

Legal Ethics Feud

WICSEC Edition



Your Host



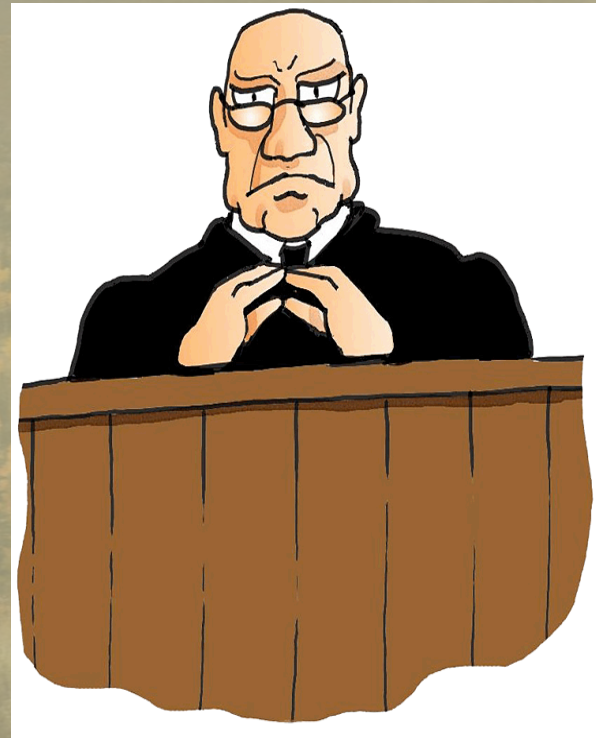
Nicholas Palos

Feud Masters

- **Diane Potts**



- **John Cardoza**



How The Game is Played



- ❖ Three teams will compete
 - ❖ Two teams on stage
 - ❖ The audience as a separate team
- ❖ We will present a series of fact patterns or video.
- ❖ After each fact pattern, there is a question related to an ethical issue raised in the narrative. Each question has four proposed answers, and each correct answer will be worth one point.

How The Game is Played



- ❖ Each team on stage will choose one of the four proposed answers and prepare to display the appropriate answer card.
- ❖ While each team on stage is choosing their answer, the audience team will vote in the on-line poll. The audience answer is the answer which received the most votes.

How The Game is Played



- ❖ One of the game judges will reveal the correct answer and provide a brief explanation. Audience and team participation is encouraged in discussing the answer.
- ❖ **Warning: The host may, at any time, engage any player in a discussion of the issue presented**

HOW THE AUDIENCE TEAM WILL SELECT THEIR ANSWER



- ❖ Text **NICHOLASPALO929** to **22333** once to join the poll
- ❖ When the poll is active, text letter of your chosen answer to 22333.



- ❖ When poll is active, respond at PollEv.com/nicholaspalo929

If I could be anywhere, I would be



a) Right where I am now, in this exciting CLE workshop

b) Anywhere but my office

c) In another workshop, but I need the ethics credits

d) In the hotel (or some other) bar, where we all know the real work occurs in a conference



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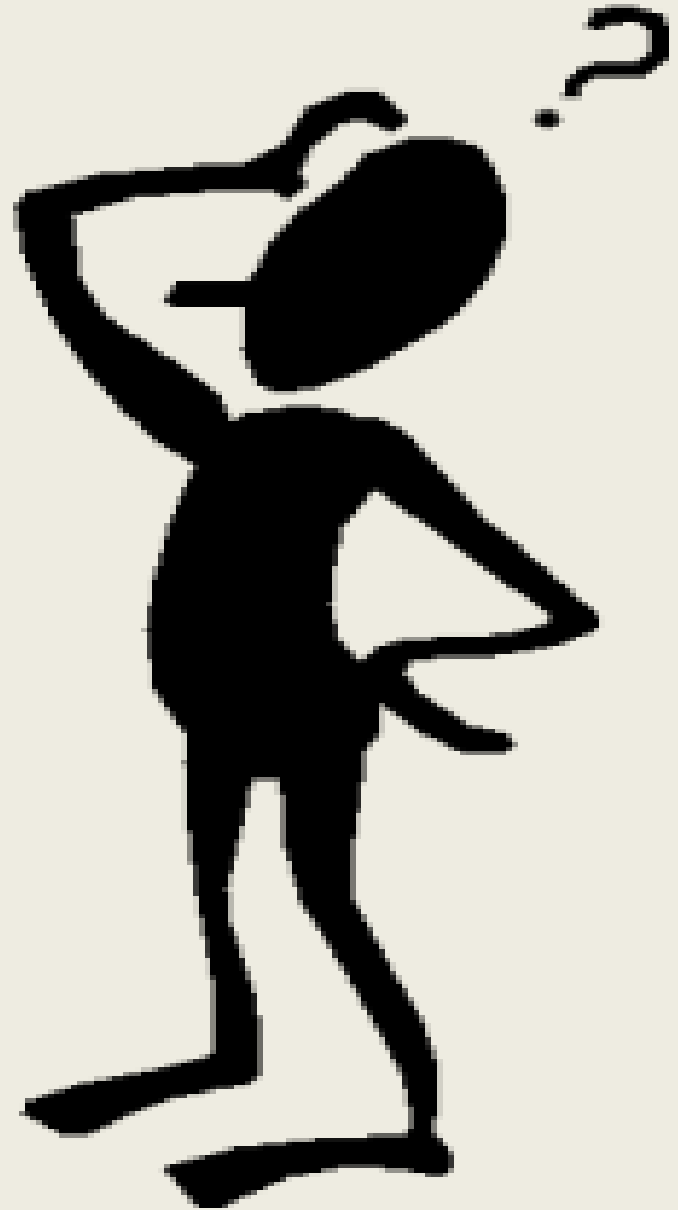
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Total Results: 0

LET'S PLAY THE FEUD



During the course of a protracted support proceeding, the paying parent, Donna Gottit, appeared in court without an attorney. On the day the trial is ready to begin, she hands Yves Dropper, the IV-D attorney, a well-written, properly cited memorandum of law setting forth her case for a deviation from a guidelines based order. Yves previously noted that Donna indicated that she had completed fifth grade and worked as a plumber's assistant. Yves had planned to engage her in a settlement discussion prior to the case being heard. Yves now suspects Donna may have engaged an attorney for the limited purpose of drafting the memorandum.



Can Yves attempt to discuss a settlement with Donna?

- a) Yes. Since no attorney has appeared on her behalf, there is nothing wrong with making an attempt to settle the matter.
- b) No. But Yves should attempt to find out who wrote the memorandum to compliment him or her on the great writing.
- c) No. An attorney has no business approaching an unrepresented person.
- d) Yes, but only after ascertaining that Donna is unrepresented or has only employed an attorney for limited purposes not including settlement discussions.

Can Yves attempt to discuss a settlement with Donna?



a) Yes. No attorney has filed a notice of appearance on her behalf, so there is nothing wrong with making an attempt to settle the matter.

b) No. But Yves should attempt to find out who ghost wrote the memorandum to compliment him or her on the great writing.

c) No. An attorney has no business approaching an unrepresented person.

d) Yes, but only after ascertaining that Donna is unrepresented or has only employed an attorney for limited purposes not including settlement discussions.



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Total Results: 0

And the answer is . . .



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Author, Author

MODEL RULE 1.2(c)

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent

LIMITED SCOPE REPRESENTATION

Pay What You Can
TO GET WHAT
YOU NEED



Author, Author

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

MRPC 1.0(e)

“Reasonable” or **“reasonably”** when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

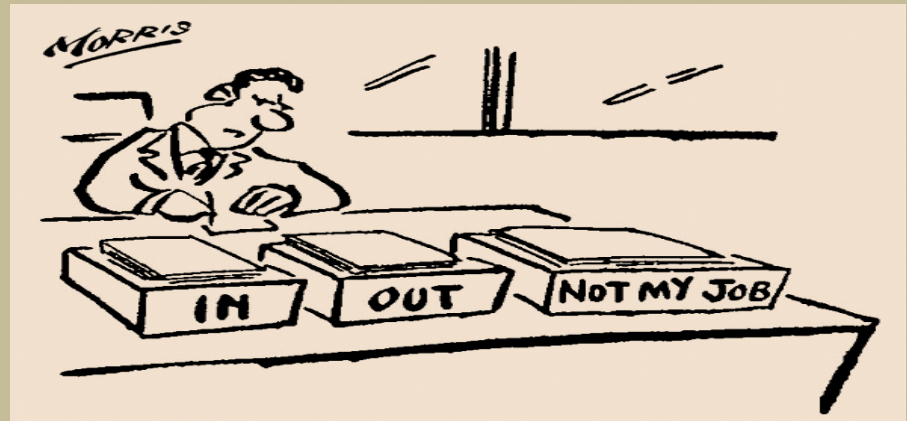
MRPC 1.0(h)

