Walking an Ethical Tightrope:
How to Protect Yourself in Court When You Disagree with Your Client

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Panelists: Justice Henry J. Nowak and Justice Dennis E. Ward

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Rules of Professional Conduct, Appendix to Judiciary Law

Rule 1.1. Competence

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

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) **A lawyer shall not intentionally:**

> **(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or**
> **(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules**.

Comment

Legal Knowledge and Skill
Thoroughness and Preparation
Retaining or Contracting with Lawyers Outside the Firm

PRACTICE COMMENTARIES
by Professor Patrick M. Connors

Subdivision (a)
C1.1:4 "Should" vs. "Shall"

ABA Model Rule 1.1, which is the genesis for the New York Rule, states that a lawyer "shall provide competent representation." (emphasis added). The New York courts opted to make the "competent representation" rule aspirational, rather than mandatory. This change was recommended by the New York State Bar Association ("NYSBA") to reflect the "practice of disciplinary authorities," which rarely prosecute isolated and careless instances of incompetence, lack of zeal, or damage to a client. See NYSBA Proposed Rules of Professional Conduct, February 1, 2008 ("NYSBA Report"), p. 12.

It is important to note, however, that the rule proposed by the NYSBA was accompanied by a provision that did make incompetent representation a disciplinable offense if it was provided "intentionally, recklessly or repeatedly." NYSBA Report, p. 10. Unfortunately, that language was not ultimately adopted by the courts. The absence of this explanatory language in Rule 1.1(a) will doubtless make it more difficult to discipline lawyers who repeatedly fail to provide competent representation, one of the most common complaints registered by clients. It is possible that a lawyer who has failed to provide competent representation has violated Rule 1.1(b). See Practice Commentary C1.1: 6 & 7, below. Furthermore, in appropriate circumstances, Rule 8.4(h), which states that "a lawyer or law firm shall not

. . . engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," could provide grounds to impose discipline on a lawyer who fails to provide competent representation.

Subdivision (c)
C1.1:9 Failure to Seek Objectives of the Client

Rule 1.1(c)(1) provides that "[a] lawyer shall not intentionally fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." This subdivision has limited application. **It applies only where: 1) the lawyer is aware of the objectives of the client, see Rule 1.4(a)(2) (requiring a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"), 2) there are reasonably available means to achieve these objectives that are permitted by law and the Rules of Professional Conduct, and 3) the lawyer intentionally fails to seek those objectives.**

Therefore, a lawyer who carelessly or negligently fails to seek the client's objectives does not violate this provision. **In addition, if the objectives of the client are not achievable through reasonably available means, the lawyer need not pursue them**. A lawyer need not, for example, pursue a scorched earth strategy in discovery, even if the client agreed to pay for it and the demands would not be frivolous. This type of strategy is not a "reasonably available means" to pursue the client's objectives. If accomplishing the client's objectives require the lawyer to violate the law or the Rules of Professional Conduct, that provides an independent basis for the lawyer to refuse to pursue them. See also Rule 1.4(a)(5) (requiring a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law").

C1.1:10 Prejudicing or Damaging the Client During the Course of the Representation

Rule 1.1(c)(2) states the obvious: a lawyer cannot **intentionally** prejudice or damage the client during the course of the representation. While this provision does not apply to a lawyer who negligently harms the client, that type of conduct may lead to a violation of other Rules. See, e.g., Rule 1.3 (requiring, among other things, that a lawyer act with reasonable diligence and promptness in representing a client and refrain from neglecting a client's matter). Furthermore, if the lawyer intentionally prejudices or damages the client during the course of the representation, she is subject to liability in a civil action for legal malpractice and/or breach of fiduciary duty. See also Judiciary Law § 487 (permitting an injured person to recover treble damages against an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" or who "[w]ilfully delays his [or her] client's suit with a view to his [or her] own gain").

The Rule contains **an important caveat that permits the lawyer to prejudice or damage the client if it is "permitted or required" by the Rules of Professional Conduct**. There are many instances in which such conduct is authorized. For example, a lawyer is permitted to reveal or use confidential information to the extent necessary to prevent the client from committing a crime or to comply with a law or court order. Rule 1.6(b)(2), (6). If a lawyer operates under one of these exceptions to the duty of confidentiality, she will often simultaneously prejudice the client. Additionally, if a lawyer is required to disclose a client's fraudulent conduct to a tribunal under Rule 3.3(b), she will no doubt cause damage to

the client's case. If the acts that prejudice or damage the client are authorized under some other provision in the Rules, the lawyer can proceed without fear of violating Rule 1.1(c)(2).

The restrictions in Rule 1.1(c)(2) only apply "during the course of the representation." If representation of the client has concluded, a lawyer may damage or prejudice the former client as long as the requirements in Rule 1.6 pertaining to confidentiality and the duties to former clients outlined in Rule 1.9 are honored.

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

(a) Subject to the provisions herein, a lawyer **shall abide by a client's decisions concerning the objectives of representation** and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall **abide by a client's decision whether to settle a matter**. In a criminal case, the lawyer **shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify**.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is **illegal or fraudulent**, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.
(e) **A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.**
(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be **unlawful**, even though there is some support for an argument that the conduct is legal.
(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer
Independence from Client's Views or Activities
Agreements Limiting Scope of Representation
Illegal and Fraudulent Transactions
Exercise of Professional Judgment
Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful
Fulfilling Professional Commitments and Treating Others with Courtesy

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

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

[4] **In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.**

[14] Paragraph (e) permits a lawyer to **exercise professional judgment to waive or fail to assert a right of a client, or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client**. Like paragraphs (f) and (g), paragraph (e) effectively creates a limited exception to the lawyer's obligations under Rule 1.1(c) (a lawyer shall not intentionally “fail to seek the objectives of the client through reasonably available means permitted by law and these Rules” or “prejudice or damage the client during the course of the representation except as permitted or required by these Rules”). If the lawyer is representing the client before a tribunal, the lawyer is required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.

PRACTICE COMMENTARIES
by Professor Patrick M. Connors

Subdivision (a)

C1.2:1 Identifying and Achieving the Client's Objectives
Comment 2 to Rule 1.2 recognizes that “[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.” See Hallock v. State, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 513 (1984) (“**From the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions.**”). That is not always the case, however, and if the client is sophisticated in the law, she may weigh in on how the objectives are to be pursued. It is also generally recognized that lawyers “usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Rule 1.2, Comment 2.
For example, the lawyer will normally determine the particular information to be pursued in pretrial discovery and the devices to employ. If, however, the client requested that the lawyer keep the costs of discovery within reasonable limits, or that discovery not be sought from a specific nonparty, that request

should normally be honored. As long as the lawyer can provide competent representation, see Rule 1.1(a), the client's requests in these regards should be fulfilled.
There will be situations in which a client's ability to make informed decisions regarding the representation will be substantially impaired because of minority, mental impairment, or some other reason. In those circumstances, the lawyer should be guided by Rule 1.14, which addresses a lawyer representing a client with diminished capacity. See Rule 1.2, Comment 4. “If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.” Rule 1.14, Comment 4.

