a two page rant, calling your appeal frivolous, telling you how s/he will have sanctions imposed against you, among other things.

In response, it is best not to engage a lawyer like this. You are not likely to accomplish anything of substance, and psychologically you cannot win playing their game. If you try, you will only draw a longer, more viperous response. Instead, consider something like a two line response which says: "Thank you for your letter. I look forward to personally seeing you at the appellate hearing."

The same problem also arises, perhaps more frequently, during email exchanges. So-called "toxic emails" are an extension of the same problem. Often they are typed and sent without careful thought, leaving an unfortunate, permanent record.

As but one example, second year associate "A" emails his counterpart at the opposing firm regarding an intensive document production request. "Your client's response is now 20 days overdue and despite early reminders, we seem to have no cooperation from you." In response, Associate "B", who just had three additional projects dropped on his or her desk responds out of frustration, saying: "You'll get the documents when I get around to it! Stop being a pain in my ass!!"

Perhaps Associate B will, like all of us, occasionally regret the fact that s/he hit the send button so quickly. But, within an hour, supervising partners are involved and things can get ugly. Hopefully, the supervisors will reduce, rather than add to the pressures that are building. But, where there is no objective intermediary, full-scale costly discovery wars often break out. No one benefits in the long run.

Particularly when it comes to Blackberry's and rapid email responses, it is all too easy to send off missives that lack the thought and reflection which was easier to employ when letters had to be typed and proof-read. In the case of responsive emails, particularly toxic emails, do not hit the send button unless you are willing to see that email as a printed exhibit in court document. Often it is best to prepare your response, and then let it sit overnight. Then, when you are fully relaxed, you can decide whether to send it out.

What you do if your opponent is "hiding the ball" during discovery?

This tactic is uncivil and unprofessional, yet it has become far too common during discovery. Hiding the ball creates distrust and creates unnecessary expense and delay. It surfaces in the form of direct concealment as well as in failures to disclose during "meet and confer" exchanges which also require good faith. But, perhaps the most common examples involve the use of objections interposed in bad faith in responses to requests for production and endless privilege logs. Ultimately, all such tactics undermine the discovery process and harm the reputation of the lawyer involved.

The California 2007 Guidelines of Civility and Professionalism specifically address and highlight the various aspects of this problem:

> As to document demands:
>
> **4.** In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.
>
> **5.** An attorney should not produce disorganized or

unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.

6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

As to interrogatories:

2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.

3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

Perhaps the best way to put an end to such tactics is to bring it to the attention of your opponent and encourage mutual candor. This is not a sign of weakness nor do you have to sacrifice your legitimate objections. You can simply agree to the following concept that changes the tone of discovery: If a reasonable request is made for something, I will provide it. Of course, this must be a mutual arrangement.

Where problems arise, it is often beneficial to arrange informal and inexpensive methods of exchanging information. These include informal "sit downs" or even lunch with your opponent. Document inspections can often be made easier by traveling to the source and simply sitting down with your opponent present, while you review their voluminous records, with an understanding that he will mark and copy only what you decide you need. Sometimes if a rapport can be created, it is even possible to jointly meet with witnesses or parties, with lawyers present, to avoid costly depositions, where they are not truly necessary.

The alternative is always available: expensive and time-consuming document exchanges, privilege logs, law and motion hearings and demands for sanctions. If you think your client may potentially benefit from you hiding the ball, consider the following. Sooner or later, the truth will likely come out. It almost always does. If you produced it as required, you can build your case around it. But, if your deception surfaces, both you and your client may face severe consequences, potentially including termination sanctions and disbarment.

How should you respond to an opponent who refuses to grant routine courtesies, like extensions of time or cooperative deposition dates?

Unfortunately, we all find ourselves in this situation from time to time. Acting as if still on the playground, obstreperous counsel employing such tactics are altogether too common. At least two clear alternatives are available to you in response.

One response is to return the discourtesy and escalate the problem. The other is to again take a deep breath and objectively assess your options. In this light, it often becomes easier to see that such inappropriate tactics are usually carried out in the relative obscurity of an office or behind a computer, where letters can be sent out without direct or immediate accountability.

But you can change that and in the process change the tone of your developing relationship. A good way to accomplish this transformation is to invite your opponent out of his or her secure hiding place. Sometimes, with a personal effort, miracles can occur. But, at a bare minimum, respond without anger or annoyance. To try and effect a "miracle", start by responding with a phone call, not a letter or email.

If possible, invite your adversary out to lunch or for "coffee". Many times, once confronted personally, even the most uncivil advocates change their demeanor and soften their approach. Give it a try. You might be pleasantly surprised. Once you have found some common ground, you can address some of the inconveniences you are experiencing and hopefully work them out. The more traditional alternative is to engage in a letter-writing campaign, which often costs your clients more and seldom produces meaningful relief.

How should you respond to the lawyer who is more interested in creating a "meet and confer" paper trail, than resolving disputes?

