LEGAL ETHICS 2011 - What's an attorney to do?

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Rules of Professional Conduct (RPC)

Rule 1.1 – Competence
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A Lawyer's Responsibilities - Preamble to RPC

- An advisor, advocate negotiator, intermediary and evaluator
- Competent, prompt and diligent
- Conduct should conform to the requirements of the law both in professional and personal affairs
- Respect the legal system and those who serve it
- Strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service
- Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to client, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.
- Issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the RPC.
- These principles include attorney's obligation to zealously protect and pursue a client's legitimate interests within bounds of the adversarial system while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Scope of RPC

- The RPC are rules of reason
- Some of the rules are imperatives – "shall" and "shall not" – and define proper conduct for purposes of professional discipline
- Other rules are permissive – "may" – and define areas in which attorney has professional discretion to exercise professional judgment

Scope -- Government Attorneys

- Responsibility of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-attorney relationships.
- May be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where private attorney could not represent multiple private clients.
- May represent the "public interest" in circumstances where a private attorney would not be authorized to do so.
- The Rules do not abrogate any such authority.

Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.6 – Confidentiality of Information
A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- to prevent reasonably certain death or substantial bodily harm;
- to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another . . . ;
- Rule 1.6 – Confidentiality
- to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud. . . ;
- to secure legal advice about the lawyer's compliance with these Rules;
- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- to comply with other law or a court order.

A Client's perjury
An attorney who, unaware his client will lie, hears the client commit perjury or materially mislead a tribunal may not remain silent and continue to represent the client – to do so would be assisting the client in committing fraud upon the court. Counsel is obligated to "remonstrate" with the client and attempt to persuade the client to correct the misleading/untruthful statements. If the client will not, the lawyer must seek to withdraw. If withdrawal is denied, the lawyer must reveal the fraud/perjury to the court. Utah State Bar Ethics Op. 00-06.

A Suicide Threat
If it is in the best interests of a client, an attorney who reasonably believes the client is contemplating imminent suicide may disclose a suicide threat to another who may help prevent it. Utah State Bar Ethics Opinion 95.

Disbarment for assisting
Disbarment was appropriate for attorney who participated in client's efforts to conceal violation of environmental remediation consent decree; attorney lied to remediators about client's removal of contaminated dirt, participated in scheme to cover up the removal by bringing in clean dirt and contaminating it, prepared false and misleading letter for client to submit to Dept. of Environmental Quality, and lied to Bar and lied during disciplinary trial. *In re Discipline of Stubbs*, 974 P.2d 296 (Utah 1999).

Rule 1.7 Conflict of Interest: Current Clients
(a) Except as provided in (b) lawyer shall not represent a client if representation involves a concurrent conflict of interest which exists if:
    1. The representation of one client will be directly adverse to another client; or
    2. There is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the personal interest of the lawyer.

(b) Notwithstanding concurrent conflict under (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(j)Conflict of Interest: Current Clients: Specific Rules

- A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For purposes of this Rule:
  - "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and
  - except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.
- Numerous Rules implicated
- Sexual relationships between attorney and client can:
  - Jeopardize the lawyer's ability to competently represent the client (Rule 1.1);
  - Interfere with the lawyer's independent professional judgment (Rule 2.1);
  - Create a conflict of interest (Rule 1.7, 1.8(b), Rule 1.10(a));
  - Jeopardize the duty of confidentiality owed to the client (Rule 1.6(a));
  - Potentially prejudice the client's matter (Rule 1.3(c)).

  See, e.g.: Virginia Legal Ethics Opinion 1853

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) 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 whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless the former client gives informed consent confirmed in writing

(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 use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known or reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 3.1 – Meritorious Claims and Contentions

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, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or 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.

Abusing the process

Attorney's filing of frivolous complaints and claims, and failure to comply with court orders, respond to proper discovery request, and withdraw claims after being warned that they appeared to be frivolous, violated state professional rules and warranted a one-year suspension from the practice of law in federal courts of the state, three-year probation upon

readmission, re-organization of his practice, and a public reprimand. *Comm. On Conduct of Attorneys v. Oliver*, 510 F.3d 1219 (D. UT 2007).

Rule 3.7 – Lawyer as Witness
A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue; the testimony relates to the nature and value of legal services rendered in the case; or disqualification of the lawyer would work substantial hardship on the client.

A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.2 – Communication with Persons Represented by Counsel (c) Rules relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

1. The communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or
2. The communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or
3. The communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or
4. The communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

Communications with Government Employees
A lawyer representing a government office or department may not prevent a lawyer representing a private party from contacting any employee of the government office or department outside the presence of government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts an employee of a government agency about pending litigation against the agency involving the private party, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.
Utah State Bar Ethics Op. 115R (1994).

Social Media and Rule 4.2
Social media is a virtual information bonanza about a litigant's private life and state of mind.

Illinois State Bar Association President John G. Locallo recently wrote in his President's Page column, "If Facebook were a nation, it would be the third largest in the world. Do I have your attention yet?" September 2011 IBJ

Social Media – Attorney Beware
Discussion point: May an attorney view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

Public profile is fair game

- A lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation to search for potential impeachment material as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so. See: New York State Bar Ethics Opinion 843

- Accessing the website of an opponent represented by counsel is the same as reading a magazine article written by that opponent and is simply reading "information posted for general public consumption." See: Oregon State Bar Assoc. Opinion 2005-164 (August 2005)

Caution – Don't get too "friend"ly!

- If the social media profile is not generally accessible to the public but rather is only accessible when the person allows access to those who are accepted as "friends", Rules violations can occur when:
  - The attorney attempts to "friend" a represented party in pending litigation (Rule 4.2)
  - Having a third party "friend" without revealing the attorney's involvement (Rule 8.4(c) conduct involving dishonesty and deceit; Rule 4.1 truthfulness in statements to others; Rule 5.3 lawyer responsible for conduct of nonlawyer).