C1.2:2 Decision Making in the Lawyer-Client Relationship; Settlements and Various Decisions in Civil Cases
Rule 1.2(a) attempts to provide some clarity in what potentially can be a thorny area. It requires a lawyer to “abide by a client's decision whether to settle a matter.” Rule 1.2(a); see Hallock, 64 N.Y.2d at 230, 485 N.Y.S.2d at 513 (“without a grant of authority from the client, an attorney cannot compromise or settle a claim”). This is an area where tensions can frequently arise between the lawyer and client. The plaintiff's lawyer who is on a contingency fee may find a pretrial settlement offer to be very attractive because it is close to the amount expected in a verdict at the end of a long fought trial. The lawyer must communicate all proposed settlement offers to the client, Rule 1.4(a)(1)(iii), and counsel the client regarding the pros and cons of any such proposal. See Rule 1.4(b). **It is the client, however, who makes the final decision on whether to accept a settlement**. See N.Y. County Lawyers' Ass'n Comm. on Professional Ethics, Formal Op. 667 (1988). The lawyer is bound to follow this decision, even if it means rejecting a handsome settlement and proceeding to prepare for a long trial in which the client's right to recovery is questionable. See also Rule 1.8(g)(requiring a lawyer representing two or more clients in the same matter to obtain the informed written consent of all clients before entering into an aggregate settlement of the matter).
If the lawyer exceeds the authority granted by the client and settles a matter, the client can be bound by the settlement if she has cloaked the lawyer with apparent authority. See Hallock, 64 N.Y.2d at 230-32, 485 N.Y.S.2d at 513-14. **In these circumstances, the client can pursue a legal malpractice claim against the lawyer for any damages caused by this misconduct**. Id. Similarly, if a lawyer fails to act on a client's direction to settle a matter, the lawyer may be liable to the client for any damages sustained by reason of the omission. This might include any amount of a judgment that the client must pay in excess of the settlement authorized, or any amount of a settlement approved by a client if the client's action is ultimately unsuccessful.
If, contrary to the lawyer's advice, a client rejects a handsome settlement, can this refusal justify a motion to withdraw from the representation? Comment 2 to Rule 1.2 states that if the lawyer “has a fundamental disagreement with the client, the lawyer may withdraw from the representation.” See Rule 1.16(c)(4). It must be noted, however that a client's desired course of action will “not create a fundamental disagreement simply because the lawyer disagrees with it.” Rule 1.16, Comment 7A. A client's decision on whether to accept a settlement will constitute a “fundamental disagreement” with the lawyer in very limited circumstances, such as “**when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement.**” Id.
While not addressed directly by the Rule, **a lawyer may not enter into an agreement with a client granting the lawyer blanket authority to settle a matter without consulting the client**. See Matter of Lewis, 266 Ga. 61, 463 S.E.2d 862 (1995). Obtaining such authority would also likely constitute a violation Rule 1.8(i), as it would amount to **a proprietary interest in the client's cause of action**. **It is**

also inappropriate for a lawyer to obtain a right to refuse any settlements that the client finds acceptable through a so-called "attorney's consent provision." See Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F.Supp. 910 (D.C. Pa. 1981) (finding an attorney's consent provision to be void as against public policy).

Generally, the client in a civil matter determines whether to waive the right to assert a particular category of damages. See Singh v. Trief & Olk, 26 Misc.3d 1211, 906 N.Y.S.2d 783 (Sup. Ct., Kings County 2009) (defendant lawyers in legal malpractice action decided to forgo plaintiff's psychiatric damages claims without plaintiff's consent, thereby breaching the duty of care owed to the client). Similarly, the defendant client has the final call on whether to plead a nonfrivolous affirmative defense, such as lack of personal jurisdiction, the statute of limitations, or the statute of frauds. EC 7-7; see CPLR 3018(b)(listing various affirmative defenses). Therefore, it is important for defense lawyers to meaningfully communicate with their clients during the short period within which the answer is due--usually 20 or 30 days from service of process-- to ascertain the specific defenses that must be pleaded in an answer or CPLR 3211(a) pre-answer motion to dismiss. See Rule 1.4(b) (requiring lawyer to fully explain matter to the client to allow the client to make an informed decision).

The decision on whether to appeal a matter belongs to the client, but the lawyer should inform the client of the prospects of success and the costs associated with the appeal. In re McGinty, 129 Misc.2d 56, 492 N.Y.S.2d 349 (Surrogate's Court, Queens County 1985) ("where an attorney is retained to prosecute or defend an action there is no implied authority in the event of a judgment adverse to the client, to prosecute review proceedings by appeal and to bind the client for costs and expenses incidental thereto"). "[T]he client's decision is binding upon an attorney even if it is not in accord with the attorney's advice." N.Y. City Bar Ass'n Formal Op. 1988-4 (1988).

C1.2:3 Decision Making in the Lawyer-Client Relationship; Pleas, Waiver of Jury Trial, and Various Decisions in Criminal Cases

In criminal matters, Rule 1.2(a) recognizes the constitutionally compelled conclusion that "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." See People v. White, 73 N.Y.2d 468, 478, 541 N.Y.S.2d 749, 755(1989). The consultation must be sufficiently detailed to allow the client to make an informed decision on the matter. Rule 1.4(b). Therefore, **a defense lawyer in a criminal case must comprehensively advise the criminal defendant on whether a particular plea to a charge appears to be desirable**. See EC 7-7.

As in a civil matter, the decision on whether to appeal in a criminal matter belongs to the client. People v. White, 73 N.Y.2d at 478, 541 N.Y.S.2d at 755. The lawyer should inform the client of the prospects of success and any costs associated with the appeal. See ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-5.1(a), (b). **The appellate lawyer has the discretion to choose which arguments to raise on the appeal and is not required to raise every nonfrivolous argument**. Id.; Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3312-13 (1983). The ABA Standards Relating to the Administration of Criminal Justice offer some additional guidance in this realm. **The Standards provide that "decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic or tactical decisions are the exclusive province of the lawyer after consultation with the client.**" ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-5.2(b). If there are disagreements between the lawyer and client concerning "significant matters of tactics and strategy," the attorney should make a record of the

circumstances, the advice given, and the conclusion reached in a manner that protects the confidential attorney-client relationship. Id. at 4-5.2(c).

Subdivision (d)
C1.2:7 Counseling or Assisting Client in Illegal or Fraudulent Conduct-Knowledge Requirement
While the lawyer must generally "abide by the client's decisions concerning the objectives of representation," Rule 1.2(a), there are several limitations on this tenet. For example, Rule 1.2(d) prohibits a lawyer from counseling or assisting the client in conduct that the lawyer "knows is illegal or fraudulent." Interpretation of this important provision requires numerous references to Rule 1.0, the "Terminology section of the New York Rules of Professional Conduct.
Initially, before Rule 1.2(d) can be violated, the lawyer must "know" that the client's conduct or proposed conduct is illegal or fraudulent. This means that the lawyer must have "actual knowledge" that the conduct is illegal or fraudulent. Rule 1.0(k). **The lawyer's knowledge can be "inferred from the circumstances," but the knowledge standard is still a subjective one. The mere fact that the lawyer "should have known" that the client's actions were illegal or fraudulent will not give rise to a violation of Rule 1.2(d).**
An example helps to illustrate the degree of knowledge required by Rule 1.2(d). Assume a lawyer is representing a client in a transaction, such as the sale of certain goods, and the client's conduct in regard to the transaction is illegal or fraudulent in some respect. The lawyer will not be in violation of this provision merely because an ordinary lawyer exercising reasonable skill and care would have known that the client's conduct was illegal or fraudulent. Rather, it must be demonstrated that the lawyer in question had actual knowledge that the client's conduct was illegal or fraudulent. That knowledge can be inferred from a set of circumstances related to the transaction, but only if the circumstances demonstrate that the lawyer did actually know that the client's conduct was illegal or fraudulent.
The fact that a reasonably prudent lawyer under the same circumstances would have known that the client was engaged in illegal or fraudulent conduct will not, standing alone, establish a violation of Rule 1.2(d). See Attorney Grievance Com'n of Maryland v. Rohrback, 323 Md. 79, 94, 591 A.2d 488, 495 (Md. 1991) (applying "actual knowledge" standard, court concluded over a dissent that the evidence before it was "legally insufficient to support a determination, under the clear and convincing evidence standard, that [attorney] assisted [client] in conduct that [attorney] knew was going to be a fraud," although the attorney "came perilously close to assisting the fraud" of the client in using a false name to hide his prior record and secure his release).
If the lawyer does not "know" that the proposed conduct is "illegal," but "believes" it to be "unlawful," she "may refuse to aid or participate in [it]" despite the fact that there is a non-frivolous argument that the conduct is legal. Rule 1.2(f)(emphasis added); see Practice Commentary C1.2:13 ("Lawyer's Discretion to Refuse to Aid or Participate in Certain Conduct"), below.