Author, Author

... Although an agreement for a limited scope representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MRPC 1.2(c), Comment 7

Lerner v. Laufer, 819 A.2d 471, 359 N.J. Super. 201 (2003) (lawyer retained specifically to review sufficiency, but not fairness, of marital property settlement agreement arrived at after mediation had no duty to investigate so as to advise on agreement's fairness)



Author, Author

- In representing a client, a lawyer **shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

MRPC 4.2



Author, Author



The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances... Thus, *the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.*

MRPC 4.2 Comment 8

Author, Author

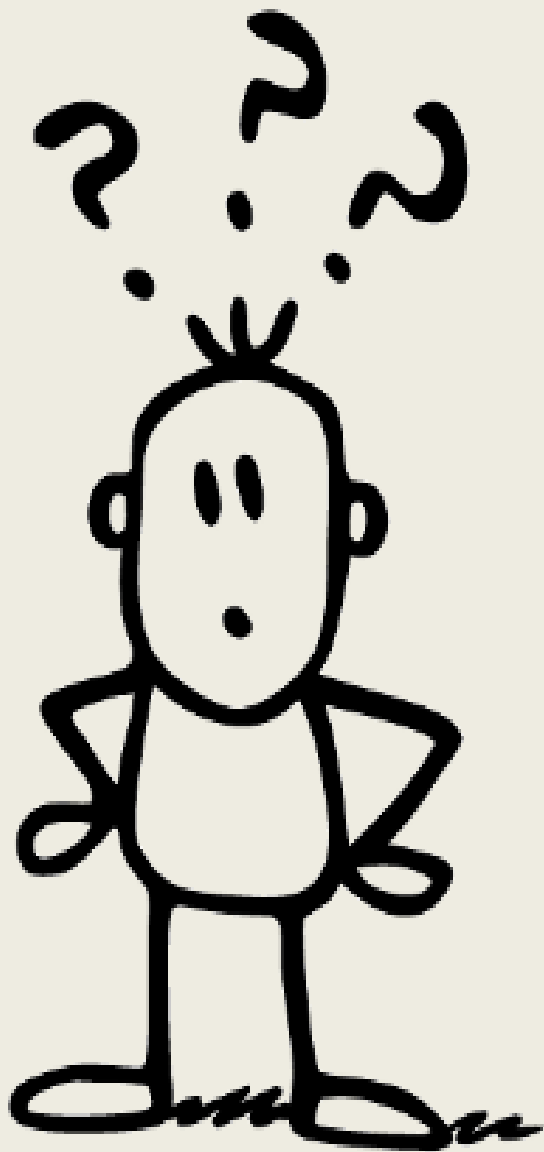
ABA Formal Opinion 472 (November 15, 2015)

- Model Rule 1.2(c) permits limited scope legal representation
- No requirement in the Rule to confirm scope in a writing provided to the client, but such would be a best practice
 - Writings are required in MD, MO, MT, NH
 - Written agreement for limited scope is preferred in OH, TN
 - Limited scope appearance filing is required by some states' rules of civil procedure

Author, Author

ABA Formal Opinion 472 (November 15, 2015)

- MRPC 4.2 does not explicitly establish a duty to inquire whether an individual is represented by counsel
 - Knowledge that person has legal representation may be inferred from the facts
 - Where it appears to the lawyer that a person is represented by counsel, begin communication with that person by **ASKING** if the person is represented to determine if MRPC 4.2 or MRPC 4.3 applies.
 - If the person is unclear as to what the scope of representation was, contact the attorney before continuing communication with that person to ascertain the scope of the representation



Iman Attorney is the IV-D attorney in Deadbroke County. Twice a week, Iman appears on behalf of the child support agency before Judge Cash and makes recommendations on child support orders based on the state's child support guidelines. Judge Cash usually accepts Iman's recommendations and orders support accordingly. After a long morning in court, Iman returns to the office and his secretary tells him that Joe Smith—a noncustodial parent from the morning's court call—needs to talk to him about his child support being way too high. In reviewing the file, Iman realizes that he miscalculated Joe Smith's income, inadvertently misrepresented that income to Judge Cash, and recommended a much higher amount than was warranted under the guidelines. Judge Cash accepted the recommendation and the order was entered this morning.

After discovering his error in calculating Joe's income, what is Iman's proper course of action?



- a) Call Joe Smith and tell him that he needs to bring the mistake to the court's attention.
- b) Call Judge Cash and tell him what happened so the judge can decide what he wants to do.
- c) File a post-judgment motion alerting the court to the error.
- d) Go to lunch and celebrate the fact that he got a lot of child support for the custodial parent.

**After discovering his error in calculating Joe's income,
what is Iman's proper course of action?**



a) Call Joe Smith and tell him that he needs to bring the mistake to the court's attention.

b) Call Judge Cash and tell him what happened so the judge can decide what he wants to do.

c) File a post-judgment motion alerting the court to the error.

d) Go to lunch and celebrate the fact that he got a lot of child support for the custodial parent.

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Total Results: 0

And the answer is . . .

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ATTORNEY ERROR EFFECTS DECISION

Model Rule 3.3 Candor Towards the 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; . . .**

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

ATTORNEY ERROR EFFECTS DECISION

A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty . . . is qualified by the advocate's duty of candor to the tribunal. . . although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, **the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.**

Model Rule 3.3, Comment 2

. . .an assertion purporting to be on the lawyer's own knowledge, . . .in a statement in open court, may properly be made only when the lawyer **knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.**

Model Rule 3.3, Comment 3

ATTORNEY ERROR EFFECTS DECISION

Model Rule 3.3 Candor Towards the Tribunal

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.



A proceeding has concluded within the meaning of this Rule when *a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.*

Model Rule 3.3, Comment 3

ATTORNEY ERROR EFFECTS DECISION

Model Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer **shall not knowingly:**

(a) **make a false statement of material fact** or law to a third person;



Misrepresentations can also occur by partially true but misleading statements or *omissions* that are the equivalent of affirmative false statements.

Model Rule 4.1, Comment 1

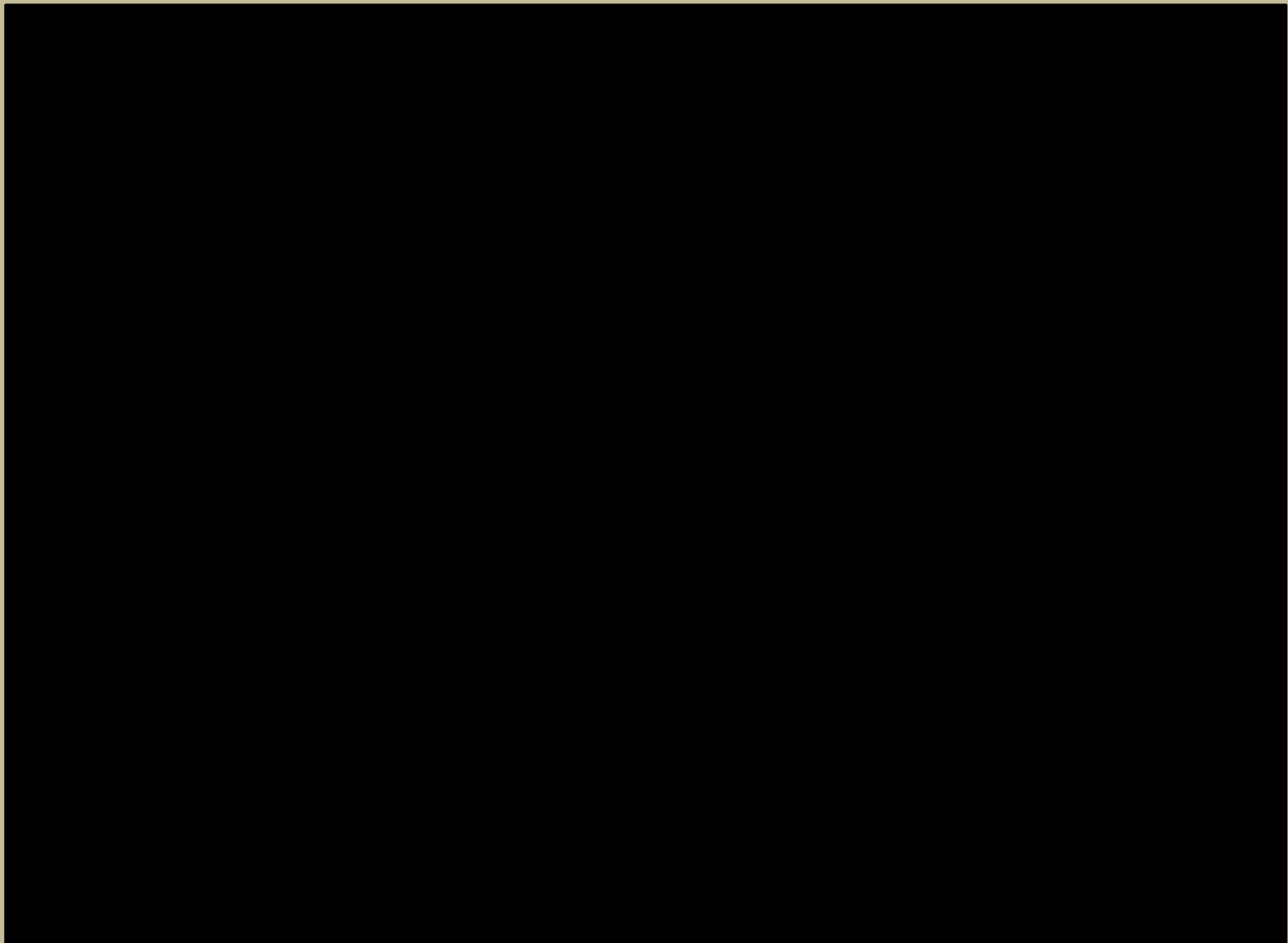
ATTORNEY ERROR EFFECTS DECISION

Model Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (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; . . .
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;





