



Professional Dilemmas: Navigating Ethical Challenges in a Shifting Business Landscape

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Agenda

1 ● Rules

2 ● Scenarios

3 ● Questions



Rules

ABA Model Rules By Category

- MR 1.x: Client-Lawyer Relationship
- MR 2.x: Counselor
- MR 3.x: Advocate
- MR 4.x: Transactions with Persons Other Than Clients
- MR 5.x: Law Firms and Associations
- MR 6.x: Public Service
- MR 7.x: Information About Legal Services
- MR 8.x: Maintaining the Integrity of the Profession

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.”

Model Rule 1.1: Comment 8

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

Jurisdictions Not Adopting Comment 8

- Alabama
- Georgia
- Maine
- Maryland
- Mississippi
- Nevada
- New Jersey
- Oregon
- Rhode Island
- South Dakota
- Washington, DC

Hawaii, adopted Comment 8 on January 1, 2022

Comment 8 in New York State

Adopted March 28, 2015

A lawyer should:

Keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information.

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

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Model Rule 1.3: Diligence

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

Model Rule 1.4: Communications

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Model Rule 1.6: (a) Confidentiality of Information

- 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).

Model Rule 1.6: (b) Confidentiality of Information

- b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
1. To prevent reasonably certain death or substantial bodily harm;
 2. To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 3. To prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 4. To secure legal advice about the lawyer's compliance with these Rules;
 5. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 6. To comply with other law or a court order; or
 7. To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Model Rule 1.6: (c) Confidentiality of Information

- c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Model Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. The representation of one client will be directly adverse to another client; or
2. There is a 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 a personal interest of the lawyer.

(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.

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.
- ...
- f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model 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, and political factors, that may be relevant to the client's situation.

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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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.

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.

Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

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; and
- (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.

ABA Formal Opinion No. 477R: Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

- May 11, 2017
- Revised May 22, 2017

ABA Formal Opinion 495: Lawyers Working Remotely

- https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf
- Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances...

A local office is not “established” within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer’s presence.

December 16, 2020

The ABA and Artificial Intelligence

- Resolution 604 (February 6, 2023) addresses how attorneys, regulators and other stakeholders should assess issues of accountability, transparency and traceability in AI and calls on organizations that design, develop, deploy and use AI to follow these guidelines:
- Developers of AI should ensure their products, services, systems and capabilities are subject to human authority, oversight and control.
- Organizations should be accountable for consequences related to their use of AI, including any legally cognizable injury or harm caused by their actions, unless they have taken reasonable steps to prevent harm or injury.
- Developers should ensure the transparency and traceability of their AI and protect related intellectual property by documenting key decisions made regarding the design and risk of data sets, procedures and outcomes underlying their AI.

ABA Formal Opinion 512: Generative Artificial Intelligence Tools

Issued July 29, 2024

“To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.”

- Model Rule 1.1 (Competence). This obligates lawyers to provide competent representation to clients and requires they exercise the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In addition, the model rule states lawyers should understand “the benefits and risks associated” with the technologies used to deliver legal services to clients.
- Model Rule 1.6 (Confidentiality of Information). Under this model rule, a lawyer using GAI must be cognizant of the duty to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent. Other model rules require lawyers to extend similar protections to former and prospective clients’ information.

ABA Formal Opinion 512: Generative Artificial Intelligence Tools

Issued July 29, 2024 - continued

- **Model Rule 1.4 (Communications).** This model rule addresses lawyers' duty to communicate with their clients and builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive." Of particular relevance to GAI, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.
- **Model Rule 1.5 (Fees).** This rule requires a lawyer's fees and expenses to be reasonable and includes criteria for evaluating whether a fee or expense is reasonable. The formal opinion notes that if a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the program, the lawyer may charge for that time as well as for the time necessary to review the resulting draft for accuracy and completeness. But, in most circumstances, the lawyer cannot charge a client for learning how to work a GAI tool.



Scenarios

The Comp Plan

You are the GC for a cybersecurity solutions company. The state & local government sales VP created an aggressive comp plan with a significant bonus for sales reps who convert trial users within a 90-day window. At a quarterly leadership meeting you learned that some reps are making verbal misrepresentations to customers about integration functionality and future upgrades. Furthermore, some sales reps are falsifying trial start dates to fit within the 90-day bonus window and creating false deadlines to bypass normal procurement processes. You bring your concerns to the sales VP, but she brushes them off. She says this is a normal sales strategy and is willing to overlook minor irregularities to meet quarterly targets.

Considering the model legal ethics rules, is there anything you should do?

The CEO Who Wants It Cleaned Up

A new issue has now come up. There is now a dispute with one of your customers, a small government agency, over feature functionality. The agency is represented by counsel and all communications have gone through their attorney. You also know that your sales reps are in continued contact with this agency.

The agency head, who negotiated the contract, emails you directly. She mentions their frustration with how things are being dragged out and would like to work with you directly on a resolution. She offers to concede points their outside counsel had insisted upon.

Your CEO is pressuring you to resolve the matter and said, “We need to get this wrapped up before this gets out publicly and affects sales”.

Do you have any ethical concerns about this situation?

The Speedy Release

You started as a GC at the beginning of the month for a fast-growing tech start-up whose CEO is the founder. The company is preparing to launch a new app that collects user location data. The CEO needs you, the company's only attorney, to review the privacy policy and user agreement so that the app can be launched in the next 48 hours.

You used Generative AI to review and edit the documents quickly and let the CEO know that the policy and agreement look fine.

Are there any ethical considerations in your review?

Hiring With the Algorithm

You are a relatively new associate general counsel for an engineering firm and have been asked to review a SaaS agreement for a new automated employment decision tool (AEDT) your employer wants to implement. The tool would be implemented nationwide. Time is of the essence as the company would like to get this implemented before they begin the recruiting season this fall for next year's internships and coop positions to be filled by college students . Your background is in M&A.

Do you have any ethical considerations here?

Ethically Entangled

You are the GC for an American division of a multinational and work remotely. The multinational has several other small American entities which do not have their own in-house counsel. Your overseas-based CLO wants to reduce outside legal spend and has asked you to review legal documents or provide legal advice for those other entities. However, you have no formal affiliation with those entities and have even had situations where those entities' interests have diverged from the one for which you are employed.

Under the ethics rules, is there anything for you to consider?



Questions?





Questions?



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