  See: Philadelphia Bar Association Opinion 2009-02

Can judges and attorneys really be "friends"? States disagree.

- Florida: would convey impression that attorney is in special position to influence the judge. Fla. Judicial Ethics Advisory Comm. Op. No. 2009-20 (Nov. 2009)

- Kentucky, New York and South Carolina: friending someone on social media does not imply those online friends have any "special pull" but judges nevertheless should be "extremely cautious" in their use of social media.

- North Carolina judge received public reprimand when he exchanged a few online comments with a Facebook friend about a proceeding – That friend was one of the attorneys in the proceeding

What about jurors?

- Any direct or indirect communication between an attorney and a juror or potential juror during trial prohibited under ethics rules. N.Y. County Lawyers Assoc. Ethics Opinion 743 (May 18, 2011)

- New Jersey lawyers can research jurors on Internet during jury selection:
  "There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it." Carino v. Muenzen, 2010 WL 3448071 (August 30, 2010).

Rule 4.4 – Respect for Rights of Third Persons

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

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.

What you say may be used against you…

- An attorney received a 90 day suspension for sending a letter that questioned whether the town manager had a soul, stated that the manager had no brain and called the town leadership "pagans," "insane" and "pigheaded."
- First Amendment does not prevent disciplinary action for conduct that violated RPC.
- Although an attorney does not surrender her freedom of expression upon admission to the bar, once admitted, she must temper her criticism in accordance with professional standards of conduct. *In re White*, 2011 WL 780753 (S.C.)

Metadata: To mine or not to mine…

Discussion points:

- Does an attorney have an affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected from inadvertent or inappropriate production via an electronic document before it is transmitted? (Rule 1.6)
- Is it unethical for an attorney to mine metadata from an electronic document he or she receives from another party?
  (Rule 4.4)

No Consensus*

What is the sender's duty when transmitting metadata?

ABA: **None**

Alabama, Arizona, Colorado, Florida, Maine, Maryland, Minnesota, New Hampshire, New York, Pennsylvania, Vermont, Washington D.C., West Virginia: **Reasonable Care**

May the recipient review or mine the metadata?

ABA, Colorado, Maryland, Vermont: **YES**

Alabama, Arizona, Florida, Maine, New Hampshire, New York, Washington D.C., West Virginia: **NO**

Minnesota, Pennsylvania: **Depends on facts**

Must the recipient notify the sender if metadata is found?

ABA, Arizona, Colorado, Florida, Minnesota, New Hampshire, New York, Pennsylvania, Vermont, Washington D.C., West Virginia: **YES**

Maryland: **NO**

Alabama, Maine: **Not addressed**

*See: Metadata Ethics Opinions Around the U.S. – Legal Technology Resource Center,
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html

Rule 7.2 - Advertising

Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

A lawyer shall not give anything of value to a person for recommending the lawyer's services. . . .

Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer of the firm responsible for its content.

Does Blogging = Advertising?

- A criminal defense attorney in Virginia has been charged with misconduct by Va. State Bar
- Blogs about cases he has won
- Ethics Rule 7.2 requires a disclaimer when attorneys list previous wins in advertising
- Attorney did not use disclaimer in blog

Rule 8.2 – Judicial Officials

A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or a candidate for election or appointment to judicial office.

A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Even if you don't like the judge's ruling, get over it!

- An attorney received a six month suspension for criticizing a judge's ruling.
- His criticism included a letter he wrote to the America Arbitration Association indicating that the judge had been "caught engaging in serious misconduct' and that the ruling was "an absurd decision from a whacko judge, whom I believe was bribed."
- He also added that he thought that opposing counsel was "demonically empowered."
- Public statements by attorneys concerning integrity of judges and judicial officers are not protected speech because they create a substantial likelihood of material prejudice to the administration of justice. *Moseley v. Virginia State Bar*, 694 S.E. 2d 586 (Va. 2010)

Rule 8.3 – Reporting Professional Misconduct

A lawyer who knows that another lawyer has committed a violation of the RPC that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

A lawyer who knows that a judge has committed a violation of the applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

The Rule does not require disclosure of information protected by Rule 1.6 or gained by lawyer or judge while participating in an approved lawyers' assistance program.

Comment - If an attorney was obligated to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is required in complying. ***The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.*** Similar considerations apply to the reporting of judicial misconduct.

Rule 8.4 – Misconduct

It is professional misconduct for a lawyer to:
Violate or attempt to violate the RPC, knowingly assist or induce another to do so, or do so through the acts of another;
Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
Engage in conduct that is prejudicial to the administration of justice;
State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the RPC or other law; or
Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment - Many kinds of illegal conduct reflect adversely on the fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication – i.e. offenses involving "moral turpitude" that concern matters of personal morality such as adultery and comparable offenses that have no connection to the fitness for the practice of law. Although an attorney is personally answerable to the entire criminal law, he/she should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to the practice of law – offenses involving violence, dishonesty, breach of trust or serious interference with administration of justice.

Comment - A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Honesty is the best policy

- An Arizona attorney received a six month suspension for falsely denying in a bar proceeding that "she had ever channeled the thoughts of a deceased person to a client."
- The attorney met the client while taking ballroom dancing lessons and was retained to handle his divorce.
- The representation terminated when the wife committed suicide.
- The attorney channeled the wife for three years, conveying the thoughts of the deceased wife to the client until she and the client stopped dancing together and parted ways.
- Bottom line: If you find yourself possessed by a client's deceased spouse, don't lie about it.

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