Should Ms. Sansclu have agreed to the bench conference which excluded Ms. Good?

- a) Yes, it was the quickest way to dispose of a case that would have likely taken too long to reach the same result.
- b) Yes, because like the judge said, its best to leave this to the professionals
- c) No. This constitutes a violation of several Rules of Professional Conduct, as well as the Code of Judicial Conduct.
- d) No. *Amici curiae* should never participate in these kind of conferences.



Should Ms. Sansclu have agreed to the bench conference which excluded Ms. Good?

- a) Yes, it was the quickest way to dispose of a case that would have likely taken too long to reach the same result.
- b) Yes, because like the judge said, its best to leave this to the professionals
- c) No. This constitutes a violation of several Rules of Professional Conduct, as well as the Code of Judicial Conduct.
- d) No. Amici curiae should never participate in these kind of conferences.

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Total Results: 0



And the answer is . . .



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Let the Professionals Do It

Model Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;



Let the Professionals Do It

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

MRPC 3.5 Comment 2

Did somebody say
ex parte ?

Let the Professionals Do It

Model Rule 4.3 Dealing with Unrepresented Person

In dealing 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 a person are or have a reasonable possibility of being in conflict with the interests of the client.



Let the Professionals Do It

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, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Let the Professionals Do It

Lombardi v. Van Deusen, 932 N.E.2d 219 (Ind. Ct. App., 2010)



- ❖ “Being deprived of *procedural due process* rights of a *meaningful opportunity to be heard*” was deemed sufficient prejudice to the rights of the unrepresented party sufficient to warrant reversal and remand.
- ❖ Matter was remanded with the direction that the case be reassigned to a different judicial officer

Let the Professionals Do It

Model Rule of Judicial Conduct 1.1

**A Judge shall comply with the Law,
including the Code of Judicial
Conduct.**

*Law encompasses court rules as well as statutes,
constitutional provisions and decisional law.*



Let the Professionals Do It

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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



Let the Professionals Do It

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 in other respects, shall inform the appropriate professional authority.

- ✓ "Knows" denotes **actual knowledge** of the fact in question. A person's knowledge may be inferred from circumstances

Rule 1.0(f)

- ✓ "Substantial" when used in reference to degree or extent denotes a **material matter of clear and weighty importance**

Rule 1.0(l)



Let the Professionals Do It

Rule 8.3 Reporting Professional Misconduct



(b) A lawyer who **knows** that a judge has committed a violation of applicable rules of judicial conduct that raises a **substantial question** as to the judge's fitness for office shall inform the appropriate authority

- ✓ "Knows" denotes **actual knowledge** of the fact in question. A person's knowledge may be inferred from circumstances

Rule 1.0(f)

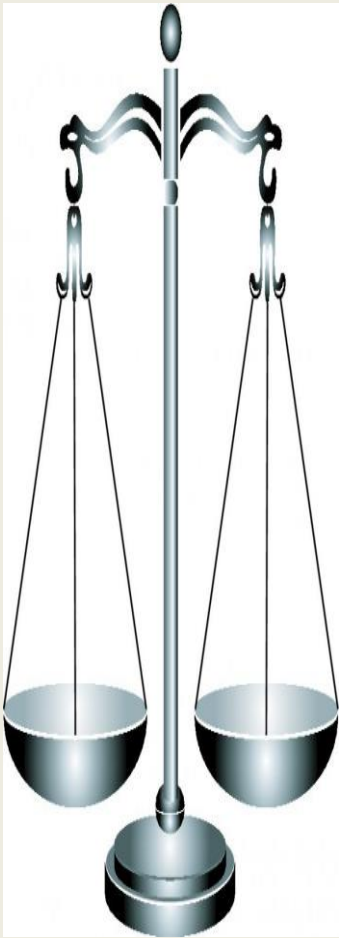
- ✓ "Substantial" when used in reference to degree or extent denotes a **material matter of clear and weighty importance**

Rule 1.0(l)

Attorney Ulysses N. Kute has been practicing in the courthouse for what seems forever. He appears in all sorts of cases, and you have to put up with his uncouth behavior in order to represent your clients. U.N. regularly offers peppermint candies to female attorneys, asking if they would like to “suck his balls”. The female attorneys who have heard these comments have always indicated to U.N. that they found these comments offensive. You have noticed he has never made such comments to male attorneys or the Judges. In addition to these comments, you have often witnessed U.N. make disparaging comments about the physical appearance of the female attorneys in the courthouse, or he would snidely refer to the physical attributes of his female clients. You have been asked to co-sign a complaint to the local disciplinary authorities.



Is it appropriate for you to sign the ethics complaint against Ulysses N. Kute?



- A. Yes, U.N.'s behavior clearly reflects upon his fitness to practice law.
- B. No. U.N. is from a different generation and was never taught differently.
- C. Yes. Its time we get these sleazeballs out of the profession
- D. It is appropriate only if I believe that U.N.'s behavior raises a substantial question as to his fitness as a lawyer.

Is it appropriate for you to sign the ethics complaint against U.N. Kute?



a) Yes, U.N.'s behavior clearly reflects upon his fitness to practice law.

b) No. U.N. is from a different generation and was never taught differently.

c) Yes. Its time we get these sleazeballs out of the profession

d) It is appropriate only if I believe that U.N.'s behavior raises a substantial question as to his fitness as a lawyer.

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Total Results: 0

And the answer is . . .

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He's not worthy

Matter of Kahn, 16 A.D.3d 7, 791 N.Y.S 2d 36 (1st Dept., 2005)

- ❖ Sixth month suspension for attorney
- ❖ Course of conduct for at least thirteen years prior to proceeding
- ❖ Conduct adversely reflected upon his fitness to practice law
- ❖ Engaged in conduct degrading to tribunal



He's not worthy

Model Rule 8.4(g)

It is professional misconduct for a lawyer to:

(g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

New
AND Exciting

He's not worthy

Model Rule 8.4(g)

Amendment to Model Rules adopted August 8, 2016



- ❖ 25 States had already adopted a similar rule
- ❖ In addition to the new rule section, three new paragraphs are added to the Comments
 - ❖ Comment [3] explanation of rationale
 - ❖ Comment [4] defines “conduct related to practice of law”
 - ❖ Comment [5] limits scope of Rule

He's not worthy

Model Rule 8.4(g)

New Comment [4]

- ❖ **Related to Practice of Law**
 - ❖ Representing clients
 - ❖ Interacting with others
 - ❖ Witnesses
 - ❖ Co-workers
 - ❖ Court Personnel
 - ❖ Lawyers
 - ❖ Others when engaged in practice of law
- ❖ Managing firm or practice



He's not worthy

Model Rule 8.4(g)

New Comment [4]

- ❖ **Related to Practice of Law**
 - ❖ Participating in bar association, business or social activities in connection with practice of law



New!

He's not worthy

Model Rule 8.4(g)

Exclusions

❖ Comment 4

- ❖ Conduct to promote diversity and inclusion

❖ Comment 5

- ❖ Limiting scope of representation in accordance with rules
- ❖ Charging and collection a reasonable fee and expenses



Francis Fordee is the child support attorney in Xuse County, and files a case for civil contempt against Aaron Scofflaw. Before the first court appearance, Francis sees Aaron outside the courthouse smoking a cigarette. Francis approaches Aaron with her cell phone in her hand and talks with him about the case, discretely recording the conversation. Aaron admits to having the money to pay child support but tells Francis that he refuses to pay the support because his ex-wife has been denying him visitation.

May Frances use the juicy confession on tape at the civil contempt trial?