Sadly, this tactic is often indicative of a journeyman approach, with little concern for efficient or creative resolutions. While it is always a good tactic to respond with civility and attempt to create rapport rather than animosity, opponents who proceed in this fashion often leave little room for compromise.

In those cases where your efforts at cooperation and development of a personal rapport have not prompted a cooperative response, it is sometimes necessary to simply follow the rules of court and file motions to obtain the relief you seek. But, even if matters devolve to that point, be ever mindful of the importance of civility in your responsive letters, emails and courtroom behavior.

The court evaluating the issues will often be able to tell who has been trying to resolve the dispute...and who has fomented it. Particularly where the issues will ultimately find their way into court,

keep your focus on civility and professionalism. It will serve you well in this context, as in all others.

What should you do if your opponent persists in coaching his deposition witness?

To preserve your record, the first thing you must do is to make an appropriate objection. But, do so in a low key fashion. If the problem persists, you may wish to consider addressing the issue off the record with your opponent. This allows you to speak your mind without escalating the problem and gives your opponent an opportunity to save face without hurting his or her pride. Sometimes it is better to speak to your opponent in the hallway away from his client or his associate counsel. If this does not work, then you must continue to put your concerns on the record.

Under appropriate circumstances, you can stop the deposition, according to your local discovery rules, and seek assistance from the court. If you know in advance that you will be dealing with someone who routinely obstructs your efforts to obtain unfiltered testimony, you may wish to videotape the deposition. Such conduct is easier to capture on video tape and may avoid the problem in the first instance.

Courts can fashion protective orders or any number of sanctions to punish and prevent such conduct. For example, in California, Code of Civil Procedure, section 2023 identifies a number of misuses of the discovery process that are punishable by sanctions. These sanctions include monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions and contempt sanctions.

Some states like California have promulgated civility guidelines. In July 2007 the California State Bar published Guidelines for Civility and Professionalism. Section 9, paragraph a(6) of these guidelines specifically addresses the issue: "Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers."

Paragraph a(8) of the same section also provides: "An attorney should refrain from self-serving speeches and speaking objections." While inappropriate, this kind of behavior is not uncommon. Usually, polite demonstration of your unwillingness to permit such interference with the testimony of the witness will suffice.

What do you do if an attorney makes rude and degrading comments about you or your client?

Initially, it helps to take a deep breath. Remain calm and attempt to follow the same "meet and confer" approach discussed above. If that does not work, be sure to make a good record of the conduct. Section 9 of the California civility guidelines provides: "An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer."

Section 9 a(4) of the guidelines provides: "An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal." The reference to "personal" evokes Sections 4 and 8 of the guidelines dealing with ad hominem or personal attacks. Disparaging another's intelligence, integrity, ethics, morals or behavior are personal or character attacks which are simply inappropriate. If your opponent persists in making such personal attacks you may have no other option but to make a good record and let the court deal with it. But, civility does not require that you act like a door mat. You should not tolerate such abusive behavior.

What do you do if oppressive deposition notices are served without any consultation or cooperation?

Trial lawyers have busy schedules. It is difficult to schedule depositions convenient for everyone's calendar. The best way to approach this scheduling problem is to pick some dates for a deposition and then call opposing counsel to cooperatively pick dates (or indicate the same by cover letter). Ideally, you should try to work it out before a notice is served. This approach might make it easier for your opponent, who in turn might produce witnesses without the necessity of expensive subpoenas.

There are many ways that scheduling issues can arise, including situations where someone notices a future deposition and then opposing counsel retaliates by noticing an even earlier, related deposition. Section a(1) of the California guidelines addresses this issue, stating: "When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement."

Deposition scheduling should not be a game. All parties should attempt to cooperate to work out a sane schedule. If your opposition refuses to do so, make your record, but continue to act with civility, regardless of how they respond. Your conduct reflects upon you. As difficult as it may seem, incivility from your opponent cannot justify and should not prompt you into making uncivil responses.

What if the witness stretches out his answers to make it impossible to finish a deposition?

This tactic can backfire and often will benefit the attorney taking the deposition because he

can keep the deposition open, review the transcript and come back another day to ask more questions. However, it is sometimes used by opposing counsel for delay and oppression. A classic example of that was documented in the recent case *GMAC v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008). This was a commercial dispute and plaintiff GMAC was deposing the CEO of the defendant. After a very long and windy response, the following exchange occurred between the plaintiff's lawyer and the witness:

> "Q: Are you done?
>
> A: No, I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way, along the way GMAC will be bankrupt along the way and I will laugh at you."

The trial court punished the witness with substantial monetary sanctions for exploiting the deposition process. This is yet another misuse and abuse of the discovery system. The lawyer who permitted the witness to act in this fashion was also sanctioned. Common sense and the "golden rule" are good guidelines to follow.

What if your opponent persists in questioning your witness from documents without supplying you and other counsel with copies?

This seems very straightforward but it happens often. Surprisingly, counsel for deponents often let their opponents get away with it. Section 9, paragraph a(5) of the California guidelines addresses the issue: "An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent."