Subdivision (e)
C1.2:12 The Lawyer's Authority to Waive a Right or Position of the Client and Grant Reasonable Adjournments
Subdivisions (e), (f), and (g) in Rule 1.2 were not proposed by the New York State Bar, but were subsequently added by the Courts when the Rules of Professional Conduct were adopted. This explains why these subdivisions have no corresponding Comments. These subdivisions carry forward various provisions from DR 7-101 in the former Code, which **recognize the lawyer's independent authority not to zealously pursue each and every right of the client, especially when doing so would result in**

unlawful or offensive behavior. One can only assume that these principles are near and dear to the hearts of the Courts.

Most decisions regarding the subject matter of the representation must be made by the client after an informed consultation by the lawyer. See Rule 1.2(a). Rule 1.2(e) provides a limited exception to this principle by permitting a lawyer to unilaterally use "professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client." This subdivision is a combination of former DR 7-101(B)(1), which addressed waiving a right or position of a client, and some language from former DR 7-101(A)(1) that permitted a lawyer to grant reasonable requests of opposing counsel.

DR 7-101(B)(1) permitted the lawyer to "exercise professional judgment to waive or fail to assert a right or position of the client." Rule 1.2(e) permits the lawyer to exercise similar discretion, but only in those circumstances "when doing so does not prejudice the rights of the client." For example, it would be impermissible for a lawyer to waive a client's affirmative defense, see CPLR 3018(b)(listing various affirmative defenses), such as the statute of limitations, if there was any merit to the defense. The client might agree to waive a meritorious affirmative defense under Rule 1.2(a), but the lawyer could not waive it unilaterally under Rule 1.2(e).

DR 7-101(A)(1) expressly authorized a lawyer to grant "reasonable requests of opposing counsel which do not prejudice the rights of the client." The Ethical Considerations to New York's prior Code of Professional Responsibility provided that "[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client." EC 7-38. **That provision generally recognized that an attorney was empowered to grant a reasonable adjournment to an adversary, even in the face of a client's objection, so long as it did not prejudice the client.** Rule 1.2(e) should be read to provide similar authority. It should also be noted that an unwarranted denial of a reasonable extension of time can result in undue expense to the parties and the court system, which may amount to conduct prejudicial to the administration of justice. Rule 8.4(d); see NYSBA 407 (1975).

The lawyer's authority to grant a reasonable adjournment to an adversary is an issue that arises frequently in a litigator's practice. The first communication between counsel often pertains to defendant's request for an extension of time to appear or answer. Adjournments are also commonly sought throughout the pretrial disclosure process, where the statutory deadlines in CPLR Article 31 and the Federal Rules of Civil Procedure can prove unreasonably short, especially in complex cases. If these types of adjournments do not prejudice the rights of the client, they can and should be granted by an attorney. There are many situations, such as in intellectual property matters, in which a client's rights must be expeditiously prosecuted to avoid prejudice. In those circumstances, the lawyer would not have the discretion under Rule 1.2(e) to grant the adjournment.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) **the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community**; or
(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) **likely to be embarrassing or detrimental to the client if disclosed**, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
(5)(i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law or court order.
(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Comment

Scope of the Professional Duty of Confidentiality
Use of Information Related to Representation
Authorized Disclosure
Disclosure Adverse to Client
Withdrawal
Duty to Preserve Confidentiality

[5] Except to the extent that the client's instructions or special circumstances limit that authority**, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community**. **In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.** In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, **the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings**. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

Rule 1.8. Current Clients: Specific Conflict of Interest Rules

(a) **A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client**, unless:
(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(c) A lawyer shall not:
(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.
For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:
(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or
(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.
(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.
(f) **A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless**:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
(3) the client's confidential information is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.
(h) A lawyer shall not:
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.
(j)(1) A lawyer shall not:
(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;
(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or
(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.
(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.
(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Comment

Business Transactions Between Client and Lawyer
Gifts to Lawyers
Literary or Media Rights
Financial Assistance

Person Paying for a Lawyer's Services

[11] **Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. See also Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.**

Rule 1.14. Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, **the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian**.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), **the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.**

Comment

Taking Protective Action
Disclosure of the Client's Condition

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. **Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.**

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. **If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct**. See Rule 1.2(d).

[8] **Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative**. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Rule 3.1. Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.
(b) A lawyer's conduct is “frivolous” for purposes of this Rule if:
(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
(3) **the lawyer knowingly asserts material factual statements that are false.**

Comment

[1] 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. The law, both procedural and substantive, establishes the limits within

which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).

Rule 3.3. Conduct Before a Tribunal

(a) A lawyer shall not knowingly:
(1) **make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer**;
(2) **fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel**; or
(3) **offer or use evidence that the lawyer knows to be false**. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
(e) **In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer**.
(f) In appearing as a lawyer before a tribunal, a lawyer shall not:
(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
(2) engage in undignified or discourteous conduct;
(3) intentionally or habitually violate any established rule of procedure or of evidence; or
(4) engage in conduct intended to disrupt the tribunal.

Comment

Representations by a Lawyer
Legal Argument
Offering or Using False Evidence
Remedial Measures
Preserving Integrity of the Adjudicative Process
Ex Parte Proceedings
Withdrawal

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. 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 while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not 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 by evidence that the lawyer knows to be false.**

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

[5] **Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes**. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) -- including the prohibitions against offering and using false evidence -- apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either

recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. **The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence**. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] **The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for**

perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. **In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel.** Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

[15] A **lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client**. See also Rule 1.16(c) for the

circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
(4) knowingly use perjured testimony or false evidence;
(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;
(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;
(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;
(d) **in appearing before a tribunal on behalf of a client:**
(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
(2) assert personal knowledge of facts in issue except when testifying as a witness;
(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or
(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or
(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: **alluding to irrelevant matters, asserting personal knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact**. See also Rule 4.4,

prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term “admissible evidence” refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and
(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) Unless authorized by law, **a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6**.
(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. **Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.**

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f), providing that a lawyer may accept compensation from a third party **as long as there is no interference with the lawyer's professional judgment and the client gives informed consent**.

2020 WL 3160982
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Gregory BORCYK, Defendant-appellant.

1216
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KA 19-00307
|
Entered: June 12, 2020

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered January 22, 2019. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

Attorneys and Law Firms

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

MEMORANDUM AND ORDER

***1** It is hereby ORDERED that the order so appealed from is reversed on the law, the motion is granted, the judgment of conviction is vacated, and a new trial is granted.