- A. Yes, but only if Aaron first denies under oath he has the money to pay child support.
- B. Yes. If Aaron was dumb enough to give the case to her on a silver platter, why not take the easy win and call it a day.
- C. No, Francis should not have recorded the conversation in the first place.
- D. Yes, but only if the recording is allowed under the law in Xuse County.

May Frances use the juicy confession on tape at the civil contempt trial?

- a) Yes, but only if Aaron first denies under oath he has the money to pay child support.
- b) Yes. If Aaron was dumb enough to give the case to her on a silver platter, why not take the easy win and call it a day.
- c) No, Francis should not have recorded the conversation in the first place.
- d) Yes, but only if the recording is allowed under the law in Xuse County.



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Total Results: 0

And the answer is . . .



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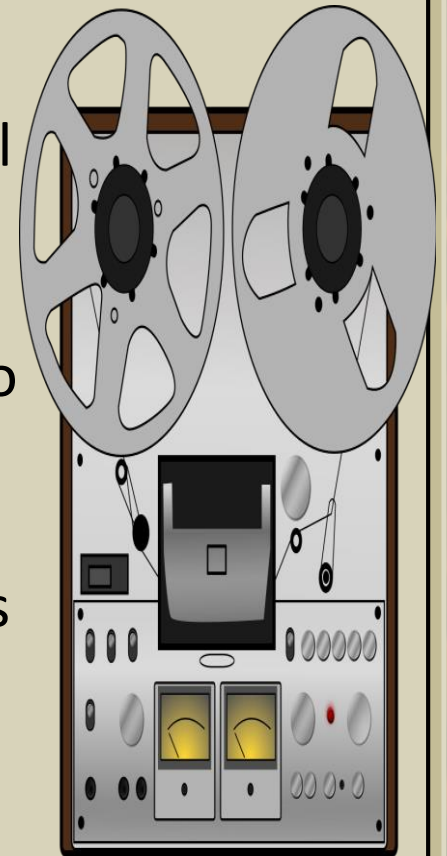


Child Support Watergate

Model Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.



Child Support Watergate

Lawyer participation in surreptitious tape-recording is generally addressed under **Model Rule 8.4**, but Model Rule 4.1 will also be implicated if the lawyer lies about



- ✓ *Miss. Bar v. Attorney ST*, 621 So. 2d 229 (Miss. 1993)
- ✓ *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009)
- ✓ ABA Formal Opinion 422 (2001)

Child Support Watergate

Rule 4.3 Dealing with Unrepresented Person

In dealing 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 a person are or have a reasonable possibility of being in conflict with the interests of the client



Ida Dunnit, a child support attorney in Minnesota, has a case scheduled to go to trial on May 2. On April 14, she files a motion seeking to continue the trial date due, in part, to an unspecified personal commitment. Before the motion is heard by the court, she purchased a nonrefundable airline ticket to Paris from May 4 to May 9 in order to attend her parents' 40th anniversary party. The court denied the motion. Ms. Dunnit failed to appear for the start of the trial.

The attorney who appeared on her behalf told the court Ms. Dunnit had been admitted to a Texas hospital the night before and she was seeking a continuance. The court continued the matter to the next day and directed counsel to provide documentation of the hospitalization. Ms. Dunnit again failed to appear, and the trial was continued to May 5. Ms. Dunnit emailed the judge's clerk that it was too soon for her to travel to Minnesota, as she had been released from the hospital on May 3, and she would not be able to travel to Minnesota for the hearing

The court scheduled a hearing on May 5, and would allow Ms. Dunitz to appear by telephone. On the night of May 4, she boarded the flight to Paris. On May 5, she appeared by phone from Paris and discussed her medical situation and her prognosis, but she failed to mention that she had traveled to Paris

Assuming the court learns all of the facts, should Ida Dunit face a disciplinary proceeding for her actions between April 14 and May 9?

- a) Yes, as the court is obligated to report her behavior to the appropriate disciplinary committee.
- b) No, but her passport should be revoked and she should be placed on a no-fly list for bringing international travel into disrepute.
- c) Yes, she has violated more than one of the Rules of Professional Conduct.
- d) While she should not be subject to any disciplinary proceeding, her client should sue her for malpractice

Should Ida Dunnit face a disciplinary proceeding for her actions between April 14 and May 9?

a) Yes, as the court is obligated to report her behavior to the appropriate disciplinary committee.

b) No, but her passport should be revoked and she should be placed on a no-fly list for bringing international travel into disrepute.

c) Yes, she has violated more than one of the Rules of Professional Conduct.

Total Results: 0

And the answer is . . .

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How Are You Going to Keep Them on the Farm. . .

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) **knowingly disobey an obligation under the rules of a tribunal**, except for an open refusal based on an assertion that no valid obligation exists



How Are You Going to Keep Them on the Farm. . .

Rule 8.4 Misconduct



It is professional misconduct for a lawyer to:

- (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) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

How Are You Going to Keep Them on the Farm. . .

In re Disciplinary Action Against Mpataniahi Syanaloli Tyari-Garrett, 866 N.W.2d 513 (Minn. 2015)

- Attorney convicted of criminal contempt
- Conviction itself supports a finding that the attorney violated the rules of professional misconduct



**INDEFINITE SUSPENSION FOR
MINIMUM OF 120 DAYS**

Will Cheatem represents Goldie Igger in a proceeding to obtain support from the father of her child, I.M. Cheap. Over the course of several meetings, Goldie brought a lot of documents which she obtained from his personal e mail account without his knowledge. Among the documents Will received were a current payroll document and a privileged list of direct examination questions prepared by Mr. Cheap's attorney, Justin D. Barr.

During the trial, Will included the documents Goldie gave him in an updated stack of exhibits. When Justin saw the documents, he demanded to know how Will obtained them, especially the now annotated list of questions.

During a hearing, Goldie testified how she came to possess the documents and that she gave them to her attorney. Will then testified that he had not seen the question list until it was mixed in his exhibits. Upon further questioning, Will admitted he realized that he should not have seen the question list, but he failed to notify Justin that the list was in his possession.

When Goldie brought the documents to Will, did he act appropriately in reference to his ethical obligations?

- a) Yes. *He* did not hack I.M.'s email account and take the documents.
- b) No. His possession and attempted use of the purloined documents violated several Rules of Professional Conduct.
- c) Maybe, although Justin and I.M. are equally to blame for the email mess.
- d) Yes. In litigation, winning isn't everything, it's the only thing.

When Goldie brought the documents to W did he act appropriately in reference to his ethical obligations

a) Yes. He did not hack I.M.'s email account and take the documents

b) No. His possession and attempted use of the purloined documents violated several Rules of Professional Conduct

c) Yes. Although Justin and I.M. were not the ones who hacked the email account, they were still responsible for the email mess



Total Results: 0

And the answer is . . .



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Hack Hath No Fury . . .

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, delay, or burden a third person, or **use methods of obtaining evidence that violate the legal rights of such a person.**

*Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include **legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer Relationship***

MRPC 4.4, Comment 1



Hack Hath No Fury . . .

Model Rule 8.4 Misconduct

It is **professional misconduct** for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;



"Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive

MRPC 1.0(d)

Hack Hath No Fury . . .

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, **destroy or conceal a document or other material having potential evidentiary value**, or counsel or assist another person to do any such act;



Hack Hath No Fury . . .

In re: Joel B. Eisenstein

Supreme Court of Missouri
SC95331 Argument on 2/24/16

SUSPENDED

Decided 4/5/16

**Suspended indefinitely, can apply for
reinstatement after six months**



Can Larry ethically present Holly's testimony during the trial?

- a) Yes. I mean, who can really be sure if the witness is actually telling the truth or lying anyway.
- b) Yes, the client is in charge and the client wants this witness to testify.
- c) No, if Larry reasonably believes Holly is not telling the truth.
- d) "What is truth?"

Can Larry ethically present Holly's testimony during the trial?



a) Yes. I mean, who can really be sure if the witness is actually telling the truth or lying anyway.

b) Yes, the client is in charge and the client wants this witness to testify.

c) No, if Larry reasonably believes Holly is not telling the truth.



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Total Results: 0

And the answer is . . .

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Polishing It Off

Model Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(3) **offer 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.**



Polishing It Off



- ❖ Governs conduct of a lawyer representing a client in the proceedings of a **tribunal**
 - ❖ Court
 - ❖ Arbitrator in a binding arbitration proceeding
 - ❖ Legislative body, administrative agency or other body acting in an adjudicatory capacity
 - ❖ Neutral official
 - ❖ Renders binding decision
 - ❖ After presentation of evidence or legal argument
- ❖ Applies as to material evidence

Polishing It Off

Model Rule 3.3 Candor Toward the Tribunal

In re Edson, 108 N.J 464, 530 A.2d 1246
(1987)

- Attorney counseled clients to lie about the facts after an arrest in order to establish a defense, ostensibly for plea bargaining
- Prosecution failed to accept plea deal based on fabricated facts and matters went to trial
- Defendant testified as to the fabricated facts and not the true facts



DISBARRED!!!!