Of course, if many depositions have been taken and all the attorneys have notebooks of the documents being used, extra copies are unnecessary. But, keep in mind that so long as the deponent is not being shown a document, there is no requirement that the deposing attorney provide any copies of source material s/he may be using to formulate questions.

What do you do when there is an objection, instruction not to answer, and a dispute about whether to call the court to get an immediate ruling?

Interposing an objection and instructing a witness not to answer can be obstructionist and unprofessional if done without substantial justification. Experienced counsel will only do so where the testimony sought is privileged, immune as work product, or would significantly invade some real privacy interest of the witness. Most other objections are inappropriate if interposed at a normal discovery deposition.

Similarly, repeated threats to call the court can be contentious, unproductive and lack civility as well. Careful counsel will try to avoid a telephone call to the court in this situation, not wanting to appear too contentious or to provoke the ire of judges who seem to hate dealing even with good faith discovery disputes, let alone ones that must be ruled upon immediately. In short, calling the court can be a high stakes gamble for both sides. A few simple rules will help avoid the appearance of incivility.

First, make certain that you have a real, finely-honed dispute. Counsel asking the objectionable question should simply state why the question is appropriate, while the objecting party should state, not simply why the objection was made for the record, but why counsel cannot allow the testimony to be elicited. Counsel should explore whether some protective order could be fashioned, that portion of the deposition sealed, or otherwise permit the testimony without waiving privileges and immunities.

Civility requires that counsel try to work our some arrangement that protects the legitimate interests of both sides, but allows the deposition to go forward. Even where a deal is not possible, consideration should be given to making a clear record of the positions of the parties and preserving the dispute for a later time when it can be handled by routine motion to compel. Calling the court should be limited to situations where such calls have been invited or time constraints make it absolutely necessary.

Finally, where such problems seem to recur, consideration should be given to asking the court to appoint a special master under Federal Rules of Civil Procedure, Rule 53, or corresponding state authority, to resolve any future disputes.

When should you consider seeking appointment of a special discovery master or referee?

It is appropriate to request the appointment of a special discovery master or referee when your opponent has shown an unreasonable pattern of incivility and unprofessionalism, which may or may not include rules violations or a violation of legal ethics.

It is now obvious that much of the trial battle has shifted from the courtroom to the discovery practice. If the rules of civil procedure are not consistently enforced on a timely basis, there are those within the profession who will violate these rules in an attempt to gain an advantage. A special discovery master can perform a useful function because he or she is able to either settle these disputes on a timely basis, enter an appropriate order, or make appropriate recommendations to the presiding judge.

This speeds discovery, produces an accurate result, and encourages all parties to abide by the rules. In some jurisdictions, special masters are paid by the parties and the master is allowed to recommend a reapportionment of his or her fees once the master's function is completed. This is not a sanction. It is simply a recognition by the master that one or more parties is more at fault for the problem than others. In many cases, the parties are equally at fault, but in some cases reapportionment is appropriate.

If the parties know that once a knowledgeable master is appointed, fees can be reapportioned, it generally limits attempts to violate the rules. This, in and of itself, saves the parties money. Even if the parties cannot cooperate on a professional and civil basis, it is in their best economic interest to do so, because it is less expensive to pay the master then it is to file motions to compel, argue them and then wait for a decision.

If your opponent does not consent to the appointment of a special discovery master or referee, the court, either under Rule 53 of the Federal Rules, or under an appropriate local rule, or in accordance with the inherent authority of the court to conduct its own business, can appoint a special discovery master or referee, in appropriate circumstances, without the consent of all parties. The court can also order that the master or referee be paid by the parties.

You will need to convince the court that it is in the interests of justice to appoint a special master and that the circumstances of your case warrant it. It may be that both parties believe they are factually and legally correct in their positions and, therefore, a master is likely to vindicate their position.

If one of the issues dividing the parties has to do with privileged documents, or statements, many lawyers file extensive privilege logs because they do not wish to waive any particular privilege. Many lawyers do not wish the court to examine their privileged documents because they are damaging to their case. A special master can examine those documents, in camera, without disclosing what is in those documents to the court itself. This can be a substantial benefit to the party filing the privilege log.

One word of caution. Many judges are not familiar with the benefits of special masters. Since they have not used special masters, they are not familiar with how to draft the appointment order. This is not a simple procedure. Under the Federal Rules, there are special requirements that must be met, and there are provisions that should be included that are not specifically set forth in the rules. Therefore, you will need to research this issue before requesting the appointment of a special discovery master, and it is recommended that you draft a detailed model appointment order so the judge can easily and conveniently appoint the master.

Then the only issue is obtaining a qualified special master. You and your opponent may agree on this, but if you do not, you may submit a list of recommendations to the court which can be helpful.

Hopefully, use of some of the more personal avenues available to you will resolve most of your incivility problems. We commend them to you. But, if you simply cannot work through them any other way, a special master or referee can make a big difference.

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