Memorandum: Defendant was previously convicted after a jury trial of murder in the second degree (Penal Law § 125.25 [1]). He appealed, and this Court affirmed (*People v. Borcyk*, 60 A.D.3d 1489, 876 N.Y.S.2d 287 [4th Dept. 2009], *lv denied* 12 N.Y.3d 923, 884 N.Y.S.2d 704, 912 N.E.2d 1085 [2009]). Defendant thereafter moved to vacate the judgment of conviction. County Court denied the motion without a hearing. This Court reversed that order and remitted the matter for a hearing on the motion insofar as it sought to vacate the judgment of conviction on the grounds of ineffective assistance of counsel and actual innocence (*People v. Borcyk*, 161 A.D.3d 1529, 1530, 77 N.Y.S.3d 242 [4th Dept. 2018]). Defendant now appeals by permission of this Court from an order denying his motion after a hearing. Initially, we reject defendant's contention that he established his claim of actual innocence by clear and convincing evidence (*seePeople v. Hamilton*, 115 A.D.3d 12, 26-27, 979 N.Y.S.2d 97 [2d Dept. 2014]; *see generally* CPL 440.10 [1] [h]; *People v. Conway*, 118 A.D.3d 1290, 1290, 988 N.Y.S.2d 337 [4th Dept. 2014]).

We agree with defendant, however, that the court erred in denying the motion with respect to defendant's claim that he received ineffective assistance of counsel, and we therefore reverse the order, grant the motion to vacate the judgment of conviction on the ground of ineffective assistance of counsel, and grant defendant a new trial.

"What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*People v. Baldi*, 54 N.Y.2d 137, 146, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]; *see People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]). "The core of the inquiry is whether defendant received 'meaningful representation' " (*Benevento*, 91 N.Y.2d at 712, 674 N.Y.S.2d 629, 697 N.E.2d 584). "[T]o prevail on a claim of ineffective assistance, [a] defendant[ ] must demonstrate that [he or she was] deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*id.* at 713, 674 N.Y.S.2d 629, 697 N.E.2d 584 [internal quotation marks omitted]). Thus, "it is incumbent on [a] defendant to demonstrate the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v. Atkins*, 107 A.D.3d 1465, 1465, 967 N.Y.S.2d 318 [4th Dept. 2013], *lv denied* 21 N.Y.3d 1040, 972 N.Y.S.2d 537, 995 N.E.2d 853 [2013] [internal quotation marks omitted]; *see People v. Bank*, 124 A.D.3d 1376, 1377, 1 N.Y.S.3d 687 [4th Dept. 2015], *affd*28 N.Y.3d 131, 42 N.Y.S.3d 651, 65 N.E.3d 680 [2016]; *People v. Young*, 167 A.D.3d 1448, 1449, 89 N.Y.S.3d 800 [4th Dept. 2018], *lv denied* 33 N.Y.3d 1036, 102 N.Y.S.3d 499, 126 N.E.3d 149 [2019]). It is well settled that "[t]he failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v. Mosley*, 56 A.D.3d 1140, 1140-1141, 867 N.Y.S.2d 289 [4th

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Dept. 2008]; *seePeople v. Pottinger*, 156 A.D.3d 1379, 1380, 67 N.Y.S.3d 746 [4th Dept. 2017]).

In support of his motion, defendant contended that defense counsel was ineffective because he failed to secure the presence of a witness who had potentially exculpatory information. In particular, defendant contended that defense counsel spoke, prior to trial, with a witness who represented that she would testify, among other things, that her former boyfriend had admitted to her that he killed the victim. According to defendant, although the witness's testimony would have supported the defense presented at trial and although defense counsel stated his intent to call the witness, when the witness did not appear at trial, defense counsel inexplicably failed to pursue available means for securing her attendance.

***2** Under the circumstances of this case, we conclude that defendant met his burden of establishing that defense counsel's failure to secure the presence of the witness constituted ineffective assistance of counsel inasmuch as the record before us reflects “the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct” (*Atkins*, 107 A.D.3d at 1465, 967 N.Y.S.2d 318 [internal quotation marks omitted]; *see generally* CPL 440.30 [6]). Importantly, this is not a case where we must speculate about defense counsel's trial strategy. Throughout defendant's trial, defense counsel pursued a theory that one or more members of a group of three men, which included the witness's former boyfriend, killed the victim and moved her body to the wooded area in which it was ultimately discovered. Indeed, evidence at trial included the statement of a man who saw the three men, who appeared to be engaged in a drug sale, enter the victim's home. He later saw two of the men emerge with an item that appeared to be the victim's body, which they placed into the trunk of the car that they drove away. Additionally, the sperm of the witness's former boyfriend was recovered from a shirt inside of the victim's home, and it was stipulated at trial that, at the time of the murder, the witness's former boyfriend was dating the victim.

Consistent with the theory defendant presented at trial, the witness testified at the CPL article 440 hearing that, although she did not know the victim, her former boyfriend told her prior to defendant's trial that he was a suspect in the victim's murder but did not believe that he would be charged. The witness explained that some time later, but also prior to defendant's trial, that boyfriend broke into her home and attempted to strangle her and that, during this incident, he recorded himself on a tape recorder, stating his name, date of birth, and social security number, and saying, “yeah, I killed that bitch,” although the witness did not know what happened to the tape recorder. She further testified that the boyfriend stated that he killed the victim and left her body in a wooded area.

Moreover, at the time of the trial, defense counsel explicitly informed the court, on the record, that his strategy was to call the witness and present her exculpatory testimony. In this regard, defense counsel stated, “[t]here's one other issue that may or may not come up ... [that has] to do with [the witness]. [The witness] had a conversation with her thenboyfriend ... who had been the boyfriend of [the victim] where [the boyfriend] made a tape recording of his voice, identifying his name, his date of birth and his social security number, and indicated there that he killed [the victim]. His words were ‘I killed the bitch. I killed the bitch. I killed the bitch.’ And that is the substance of a police report that I received from [the prosecutor].” When the court asked how defense counsel intended to introduce this testimony, he responded, “[w]ell, I intend to call [the witness], should she appear in court. She was subpoenaed. She appeared on Thursday pursuant to the subpoena as well and told me this information for the first time. I don't know whether she's going to be here when we need to call her, which is why I thought maybe we'd wait and see if she showed up and not take the Court's time to do extra research on this issue. But since you've asked me to bring up any possible issues, I would put her on the witness stand and make an offer of proof to the Court and attempt to prove her reliability of the information that she's giving under the Settles case relating to a statement against [the boyfriend's] penal interest.” When the court then asked whether “[the witness's] testimony would relate to this particular homicide,” defense counsel responded, “Oh yes. Yes.” Nevertheless, and consistent with defense counsel's representation that he would pursue the testimony only if the witness appeared as directed, defense counsel took no further action to secure the witness's presence when she did not appear (*see Borcyk*, 161 A.D.3d at 1531, 77 N.Y.S.3d 242). We agree with defendant that the failure to secure the witness's attendance was deficient conduct and that the record discloses no tactical reason for defense counsel's actions (*see generallyPeople v. Dombrowski*, 94 A.D.3d 1416, 1417, 942 N.Y.S.2d 830 [4th Dept. 2012], *lv denied*19 N.Y.3d 959, 950 N.Y.S.2d 111, 973 N.E.2d 209 [2012]).