Polishing It Off

Model Rule 3.4. Fairness to Opposing Party and Counsel



A lawyer shall not:

(b) falsify evidence, **counsel or assist a witness to testify falsely**, or offer an inducement to a witness that is prohibited by law;

Georgia Gogetter is a new paralegal in the office. She has observed the hard time attorneys in the office are having trying to establish the income of some non-custodial parents who are alleged to be hiding assets. After surfing through Facebook, she decides to create a new profile in order to “friend” each non-custodial parent in this difficult caseload. After successfully tricking two parents into revealing hidden assets through this fake profile, she reveals to her supervising attorney, Gail E. Suem, what she has been doing.

Once Gail E. Suem learns what Georgia Gogetter is doing, can the practice continue?

- a) No, because it is a deceitful practice and is therefore prohibited.
- b) Yes, with modifications to the procedures being used.
- c) Yes, because we need to right-size support orders.
- d) If the parent is dumb enough to fall for this, why is it my problem?

Once Gail E. Suem learns what Georgia Gogetter is doing, can the practice continue?

a) No, because it is a deceitful practice and is therefore prohibited.

b) Yes, with modifications to the procedures being...

c) Yes, because we need to right-size support orders.



0:15



Total Results: 0

And the answer is . . .



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Why Can't We Be Friends

Model Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;



Why Can't We Be Friends



Model Rule 4.3 Dealing with Unrepresented Person

In dealing 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 a person are or have a reasonable possibility of being in conflict with the interests of the client.

Why Can't We Be Friends

Model Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

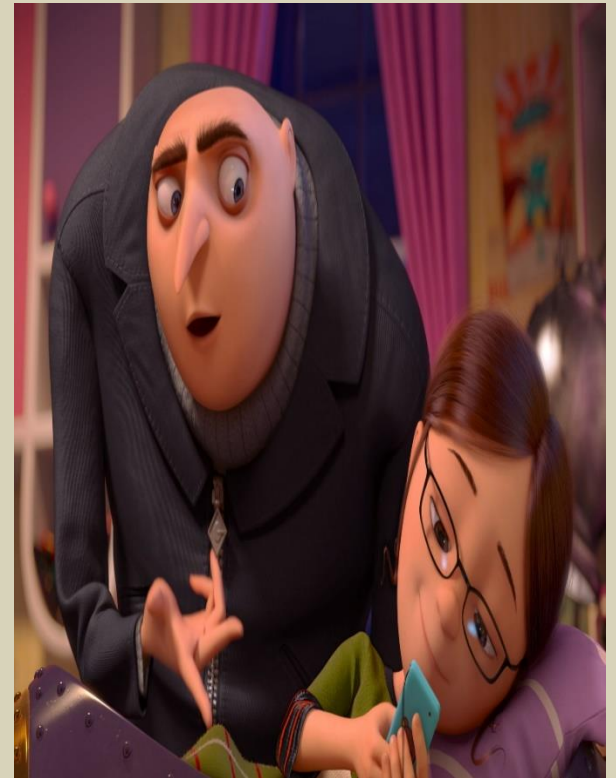


Why Can't We Be Friends

Model Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person



Why Can't We Be Friends

Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer



Why Can't We Be Friends

Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

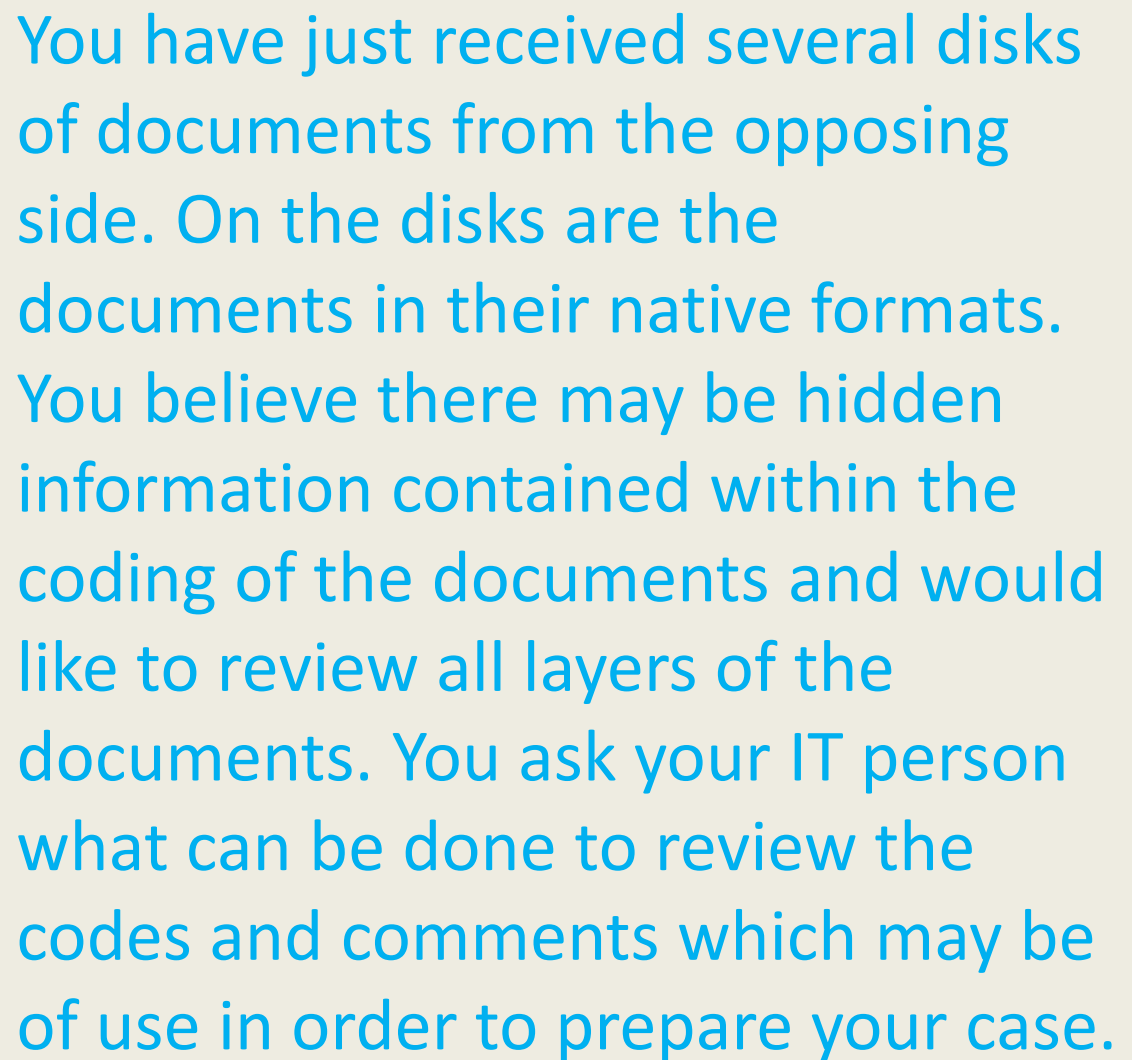
With respect to a nonlawyer employed or retained by or associated with a lawyer:

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.





Once you are given electronic documents as part of discovery, are you free to review the metadata attached to each document?

- a) Yes, because searching and reviewing the metadata is not expressly forbidden by the Rules of Professional Conduct and information which is helpful to the case may be found within.
- b) No, because searching the metadata is a deceptive practice.
- c) Who looks for metadata, I barely have time to review the documents themselves.
- d) Yes, as turning over the documents with the metadata may have waived any confidentiality or privilege attached to that metadata.

Once you are given electronic documents as part of discovery, are you free to review the metadata attached to each document?



a) Yes, because searching and reviewing the metadata is not expressly forbidden by the Rules of Professional Conduct and information which is helpful to the case may be found within.

b) No, because searching the metadata is a deceptive practice.

c) Who looks for metadata, I barely have time to review the documents themselves.



