

**ETHICAL CONSIDERATIONS  
INVOLVING MATTERS INITIATED  
BY THE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
ENVIRONMENTAL LAW FORUM  
Harrisburg, PA April 3, 2019**

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**Hypothetical Number 1:  
WHEN THE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
PROPOSES A CIVIL PENALTY  
ASSESSMENT TO YOUR CLIENT**

Question No. 1:  
What, if any, ethical  
considerations are implicated by  
Lilly's call?

## Rule 4.2. Communication with Person Represented by Counsel.

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

## Comment No. 8 to Rule 4.2

- (8) The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

**Question No. 2:**  
What, if any, ethical considerations are implicated by Wally's letter?

## Rule 3.4. Fairness to Opposing Party and Counsel.

- A lawyer shall not:

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

\* \* \*

## Rule 3.4. Fairness to Opposing Party and Counsel.

- A lawyer shall not:

- d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - 1) the person is a relative or an employee or other agent of a client; and
  - 2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

**Question No. 3:**  
What, if any, ethical considerations are implicated by Ron's call to Carl?

## Rule 4.2. Communication with Person Represented by Counsel.

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

## Comment No. 4 to Rule 4.2

- A lawyer may not make a communication prohibited by this Rule through the acts of another. **See Rule 8.4(a)**. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. ...

## Rule 8.4. Misconduct.

- It is professional misconduct for a lawyer to:
  - a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

## Comment No. 1 to Rule 8.4

- 1) Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

### Question No. 4:

What, if any, ethical considerations are implicated by the conversation between Wally and Ron?

## See Rule 4.2 Communication with Person Represented by Counsel.

- See also Rule 8.4. Misconduct.
- Rule 1.4. Communication.

a) A lawyer shall:

\* \* \*

- 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

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## Comment 1 to Rule 1.4

- 1) Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

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## Comment 3 to Rule 1.4:

- 3) Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. (...)

## *Comment 5 - Explaining Matters*

- 5) The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued... Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement...

### Question No. 5:

What, if any, ethical considerations are implicated by the conversation between Lilly and Carl if Carl follows her instructions and calls Ron?

## See Rule 8.4

- It is professional misconduct for a lawyer to:
  - a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

### Comment 1:

- Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.
- See Also Rule 4.2

**Hypothetical Number 2:**  
WHEN YOUR CLIENT RECEIVES  
AN ORDER FROM THE  
DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

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**Question No. 1:**  
What ethical issues (separate and apart  
from a potential malpractice claim)  
should Albert be concerned with?

## Rule 7.1. Communications Concerning a Lawyer's Services.

- A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

## Comments to Rule 7.1

- 1) This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

## Comments to Rule 7.1

2) Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

## Comments to Rule 7.1(continued)

3) An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. ... The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

## Rule 7.2. Advertising

- a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.
- c) A lawyer shall not give anything of value to a person for recommending the lawyer's services...

## Rule 7.2. Advertising (continued)

- e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

\* \* \*

## Rule 7.2. Advertising (continued)

- k) A lawyer shall not, directly or indirectly, advertise that the lawyer or his or her law firm will only accept, or has a practice limited to, particular types of cases unless the lawyer or his or her law firm handles, as a principal part of his, her or its practice, all aspects of the cases so advertised from intake through trial. If a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed ... (emphasis added).

## Comment to Rule 7.2

\* \* \*

- *Paying Others to Recommend a Lawyer*
- 6) Subject to the limitations set forth under paragraphs (c) and (j), a lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (c)(1)... (emphasis added)

## Comment to Rule 7.2 (continued)

- *Endorsements*

- 7) Paragraphs (d) and (e) require truthfulness in any advertising in which an endorsement of a lawyer or law firm is made. The prohibition against endorsement by a celebrity or public figure is consistent with the purpose of Rule 7.1 to avoid the creation of an unjustified expectation of a particular legal result on the part of a prospective client.

## Comment to Rule 7.2 (continued)

- 14) Paragraph (k) prohibits a lawyer from misleading the public by giving the impression in an advertisement that the lawyer or his or her law firm specializes in a particular area of the law unless the lawyer or his or her law firm handles the type of case advertised as a principal part of the practice of the lawyer or law firm.



## Comment to Rule 7.2 (continued)

14) (continued) For example, where a lawyer advertises for “personal injury cases” or “serious personal injury cases” or “death cases only” those types of cases must, in fact, constitute a principal part of the practice of the lawyer or his or her firm.

### Question No. 2:

Was Chloe, as a government lawyer, under an ethical obligation to inform Albert how to file an appeal before the EHB?

## Rule 1.3. Diligence.

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

## Comment 1 to Rule 1.3

- A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

## Comment 1 to Rule 1.3 (continued)

- A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2...(emphasis added)

## Rule 4.1. Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
  - a) make a false statement of material fact or law to a third person

## Comment to Rule 4.1

- *Misrepresentation*

- 1) A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

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

## Comment to Rule 4.1 (continued)

- *Statements of Fact*

- 2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.

- Estimates of price or value
  - A party's intentions as to an acceptable settlement of a claim
  - the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.
- **See also ABA Formal Opinion 94-387-Disclosure to Opposing Party and Court that Statute of Limitations has run.**

## Rule 1.6 Confidentiality of Information

- a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

## Rule 4.1 Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
  - a) make a false statement of material fact or law to a third person; or
  - b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

## Comment to Rule 4.1

- *Misrepresentation*

- 1) A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

**Question No. 3:**  
What ethical issues arise for Albert with this information?

## Rule 3.3. Candor Toward the Tribunal

a) A lawyer shall not knowingly:

- 1) make a false statement of material 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;

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## Rule 3.3. Candor Toward the Tribunal

a) A lawyer shall not knowingly:

- 2) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, 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. (emphasis added)

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## Rule 3.3. Candor Toward the Tribunal (continued)

- b) A lawyer who represents a client in an adjudicative proceeding 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) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

## Rule 1.6. Confidentiality of Information

- a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
- c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
  - \* \* \* \*
- 3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used



## § 81.1. Preamble: A Lawyer's Responsibilities

\* \* \* \*

- 4) In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

## Rule 1.4. Communication

a) A lawyer shall:

\* \* \*

- 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

**Question No. 4:**  
Was Albert under an ethical obligation to obtain further evidence about the past civil penalties?

## Rule 1.16. Declining or Terminating Representation

- a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- 1) the representation will result in violation of the Rules of Professional Conduct or other law;

## Rule 1.16. Declining or Terminating Representation (continued)

- b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- 1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - 2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

## Rule 1.16. Declining or Terminating Representation (continued)

- b) (continued) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- 3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - 4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- *See Also Rules 3.3 and 1.6*

What should Albert do now that he has information of Danny's deception?

- *See Pa.R.P.C.- Rules 3.3 and 1.6*

Will Albert's conduct differ if post-hearing briefs are already filed in the case?

If the EHB already issued an adjudication  
but the appeals period is still pending?

If the case is on appeal before  
Commonwealth Court?

If all appeals have been concluded or the time for the appeal period has expired?