***3** In so holding, we reject the determination of the court, following the CPL article 440 hearing, that defense counsel

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may have legitimately decided against calling the witness because he deemed her incredible. To the contrary, the record affirmatively establishes that, even after meeting with and speaking to the witness, defense counsel stated that he intended to call her as a witness. We note that defense counsel could not be located to testify at the CPL article 440 hearing, although the record reflects that he previously informed the parties that he could no longer recall defendant's trial.

The dissent's focus on the court's determination that the witness was not credible is misplaced. The hearing on defendant's CPL article 440 motion took place years after both the events described by the witness and the alleged instance of ineffective assistance of counsel. Whether the witness appeared credible at the hearing years after the trial does not answer the question whether defense counsel, at the time of the trial, possessed a strategic reason not to call her. To the contrary and unique to this case, the record reflects that defense counsel, at the time of the trial, spoke with the witness, believed that the witness possessed relevant testimony, considered her testimony helpful to the defense, and stated that his trial strategy was to call her as a witness. Simply put, the court's assessment of the witness's credibility after a lengthy passage of time does not alter the fact that defense counsel, at the time of the trial and the alleged ineffective assistance, believed the witness to be credible enough to present to the jury.

Further, the record belies the conclusion of the court and the dissent that defense counsel may have had a strategic reason for failing to call the witness. Defense counsel explicitly informed the court that his strategy was to call the witness if she was "here when we need to call her." Thus, this Court need not speculate why defense counsel failed to call the witness because defense counsel placed his reasoning on the record: he failed to call the witness because she did not appear—a failure that this Court has recognized could support a claim of ineffective assistance (*see Borcyk*, 161 A.D.3d at 1531, 77 N.Y.S.3d 242). Nothing in the record indicates that defense counsel amended that plan, that he failed to call the witness for any reason other than her nonappearance, or that he altered his belief that her testimony would be helpful to the defense.

The mere absence of a legitimate strategy in failing to secure the witness's presence at trial does not end the inquiry. A single error may qualify as ineffective assistance only if it is "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v. Baker*, 14 N.Y.3d 266, 270, 899 N.Y.S.2d 733, 926 N.E.2d 240 [2010][internal quotation marks omitted]). Under the circumstances of this case, however, we conclude that the error was sufficiently egregious to constitute ineffective assistance of counsel. At defendant's trial, the prosecution relied primarily on evidence that material containing defendant's DNA was recovered from underneath the victim's fingernails and that his sperm was found inside her vagina, although the victim's body showed no sign of rape. At his CPL article 440 hearing, however, defendant explained that, although he did not recognize the victim, he had exchanged sex for drugs with various prostitutes around the time of the victim's death, and it was undisputed at defendant's trial that the victim was a prostitute and drug user. In opposition to the People's evidence, the defense largely relied on the statement of the man who had seen the witness's former boyfriend near the victim's home and later near what appeared to be her body; evidence that the former boyfriend's sperm was found in the victim's home; and evidence that blood from an unidentified person was found on the threshold. Critically, the witness's testimony would have corroborated the defense's theory by providing evidence that a direct admission was made by the very person the defense suggested had committed the murder and was in proximity to the victim's body after her death.

***4** Notably, this is not a case where defense counsel simply chose to pursue a different trial strategy that did not implicate the witness's testimony (*see e.g. Baldi*, 54 N.Y.2d at 146, 444 N.Y.S.2d 893, 429 N.E.2d 400). Instead, throughout the trial, defense counsel argued and presented proof that the witness's former boyfriend or his associates killed the victim. Indeed, this was defendant's sole theory of the victim's death. It was thus vital for defendant to corroborate the evidence placing the witness's former boyfriend at the scene of the murder, and this corroboration was precisely what the witness's testimony offered.

All concur except CURRAN and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that defendant carried his burden of establishing, by a preponderance of the evidence, "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v. Atkins*, 107 A.D.3d 1465, 1465, 967 N.Y.S.2d 318 [4th Dept. 2013], *lv denied* 21 N.Y.3d 1040, 972 N.Y.S.2d 537, 995 N.E.2d 853 [2013] [internal quotation marks omitted]; *see* CPL 440.30 [6]; *People v. Bank*, 124 A.D.3d 1376, 1377, 1 N.Y.S.3d 687 [4th Dept. 2015], *affd* 28 N.Y.3d 131, 42

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N.Y.S.3d 651, 65 N.E.3d 680 [2016]; *People v. Young*, 167 A.D.3d 1448, 1449, 89 N.Y.S.3d 800 [4th Dept. 2018], *lv denied* 33 N.Y.3d 1036, 102 N.Y.S.3d 499, 126 N.E.3d 149 [2019]), i.e., defense counsel's failure to secure the presence of a witness who had potentially exculpatory information. Although a close call, on the record before us, we conclude that defendant did not meet his burden, and we would therefore affirm the order denying defendant's motion to vacate the judgment.

It is well settled that, to be entitled to vacatur of a judgment under CPL 440.10 (1) (h) based on a claim of ineffective assistance of counsel, a defendant is required " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998], quoting *People v. Rivera*, 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698 [1988]; *see People v. Baker*, 14 N.Y.3d 266, 270-271, 899 N.Y.S.2d 733, 926 N.E.2d 240 [2010]). Absent evidence that no reasonable strategy animated defense counsel's allegedly deficient conduct, it is presumed that defense counsel acted competently (*seePeople v. Wells*, 187 A.D.2d 745, 745-746, 591 N.Y.S.2d 44 [2d Dept. 1992], *lv denied* 81 N.Y.2d 894, 597 N.Y.S.2d 956, 613 N.E.2d 988 [1993]; *see generally People v. Flores*, 84 N.Y.2d 184, 187, 615 N.Y.S.2d 662, 639 N.E.2d 19 [1994]). Simple disagreement with strategies or tactics "does not suffice" to satisfy a defendant's burden of establishing ineffective assistance of counsel (*Flores*, 84 N.Y.2d at 187, 615 N.Y.S.2d 662, 639 N.E.2d 19) because as long as the evidence, the law, and the circumstances of a case, "viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v. Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]; *seePeople v. McDaniel*, 13 N.Y.3d 751, 752, 886 N.Y.S.2d 88, 914 N.E.2d 1005 [2009]).

Although what constitutes effective assistance of counsel varies according to the unique circumstances of each case, the consistent core of our inquiry is whether the defendant received meaningful representation (*see Baldi*, 54 N.Y.2d at 146-147, 444 N.Y.S.2d 893, 429 N.E.2d 400). "The phrase 'meaningful representation' does not mean 'perfect representation' " (*People v. Ford*, 86 N.Y.2d 397, 404, 633 N.Y.S.2d 270, 657 N.E.2d 265 [1995], quoting *People v. Modica*, 64 N.Y.2d 828, 829, 486 N.Y.S.2d 931, 476 N.E.2d 330 [1985]), and defense counsel's representation need not be completely error-free. Thus, courts are "properly skeptical" when "disappointed [defendants] try their former lawyers on charges of incompetent representation" (*Benevento*, 91 N.Y.2d at 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [internal quotation marks omitted]; *see People v. Brown*, 7 N.Y.2d 359, 361, 197 N.Y.S.2d 705, 165 N.E.2d 557 [1960], *cert denied* 365 U.S. 821, 81 S.Ct. 703, 5 L.Ed.2d 698 [1961], *rearg denied*12 N.Y.2d 1022, 239 N.Y.S.2d 1027, 189 N.E.2d 634 [1963]; *see also People v. Satterfield*, 66 N.Y.2d 796, 798-800, 497 N.Y.S.2d 903, 488 N.E.2d 834 [1985]).