0:15



Total Results: 0

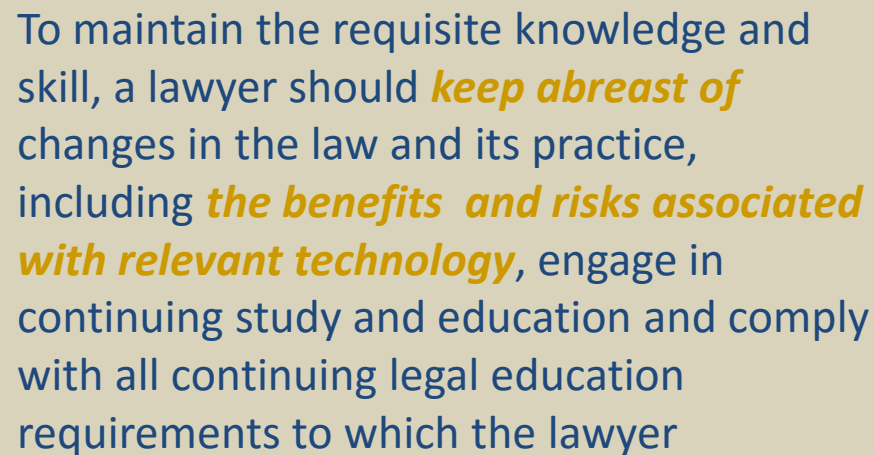
And the answer is . . .

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Model Rule 1.1 COMPETENCE

Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

[illegible]

Hi Ho, Hi Ho, It's Off to (Data mine) Go

Model Rule 1.3 Diligence

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



Model Rule 1.6 Confidentiality

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

Hi Ho, Hi Ho, It's Off to (Data mine) Go

Model Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;



Hi Ho, Hi Ho, It's Off to (Data mine) Go

Model Rule 4.4 Respect For the Rights of Third Persons

(a) 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.

(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.



Depending on where you are, answers (a), (b) and (d) are equally correct



Search and Use Permitted (a)	Hybrid to prevent waiver (d)	Search and Use Prohibited (b)
ABA	OR	AL
CO	PA	AZ
DC	WA	FL
MD	WI	ME
VT		MS
		NH
		NYSBA, NYCLA
		NC

Amal Rule is a IV-D attorney for Supert County. She is litigating a child support case against Ahmed Rong, a wealthy noncustodial parent, represented by Barry Barracuda, an attorney with a reputation for playing dirty. One afternoon Amal receives the following email from Barry:

Ahmed,

No inquiry yet on those assets. You were smart to put them in your mom's name – you'll pay a lot less in support. Meet me outside tomorrow before we go into court to go over your testimony.

Amal soon realizes that Barry accidentally sent her the email intended for Ahmed due to the automatic Microsoft Outlook email feature and the similarity of their names.

Once Amal realizes Barry inadvertently sent the email, what should she do next?

- a) Notify Barry that he inadvertently sent her the email.
- b) Email Barry and threaten him with criminal prosecution if he doesn't tell her about the assets.
- c) Forget work and pretend she is married to George Clooney.
- d) Report Barry to the State Bar Disciplinary Commission for not voluntarily disclosing the assets

Once Amal realizes Barry
inadvertently sent the email, what
should she do next?

a) Notify Barry that he
inadvertently sent her the
email.

b) Email Barry and threaten him
with criminal prosecution if he
doesn't tell her about the
assets.



0:15



Total Results: 0

And the answer is . . .



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Now You See It . . .

Model Rule 4.4 Respect for Rights of Third Persons

(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.



Now You See It . . .

Model Rule 4.4 Respect for Rights of Third Persons



If a lawyer **knows or reasonably should know that such a document was sent inadvertently**, then this Rule requires the lawyer to promptly notify the sender in order to **permit that person to take protective measures**. **Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived**. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

MRPC 4.4, Comment 2

You are private practitioner under contract with the local child support agency. Three years ago, a close friend moved from a neighboring state to your state with her two young daughters. Before moving, she was involved in a contentious divorce. She unsuccessfully sought to have her ex-husband's parental rights terminated, alleging that he had engaged in sexual misconduct with the daughters.

A judge in the neighboring state recently issued an order that the children be sent for their previously ordered, unsupervised summer visitation with their father. The court declined to issue a stay of its order pending a further hearing requested by your friend.

You believe your friend's allegations regarding the ex-husband's misconduct. Her new husband filed for adoption of the two girls in your state but the local judge has declined to exercise subject matter jurisdiction in light of the ongoing legal proceedings in the neighboring state.

You are so convinced that the two judges are endangering the two daughters, you assist your friend in “getting her thoughts out there” by helping draft inflammatory on-line petitions about the matter. The petitions accuse the judges of ignoring evidence and endangering the children’s safety. The petitions, which you also sign, name the judges and provide their courtroom addresses and phone numbers. The petitions urge the public to contact the judges and insist that they take action to protect the children

In addition to signing the petitions yourself, you provide language that your friend can use on Facebook and Twitter to continue to call attention to the judges’ “dereliction” of their duties to protect the children.

In response to the ferocity of public reaction generated by the on-line campaign, both judges recuse themselves from the respective proceedings. Each in turn files a complaint with the disciplinary board in your state accusing you of misconduct.

Even if the lawyer's actions comprised ethical violations, aren't they "protected speech" under the 1st Amendment when, as here, helping a friend to articulate her grievances in a manner geared to draw needed attention?

- a) Yes. As a citizen, you're free to speak out on matters of public concern.
- b) Yes. On the internet, no one knows you're a lawyer.
- c) No. Lawyers have a duty to avoid bringing the courts into disrepute.
- d) No. Lawyers must confine their communications with courts to traditional forms and forums.

**Even if the lawyer's actions comprise
ethical violations, aren't they
"protected speech" under the 1st
Amendment when, as here, helping a
friend to articulate her grievances in
a manner geared to draw needed
attention?**



Yes. As a citizen, you're free to
on matters of public
concern

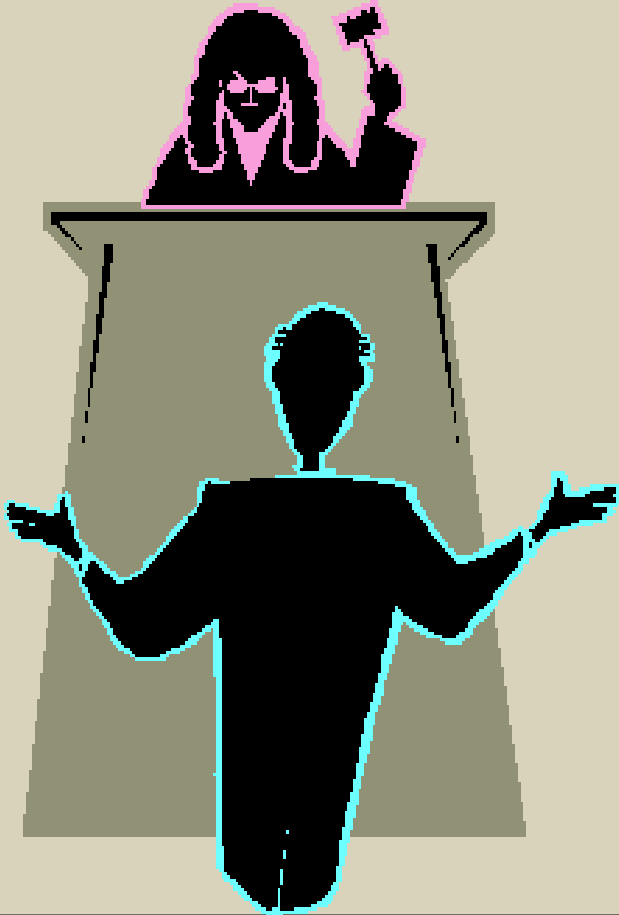
Total Results: 0

And the answer is . . .

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Free Speech Isn't Always Free



“Reviewing all the evidence, we conclude the telephone calls, the email, and the faxed petitions constitute prohibited ex parte communication induced and/or encouraged by respondent. Coupled with her social media postings, we further conclude respondent’s online activity amounted to a viral campaign to influence and intimidate the judiciary...we find the evidence clearly and convincingly shows respondent’s conduct in this regard violated Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct...”

In re McCool, 2015-B-284 (La. 6/30/2015)

Free Speech Isn't Always Free

Model Rule 3.5 Impartiality And Decorum Of The Tribunal

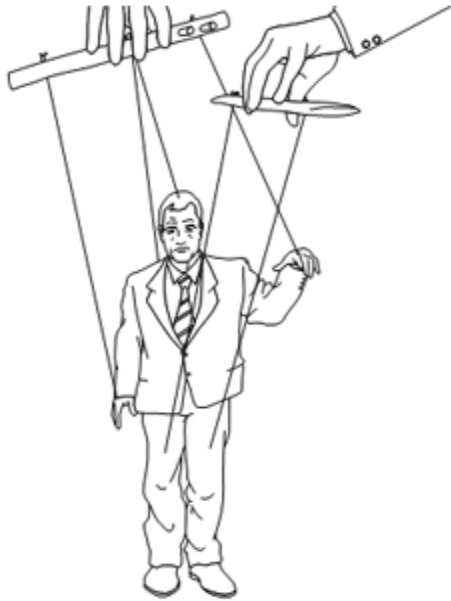
A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;....



Free Speech Isn't Always Free

Model Rule 8.4 Misconduct



It is professional misconduct for a lawyer to:

(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;....

(d) engage in conduct that is prejudicial to the administration of justice

Free Speech Isn't Always Free

'It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)





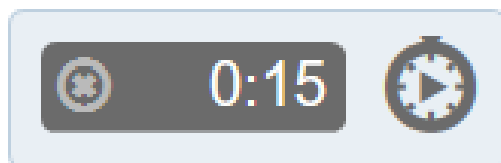
Can you ethically represent Carmela even after Anthony had been to your office for a consultation?

- a) No way, sleeping with the fishes is not my idea of a retirement plan.
- b) Yes, assuming Carmela gives informed consent to the representation.
- c) Yes, the attorney does not owe any duty to Anthony.
- d) No, Anthony is a potential client and the information he provided is subject to privilege.

Can you ethically represent Carmela
even after Anthony had been to your
office for a consultation?

a) No way, sleeping with the
fishes is not my idea of a
retirement plan.

b) Yes, assuming Carmela gives
informed consent to the
representation.



Total Results: 0

And the answer is . . .



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I Need A Hero

CONFLICT OF INTEREST – Current Client

A lawyer *shall not* represent a client if the representation involves a **concurrent conflict** of interest.

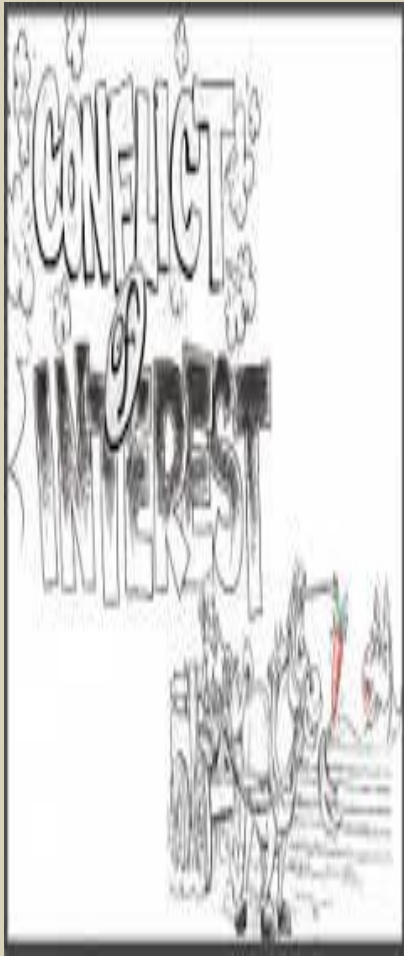
A concurrent conflict exists where:

- Representation directly adverse to another client; or
- Significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or a *third person* or by a personal interest of the lawyer

Model Rule 1.7(a)



I Need A Hero



Conflicts of Interest – Former Client

Model Rule 1.9

(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 gives informed consent, by former client, confirmed in writing.

I Need A Hero



Conflicts of Interest – Former Client

Four criteria to consider

- ❖ Was there a Lawyer-client relationship?
 - ❖ Did attorney actually represent client?
 - ❖ If so, has representation ended?
- ❖ Does subsequent representation involve the same or a substantially related matter?
- ❖ If the matters are the same or substantially related, are the interests of the subsequent client materially adverse to those of the former client?
- ❖ Did the former client consent or waive the objection to the new representation?

I Need A Hero

Model Rule 1.6 Duty of Confidentiality

(a) A lawyer shall not reveal any **information relating to the representation of a client** unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

- Full duty is owed to a **CLIENT**
- Concerns **INFORMATION RELATING** to the representation



I Need A Hero

- Duty Defined in RPC 1.6 is owed to a **“CLIENT”**
 - CLIENT is **not defined** within the MPRC



"principals of substantive law external to these Rules determine whether a client- lawyer relationship exists" (MRPC, Scope, §17)

I Need A Hero

- **BEAUTY CONTEST**



- OR



- **TAINT SHOPPING?**



I Need A Hero

Model Rule 1.18 Prospective Clients

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



- Consult with attorney about the **possibility** of forming a client-lawyer relationship
- **Reasonable expectation** that the lawyer is willing to discuss the possibility of forming the relationship

I Need A Hero



... Moreover, a person who **communicates** with a lawyer **for the purpose of disqualifying** the lawyer is not a prospective client.

MRPC 1.18, Comment 2

I Need A Hero



NYRPC 1.18(e)(2): A person who **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** within the meaning of paragraph (a).



NVRPC 1.18(e): A person **who communicates information to a lawyer** without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or **for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation**, is not a “prospective client” within the meaning of this Rule.

I Need A Hero

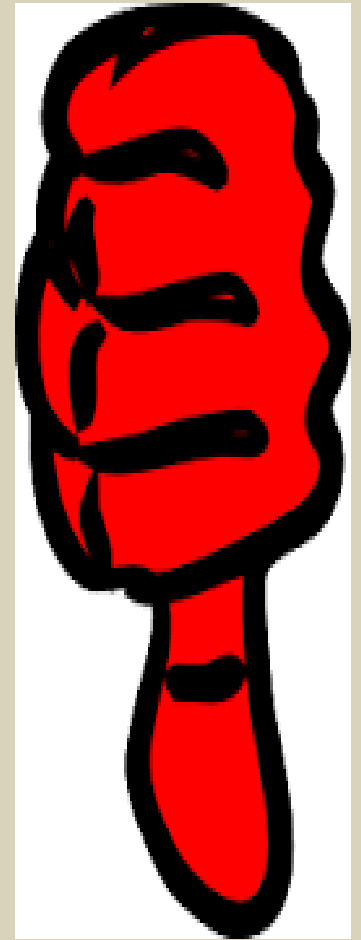
MODEL RULE 8.4 MISCONDUCT

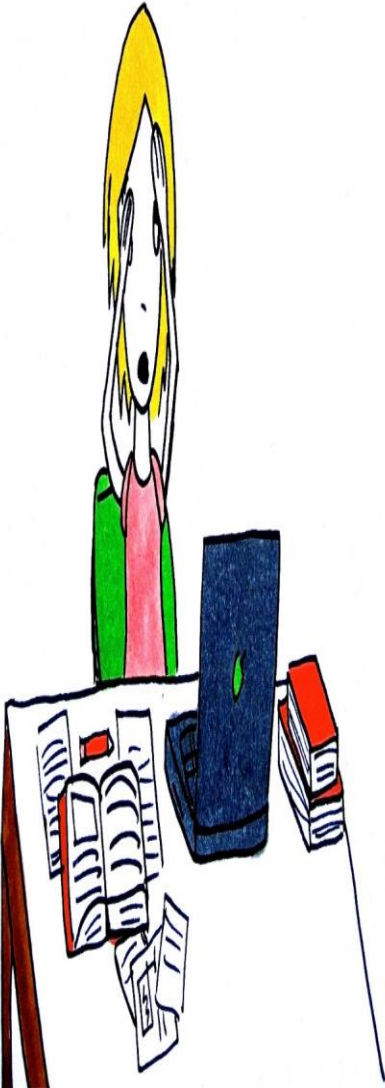
It is **professional misconduct** for a lawyer to:

(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; . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in **conduct that is prejudicial** to the administration of justice;





You have been handed a file of a notorious non-payor, Ike Anpais. You notice that he has not made a payment in nearly six months, and have decided to reach out to him. You invite him into the office in order to try to find out why he does not do what the order tell him to do.

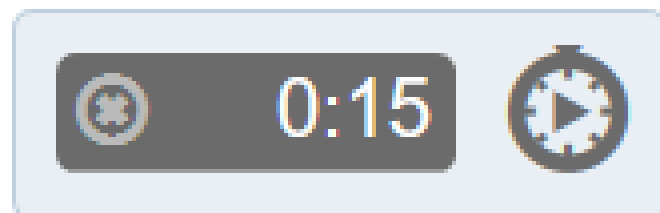
During these meetings, you learn that Ike would like to pay, but he can't seem to find (or keep) a job. He does not seem all that motivated. You even referred him for a position at a local business that knew needed help. He tells you he turned down the job he was offered because he did not feel like getting up early enough to start the job each morning.

Reaching the limits of your patience, you finally unload on Ike, telling him that if he turns down another job, you will commence a proceeding to have him held in contempt of court and sent to jail.

Can you threaten a non-paying non-custodial parent with a contempt proceeding in an attempt to coerce compliance?

- a) No, you can't threaten contempt or a criminal charge to gain an advantage in a civil case.
- b) Yes, but only if you have the evidence to prove the charge beyond a reasonable doubt.
- c) Yes, he or she is under an obligation to follow a court order; willful failure might lead to contempt.
- d) Why would you waste your time with that antiquated approach in the first place?