***5** Here, we conclude that defendant failed to demonstrate that defense counsel's decision not to procure trial testimony from the witness was not strategic. In our view, County Court properly concluded that the witness's testimony implicating her former boyfriend in the victim's death was not credible. The witness provided the purportedly exculpatory information to the police and an assistant district attorney (ADA) as a justification for her alleged stabbing of her former boyfriend, and the court properly determined that the witness's statement that the former boyfriend verbally admitted to her that he killed the victim was entirely selfserving because it was offered only in an attempt to ameliorate the charges pending against her. The witness did not come forward with the information until *after*she was charged in the stabbing—almost 18 months after the victim was killed—and, although she claimed that she told the police and the ADA that her former boyfriend recorded some of his statements about the victim's death, there was no mention of any such recordings in the reports of the officers who spoke to her. The witness's credibility was further diminished by her inability to explain why she used an alias when she gave her statement to the police and the ADA. Given the issues surrounding the witness's credibility, defense counsel could have reasonably concluded that presenting the witness's testimony would have strained the jury's credulity.

Moreover, defense counsel could have made the strategic decision not to call the witness in light of the other available evidence that supported the theory that someone other than defendant killed the victim. To that end, we note that at trial, defense counsel and the prosecutor stipulated to the admission in evidence of the statement of a man who told police that, at approximately 11:00 p.m. on the night before the victim's body was discovered, he saw three men enter the victim's home, one of whom was the witness's former boyfriend, and later saw two of those men carrying the victim's body out of her home and placing it in the trunk of a vehicle. Defense counsel also procured from the prosecutor a stipulation that a shirt was taken from the victim's home,

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and the forensic biologist's testimony at trial established that a semen stain found on the shirt matched the DNA profile of the witness's former boyfriend. The two stipulations that defense counsel obtained allowed him to argue that the credible evidence identified the witness's former boyfriend as the killer without exposing the witness herself to cross-examination. This permitted defense counsel to blunt the effect of the DNA evidence, which was the strongest evidence against defendant, and to argue to the jury that the DNA evidence proved only that defendant had sex with the victim, not that he was also her killer.

In our view, the majority places undue emphasis on defense counsel's statement at trial that he “intended to call” the witness. Viewed in context, defense counsel's statement actually indicated his doubts about the witness's reliability—particularly with respect to whether she would honor the subpoena—and, separately, whether the relevant portion of her testimony was even admissible. It follows that, in a close case based primarily on DNA evidence and where there was other evidence to support defendant's theory of the case, defense counsel could have reasonably strategized that it was inadvisable to delay the trial to procure and execute a material witness order with respect to such a witness, despite his prior statement that he intended to call her.

In reaching this conclusion, we are mindful that the court's credibility determinations in evaluating witness testimony at a hearing on a CPL 440.10 motion are entitled to great weight based on the court's superior opportunity to see the witnesses, hear the testimony, and observe demeanor (*see People v. Parsons*, 169 A.D.3d 1425, 1426, 91 N.Y.S.3d 825 [4th Dept. 2019], *lv denied* 33 N.Y.3d 980, 101 N.Y.S.3d 238, 124 N.E.3d 727 [2019]). The majority rejects the court's credibility determinations regarding the witness's testimony, despite the great weight that they should be accorded. The court characterized parts of the witness's testimony as “neither persuasive or convincing” and “problematic.” Additionally, the court could not “find a rationale that vindicates the veracity of critical components of her testimony” and was “unable to conclude her account is of convincing quality.” Based on those observations, the court determined that “[t]he only logical conclusion is that [defense counsel] determined her testimony was not of significant value to the defense.” In light of those clearly elucidated credibility determinations, we are unable to agree with the majority that the court did not appropriately weigh the evidence in denying defendant's motion.

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NYSBA Ethics Opinion 1183

3.10.2020

By Committee on Professional Ethics

Topic: Designated counsel in financing transactions; payment of fees by a third party; exercise of independent judgment; conflicts of interest

Digest: A lawyer may accept appointments as designated counsel for underwriters, lenders or other funding sources involved in private equity or corporate financing transactions on the recommendation of the counter-party to the transaction, with the lawyer being paid out of the proceeds of the transaction, provided that no interference occurs with the lawyer's exercise of independent professional judgment on the clients' behalf, the lawyer preserves the confidentiality of client confidential information, and the lawyer obtains the clients' informed consent, confirmed in writing.

Rules: 1.0(j), 1.1, 1.2, 1.3, 1.4, 1.6, 1.7(a) & (b), 1.8(f), 4.2, 5.4(c)

FACTS

The inquirer is a New York lawyer who represents underwriters, lenders and other financial institutions that participate in large private equity offerings and other corporate financing transactions. The fees for the lawyer and the lawyer's clients are paid out of the proceeds of the transactions. At risk of oversimplification, but for ease of reference, we refer to the lawyer's clients as the "funders" and the counterparties as the "recipients."

We are told that, in a growing number of these financing transactions, it is not uncommon for the recipients (or their counsel) to maintain lists of designated counsel to act on behalf of the funders, the use of which counsel is a condition precedent to the recipients' willingness to transact business with the funders. As we understand the circumstances, the recipients' designation of the funders' counsel is made independent of the selection of the funders and is made by the law firm representing the recipients. No provision is made for the funders' consent to counsel other than that implicit in the funders' agreement to participate in the transaction.

These financing transactions are not part of a series of offerings, but have different parties for each transaction. The inquirer has been offered the opportunity to have the inquirer's firm included on the list of designated counsel, which the inquirer acknowledges could result in fees comprising a material portion of the income of the firm's financial transactions practice.

Recently the inquirer has learned that the recipients have sent a so-called "terms list" to the funder clients with instructions to agree with the proposed terms, or propose counter terms, but to do so without consultation with the funders' designated counsel. According to the inquirer, no opportunity exists for the funders to use their designated counsel to negotiate the term sheet with the recipients. The role of

the funders' designated counsel is thus to prepare the financing documents based on the terms negotiated by the funders (without benefit of counsel) and the recipients (with counsel).

We are asked to assume that, if the designated counsel fails to abide by the recipients' directives, then the prospect of future designations will disappear, with the attendant loss of income to the lawyer's firm.

QUESTION

May a lawyer accept a designation of counsel to represent a client in a transaction when the counterparty in the transaction makes the designation, places restrictions on the lawyer's ability to exercise independent professional judgment on behalf of the lawyer's client, and the designated counsel is paid out of the proceeds of the transaction?

DISCUSSION

The inquiry implicates several provisions of the N.Y. Rules of Professional Conduct (the "Rules"). These Rules regulate the lawyer's responsibilities in an attorney-client relationship when factors extraneous to that relationship may imperil the lawyer's fiduciary obligations to a client and the duties of loyalty and care that accompany those obligations. Broadly stated, the Rules forbid a lawyer to allow a stranger to the attorney-client relationship to inhibit the lawyer's faithful discharge of those obligations to a client, at least absent circumstances in which the client is able freely to provide informed consent to the intrusion without impairing the lawyer's ability to fulfill the lawyer's duties to the client.

One such provision is Rule 5.4(c), contained in the provision "Professional Independence of a Lawyer," which says that, unless the law otherwise provides, "a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client" that Rule 1.6 safeguards. Comment [2] associated with this Rule explains that the Rule "expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another." See generally Y. State 1081 ¶ 16 (2016); N.Y. State 957 ¶¶ 11-12 (2013).

This same Comment [2] directs attention to Rule 1.8(f), of special pertinence here, which says that a "lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment and (3) information relating to the representation of the client is protected as required by Rule 1.6." "Simply put, Rule 1.8(f) means that a lawyer owes a client the same duties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give 'informed consent' to the arrangement." N.Y. State 1000 ¶ 5 (2014) (allowing a lawyer to be paid by an adverse party subject to Rule 1.8(f)). As Comment [11] to this Rule explains, and as our Opinion 1000 attests, "[t]hird-party payors frequently have interests that may differ from those of the client." But this fact does not unburden the lawyer of the duty to comply with obligations to a client, including, among others, the duties of competence set out in Rule 1.1, of diligence set out in Rule 1.3, of communication set out in Rule 1.4, of confidentiality set out in Rule 1.6, and of attention to conflicts of interest set out in Rule 1.7.

Y. State 818 (2007) is instructive in applying these principles to this inquiry. That opinion was issued under the N.Y. Code of Professional Responsibility (the "Code"), the precursor of the Rules, but the relevant provisions of the Code and the Rules are interchangeable for our purposes. There, the inquirer was designated counsel for an underwriter of a series of municipal security offerings by the same issuer. The lawyer was "selected for this work by the issuer," which paid the designated counsel's fees. In Opinion 818, we recognized that "there may be competing interests when negotiating the underwriting agreement" and that disagreements could arise about what is 'material' for the purposes of disclosure in offering documents." Id. ¶ 5. We continued: "The Code explicitly requires that a lawyer whose fees will be paid by a third party obtain the consent of the client, after full disclosure of all relevant facts and circumstances, before accepting such compensation." Id. ¶ 8. Included in the disclosures are "any material facts or circumstances – beyond the selection of Designated Underwriters' Counsel by the issuer and what that normally entails – that might bear on the lawyer's ability to exercise independent professional judgment on behalf of the client (the underwriter) or otherwise interfere with the lawyer's ability to adequately represent the client." Id.

Although some facts in Opinion 818 vary from those here – for instance, here each transaction is unique and involves different financial instruments and participants – these variances do not affect the controlling principles. Among other things, the competing interests and the potential for disagreement over disclosure and material terms persist, and thereby engender the same concerns animating Opinion 818. There, as here, these concerns included that the designating counterparty might impose conditions on the lawyer's exercise of independent professional judgment and also that the prospect of future designations comprising a significant source of income to the lawyer could affect lawyer's exercise of that judgment. Accordingly, there, we concluded: "A law firm selected to serve as Designated Underwriters' Counsel by a company must carefully consider its relationship with the company selecting it, and assess whether a disinterested lawyer would conclude that the law firm can competently represent the interests of the underwriters in light of its relationship with the company, and if so, ensure that the underwriters appropriately consent to its representation of them." Id. ¶ 14.

Apparent from Opinion 818 is that a conflicts analysis under Rule 1.7 may be an integral part of appraising the ethical limitations of accepting the role of counsel designated by an adverse party and paid by other than the counsel's own client. The Comments associated with each Rule refer to the other. Thus, Comment [12] under Rule 1.8(f) says that a conflict under Rule 1.7(a) may exist if "there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third party payer." Likewise, Comment [13] under Rule 1.7(a) says that a lawyer "may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying the lawyer's fee . . . then the lawyer must comply with the requirements of [Rule 1.7] (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation." Our prior opinions frequently refer to each Rule in describing a lawyer's duties when the source of the lawyer's fee is other than the client. See, e.g., Y. State 1162 (2019); N.Y. State 1155 (2018); N.Y. State 1086 (2016); N.Y. State 1063 (2015).

The lessons for this inquiry from these Rules and the opinions construing them are readily apparent. A lawyer may not ethically accept a representation of a client if the lawyer accepts compensation or "anything of value" (including inclusion of an approved list of designated counsel), nor a recommendation to serve as counsel, if the lawyer thereby allows a stranger to the attorney-client relationship to interfere with, among other things, the lawyer's exercise of independent professional judgment on behalf of the client. To us, this means that a lawyer may not allow counsel for an adverse party to dictate the limits the lawyer's role in service of a client's interests absent a client's informed consent confirmed in writing.

Other Rules compel this conclusion. Rule 1.2(a) provides that a "lawyer shall abide by a client's decisions concerning the objectives of representation," and by necessary implication not abide by the dictates of others. Rule 1.3 says that a lawyer "shall act with reasonable diligence and promptness in representing a client." Rule 1.4 imposes obligations on a lawyer promptly to inform the client of material developments in the matter and, among other things, reasonably to consult with the client about the means by which the client's objectives are to be achieved and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. To fulfill these responsibilities requires the unfettered ability to exercise independent professional judgment on the client's behalf unless the client otherwise agrees.

In addition, in these circumstances, if a "significant risk" exists that a disinterested lawyer would conclude that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's "own financial, business, property or other personal interests," then a conflict of interest is present. In light of the inquirer's acknowledgement that a failure to abide by the third party's directives could endanger a material portion of the lawyer's business and property interests, it is likely that a disinterested lawyer would find such a significant risk. Fortifying this conclusion is that Rule 1.8(f), which addresses specific conflicts that Rule 1.7 addresses more generally, identifies situations involving third-party payors as ones in which conflicts are inherently present. So, too, does Rule 5.4(c).

This leaves the question – applicable under Rule 1.7(a) and Rule 1.8(f) – whether the conflict is subject to informed consent. We think the answer is yes. Rule 1.0(j) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." The expectation of informed consent to the representation is found within Rule 1.8(f) and, save for the requirement of a writing, is no different from that required under Rule 1.7(a)(2). On our view, "informed consent" cannot be adequate without disclosing to the client the lawyer's business and personal interest in carrying out the representation.

This is nothing new. We have followed these principles in other areas, most notably in insurance defense when the existence of third party payment of fees did not alter the primary obligations owed to the client. See Y State 721 (1999). For instance, in N.Y. State 1154 (2018), we said that, if the "lawyer depends on an insurance carrier for a regular flow of business," then the inquirer needed to resolve whether this relationship created a conflict of interest. If the inquirer concluded that it did, then the inquirer had to determine whether the inquirer reasonably believed that the inquirer could nevertheless provide "competent and diligent" representation to the affected client. If yes, then the inquirer needed to obtain the client's informed consent confirmed in writing, including by disclosing "the inquirer's

relationship with the insurer." Id. ¶ 16. Applying that statement to the present inquiry would suggest that the inquiring counsel disclose to the funder clients the nature of the inquirer's relationship with recipients and their counsel.

Similarly, in N.Y. State 942 (2012), another inquiry involving a third-party payor, the client would not be told material facts concerning the fee arrangement. There, we said: "Informed consent can occur only after the lawyer has adequately explained the risks and provided enough information for the client to make an informed decision." We concluded, "That standard may not be satisfied here, given the apparent limits to the planned disclosure to the client." So, too, here. The analysis of adequate consent is heavily fact-dependent, including clarification that the duty runs solely to the client, the sophistication of the client, the risks flowing from the representation, and the ability to exercise independent judgment on the client's behalf. Nevertheless, we are confident that the funder's willingness to participate in the transaction does not alone constitute "informed consent" within the meaning of the Rules.