Can you threaten a non-paying non-custodial parent with a contempt proceeding in an attempt to coerce compliance?



you can't threaten contempt or a criminal charge

Total Results: 0

And the answer is . . .

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That's All's I Can Stand 'Cause I Can't Stands No More

Model 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.



The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure

MRPC 3.1 Comment 1

That's Alls I Can Stand 'Cause I Can't Stands No More

Model Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer **shall not**:

(g) present, participate in presenting, or **threaten to present criminal charges** to obtain an improper advantage in a civil matter





You are IV-D counsel meeting with an obligee who is the respondent in an obligor application for downward modification based on reduced income. Obligor/Dad attests in his application that he is a tow truck driver and that work has been slow. He attaches a paystub, indicating a gross pay of \$167.00 weekly (minimum wage for 20 hours worked). The obligee/Mom tells you she is sure that the obligor is lying. She advises you that the obligor just bought an expensive home and that his former business colleague (with whom he had a recent falling out) would testify on her behalf that obligor earns an additional \$500.00 weekly on average in cash.



You advise obligee that you will subpoena the obligor's mortgage application and that you will subpoena the former business colleague. Soon thereafter, your workload dramatically changes. Your office loses an attorney and you inherit her caseload including her appellate brief deadline. You never get around to issuing the subpoenas – however at trial you argue your opposition vigorously, obtaining testimony from the obligee, diligently cross-examining the obligor and arguing all relevant case law. The Court grants the reduction

Have you breached any obligation imposed on you by the Rules of Professional Conduct by failing to issue subpoenas for the documents and witness in support of the obligee's opposition to the modification application?

- a) Yes. You have breached your obligation to provide competent representation to the obligee.
- b) While there may not have been a violation of the Rules of Professional Conduct, you may have committed legal malpractice.
- c) No. It's not my fault the hearing officer didn't see through the obligor's smokescreen. We can always appeal.
- d) No, as IV-D counsel you represent the agency and are not bound by any promise made to the litigant.

Have you breached any obligation imposed on you by the Rules of Professional Conduct by failing to issue subpoenas for the documents and witness in support of the obligee's opposition to the modification application?

a) Yes. You have breached your obligation to provide competent representation to the obligee.

b) While there may not have been a violation of the Rules of Professional Conduct, you have committed legal malpractice.

Total Results: 0

And the answer is . . .



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Who's Your Client . . .

Model 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.



Although the duty of competence is owed to a “Client”, the term “Client” is not defined within the Model Rules

Who's Your Client . . .

Model Rule 1.13 Organization as Client



(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Who's Your Client . . .

All states have statutes or case law that clarify the role of the IV-D attorney.

Office of Child Support Enforcement v. Terry, 336 Ark. 310, 985 S.W.2d 711 (1999).



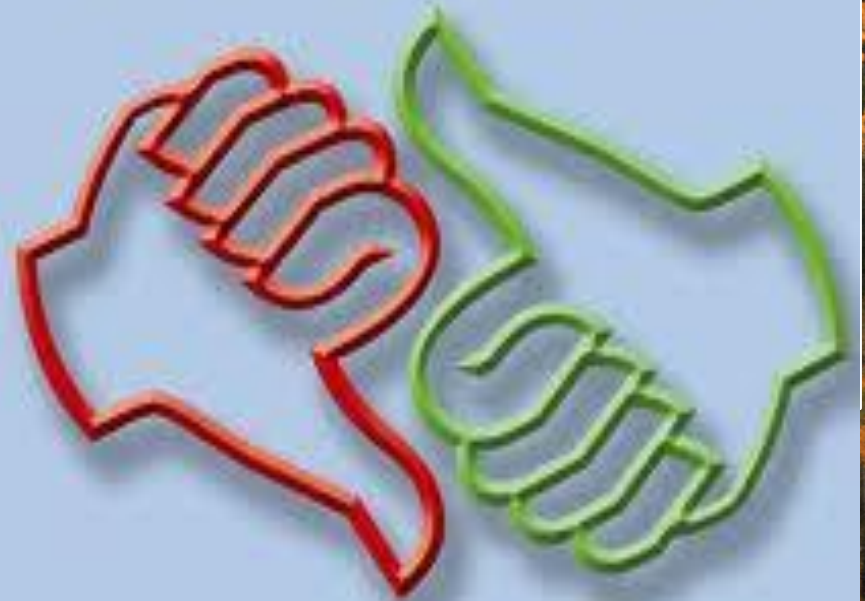
Who is my client?

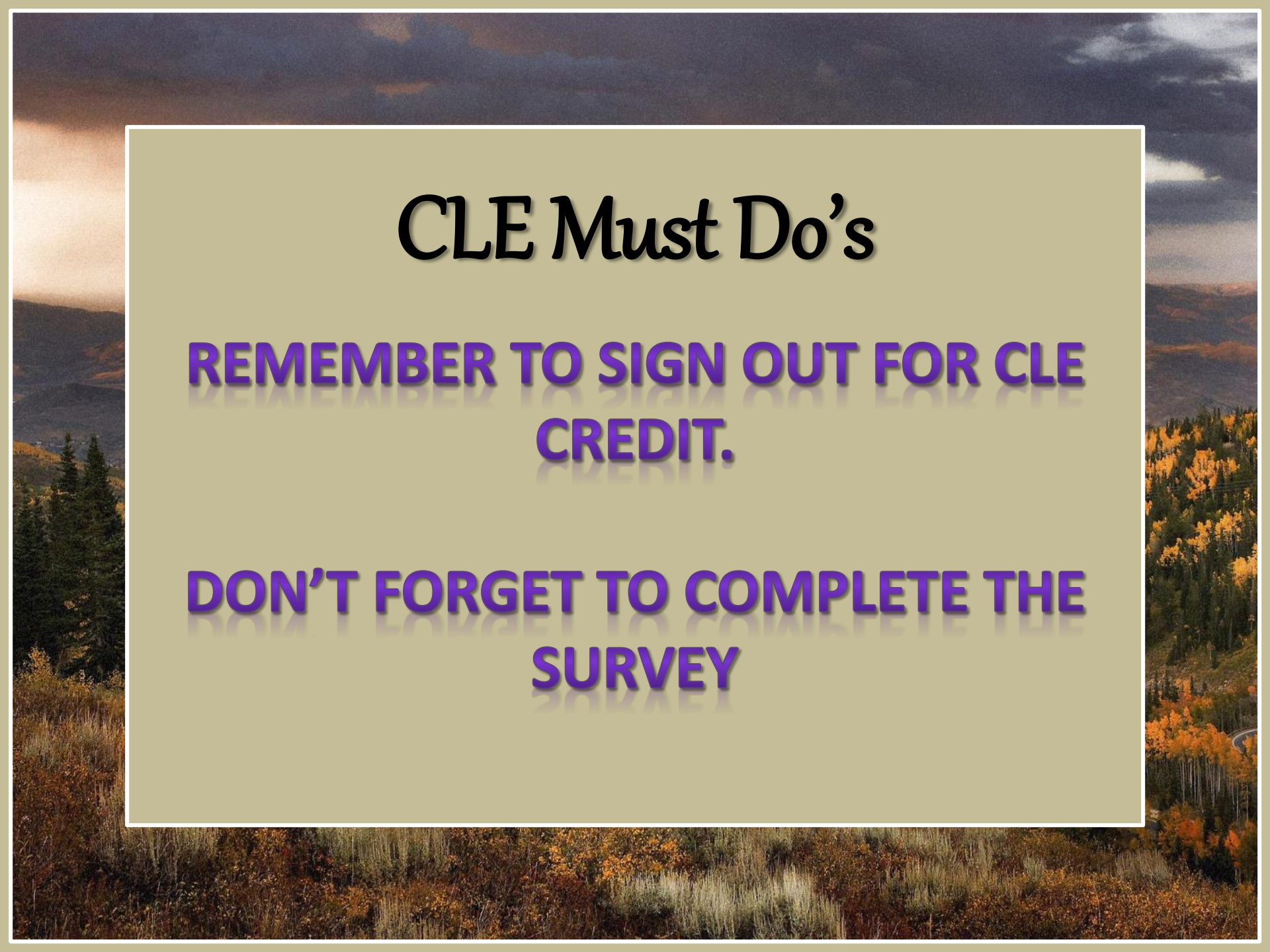
- Questions???



- Comments???

COMPLAINTS
COMMENTS
COMPLIMENTS





CLE Must Do's

**REMEMBER TO SIGN OUT FOR CLE
CREDIT.**

**DON'T FORGET TO COMPLETE THE
SURVEY**

Speaker Contact Information

- Diane Potts: dpotts@csfmail.org
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- Nicholas Palos: npalos@nycourts.gov