Nothing in this opinion is intended to criticize or discourage use of designated counsel, a common practice that often provides efficiencies of great benefit to the clients and other parties. Nor is there anything wrong with principals negotiating the material terms of a transaction without benefit of counsel on each side and then enlisting lawyers to prepare the needed documents, subject to the requirements of Rule 4.2 regulating a lawyer's right to communicate with a person known to be represented by counsel. And a client is free to give informed consent, as defined above, to limit the scope of a representation if the limitation is reasonable in the circumstances. Rule 1.2(c) & Rule 1.2, Cmt. [6A]. But a lawyer is not free to undertake a representation of a client when a counter-party dictates the terms of the lawyer's exercise of independent professional judgment.

CONCLUSION

A lawyer may accept appointments as designated counsel for underwriters, lenders or other funding sources involved in a private equity or corporate financing transaction on the recommendation of and paid for by the issuer, borrower or other lead entity from the transaction proceeds if the lawyer concludes the third party will not interfere with the lawyer's independent professional judgment and the lawyer obtains the informed consent confirmed in writing to the representation from the lawyer's client.

(33-19)

FINDLAW – LAW FIRM MANAGEMENT PRACTICE GUIDE

HOW TO HANDLE DIFFICULT CLIENTS

By Steven A. Meyerowitz of The Pennsylvania Lawyer Magazine

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A lawyer who has been practicing for any length of time at all no doubt has encountered the "difficult" client. This is not necessarily the client who simply presents a difficult case with complex legal issues, the client who stops paying a lawyer's bills as it nears bankruptcy or even the client who involves the lawyer in conflict of interest or ethics problems.

The difficult client is difficult in a human-relations sense. It is the client who regularly says, "I want it tomorrow," who demands, "Do not put that lawyer on my case," or who always seeks detailed explanations for every letter a lawyer writes or motion a lawyer wants to file. The difficult client confronts the lawyer with "Your bill is too high" or "What do you mean I can't do that deal?" A client who is difficult is the overseas client who insists that the lawyer wake up very early in the morning and make a telephone call to the client at 3 a.m.

Difficult clients, in other words, are the clients who not only put themselves first (from a practice-development perspective, lawyers probably should put clients first, too), but who think only of themselves (which is an unpleasant extreme).

Lawyers should focus on the issue of dealing with a difficult client at the intake stage of the relationship. They should analyze the risks they may be running by agreeing to represent a difficult client - if the client has had four different lawyers on the same matter over the preceding eight months, the new lawyer may want to refuse to represent the client.

Deborah Addis, the president of Boston-based Addis & Reed, Inc., a law-firm consulting company, points out that a difficult client may be the kind of person who is more likely to file a malpractice action if the result is not satisfactory than a more reasonable and understanding client would be. At the least, the difficult client may force the lawyer to spend more time than warranted on a matter, some - or a lot - of which the lawyer will be unable to bill.

Of course, it is not easy for lawyers to turn away business, especially when their cash flow is suffering and clients are not exactly knocking down the office door. Fortunately, there are ways for a lawyer who agrees to represent a difficult client to limit the problems.

One of the best ways to handle the difficult client is to anticipate the problems and attempt to deal with them at the beginning of the relationship, according to Robert W. Denney, a law-firm management consultant and the president of Wayne-based Robert Denney Associates, Inc. He says, for instance, that a lawyer should ask a client what the client's deadlines are - and then try to beat them. For example, he says, "If the client says, 'I want it by Monday,' lawyers should gear themselves up to get it done by Friday." If a lawyer has an ongoing relationship with a client and the client then sets an impossible

deadline, the lawyer’s prior work should help the client understand that the impossible deadline has to move.

Staffing

Dealing with staffing issues up front can also help avoid the situation of the client trying to dictate which lawyers from a firm should be handling a case or representing the client on a particular transaction. If a client rejects the lawyer’s staffing proposals, the lawyer should ask the client why. The lawyer may be able to cure a misunderstanding and staff the case as proposed. If necessary, the lawyer might be able to tell the client that the client’s view is unfortunate but that there is someone else at the firm who can handle the matter. If that will not work, the lawyer can refer the client to some other law firm. It obviously is better for a lawyer to do this ahead of time, before incurring time and expense, than later. In certain cases, it may be difficult, if not impossible, to resign from representation, at least without court approval.

Addis says lawyers should carefully think about staffing issues for a difficult client. Toward that end, she recommends considering whether to put a male lawyer on a matter for a difficult male client, a female lawyer for a difficult female client or an older lawyer for a difficult younger client. This may be a way to engender trust, she believes.

Billing

A discussion of billing at the intake stage can also help avoid bill problems later. At the beginning of the relationship, Denney says, a lawyer should tell the client what the lawyer’s fee, or estimated fee, will be. The lawyer also should explain how often the client will be billed and when the lawyer expects those bills to be paid.

On occasion, however, attorneys moving through a lawsuit or a project will find that they underestimated the legal expenses. Denney suggests that they pick up the phone at that time, discuss it with the client and negotiate if necessary.

Lawyers who represent difficult clients, but who have not discussed their bills in advance, will come to the point - perhaps after the assignment is completed - where they want to submit their bills to their clients. In Denney’s view, a lawyer in this position should call the client, find out whether the client is pleased with the outcome, explain the amount of the bill the lawyer is prepared to send, then ask, "May I send it?" Even in this situation, Denney believes, a lawyer may be able to lead a difficult client to accepting and paying the bill. If the client rejects the lawyer’s entreaties, the lawyer will learn that fact sooner rather than later and should be able to find an amount to bill that is acceptable to both parties.

What if a lawyer takes none of these steps and simply sends a bill, to which the client objects? The lawyer should not fight with the client, but should speak with him or her and offer to look at the bill again. After doing so, the lawyer can contact the client again and say that it looks fine, but ask what the client thinks is right. At that point, the lawyer can negotiate the bill or take other appropriate action.

‘Yes If, No But’

There may also be a better way to tell a difficult client, and other clients, too, that they cannot do something that they want to do. Instead of saying, "No," a lawyer can use what Denney refers to as the "yes if; no but" method.

The lawyer can tell the client that the client can do what he or she wants to do, but only if the client meets certain conditions. These may be, as a practical matter, impossible conditions to meet, but it gives the client a sense that it is not the lawyer who is refusing to permit the client to act. Alternatively, the lawyer can tell the client that the client may not take the actions he or she wants to take, but that there may be alternatives that can get the client to essentially the same position. The lawyer can then explain what those alternatives involve, including the legal issues that need to be examined.

Good morning!

And what should a lawyer do about the client who wants the lawyer to awaken at 3 a.m. to make a conference call? The lawyer should get up and make the call! Lawyers have plenty of time to sleep once they retire.

Lawyers and Clients: In Each Others' Eyes

A man is flying in a hot air balloon and realizes he is lost. He reduces his altitude and spots a man down below. He lowers the balloon further and shouts, "Excuse me, can you help me? I promised my friend I would meet him a half an hour ago, but I don’t know where I am."

The man below says, "Yes, you are in a hot air balloon, hovering approximately 30 feet above this field. You are between 40 and 42 degrees north latitude and between 58 and 60 degrees west longitude."

"You must be a lawyer," the balloonist says.

"I am," replies the man. "How did you know?"

"Well," says the balloonist, "I assume that everything you have told me is technically correct, but I have no idea what to make of your information, and the fact is I still am lost."

The lawyer responds, "You must be a client."

"I am," replies the balloonist, "but how did you know that?"

"Well," replies the lawyer, "you don’t know where you are or where you are going. You have made a promise that you have no idea how to keep and you expect me to solve your problem. The fact is that you are in the exact same position you were in before we met, but now it is somehow my fault."