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ETHICS FOR REAL ESTATE LAWYERS TODAY



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Legal ethics involve not just doing the right thing, but also conducting a lawyer’s professional life in a manner that complies with basic tenets. In this article, we consider application of those tenets in today’s legal world where new technology has become a hot topic and considerations of diversity, equity, and inclusion are now front of mind, both for clients and for firms.

MODEL RULE 8.4(G) AND ITS CONSTITUTIONAL IMPLICATIONS

In 2016, the American Bar Association added a new rule, Rule 8.4(g), to the Model Rules of Professional Conduct. That Rule provides:

It is professional misconduct for a lawyer to:

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

Various commentary accompanied the Rule:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients: interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. *Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.* [Italics added.]

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law....A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

The Rule in the courts

Though various iterations of the Rule have been adopted in some states, some courts have questioned the Rule's appropriateness and constitutionality.

Colorado has a rule similar to Rule 8.4(g), which was in place prior to the adoption of the Model Rule and was challenged in an appeal from the hearing board of the Office of the Presiding Disciplinary Judge (hearing board) in 2021.¹ The Colorado rule states:

It is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process[.]²

Defendant challenged the rule, arguing that it violated both the First and Fourteenth Amendments as unconstitutionally overbroad and vague.³ Notably, the Colorado rule differs from the Model Rule because it contains the limiting phrase "in the representation of a client," as opposed to the broader phrase in the Model Rule "in conduct related to the practice of law." On appeal, the Colorado Supreme Court affirmed the hearing board's findings and dismissed the defendant's First and Fourteenth Amendment claims.⁴

Specifically, the court found that, although the rule did prohibit some speech "that would be constitutionally protected in other contexts," it did not violate the First Amendment because the rule served the compelling state interest of "regulating the conduct of attorneys during the representation of their clients, protecting clients, and other participants in the legal process from harassment and discrimination, and eliminating expressions of bias from the legal process."⁵ The court held the rule was narrowly tailored because in order to violate the rule, an attorney's speech must: (i) occur in the course of representing a client; (ii) exhibit or intend to engender bias against a specific person belonging to a protected class; and (iii) be directed at a specific person involved in the legal process.⁶ The court also highlighted that only four other lawyers had been sanctioned under the rule in over 30 years; therefore, the

rule was not overbroad and did not create a chilling effect on speech.⁷

Last, the court found that the rule was not void for vagueness in violation of the Fourteenth Amendment as applied because: (i) Defendant's use of an anti-gay slur in reference to a judge was clearly understood to be an anti-gay slur; (ii) it occurred in the course of representing a client; and (iii) thus, the conduct was clearly prohibited under the rule.⁸

Ultimately, the court upheld the Colorado rule as constitutional. The Model Rule, on the other hand, may face challenges based on its broader scope, extending outside of representation of a client. A Pennsylvania lawsuit addressed this potential weakness.

In a pre-enforcement action for violating the First and Fourteenth Amendments, the US District Court for the Eastern District of Pennsylvania held that the Pennsylvania version of Rule 8.4(g) was unconstitutional.⁹ The Pennsylvania version of Rule 8.4(g) stated:

It is professional misconduct for a lawyer to: ... (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules. PA ST RPC Rule 8.4.

Notably, the scope of this rule, "in the practice of law," is broader than the Colorado rule and seems substantially similar to the scope of the Model Rule: "in conduct related to the practice of law."

The district court held that the rule was overbroad and not narrowly tailored. The rule violated the First Amendment because the rule governed speech "far beyond ... a judicial proceeding or representing a client."¹⁰ The court emphasized that the rule would

limit speech outside of the "legal process," such as seminars or conferences offering legal education credits.¹¹ The court rejected the argument that this speech could be regulated as "professional speech," stating that the covered settings extended beyond a professional environment.¹²

Additionally, the court found that the rule constituted unconstitutional viewpoint discrimination in violation of the First Amendment.¹³ The court held "Rule 8.4(g) ultimately turns on the perceptions of the public to Plaintiff's speech and then the judgment of the government agents to investigate the incident or administer some form of discipline."¹⁴ The court concluded "[b]y focusing on the speaker's intention, the regulation extends to simple offensive acts that are generally insufficient for federal anti-harassment liability."¹⁵

In contrast to the Colorado ruling, the Pennsylvania court did not find the goals of "eradicating discrimination and harassment, ensuring that the legal profession functions for all participants, maintaining the public confidence in the legal system's impartiality, and its trust in the legal profession as a whole" sufficient to meet a compelling state interest.¹⁶ Though the court praised the goals as "aspirational," it also criticized them as "largely unfocused" and emphasized a slippery slope of broad strokes that impinge on constitutional rights.¹⁷

The broad nature of the rule led the court to conclude it was also both over-inclusive, capturing speech beyond the "administration of justice," and under-inclusive, failing to reach the conduct of those involved in dispute resolution processes.¹⁸ Furthermore, the court held that Rule 8.4(g) was not the least restrictive means of advancing the interest of the state.¹⁹ Specifically, the court pointed out that Pennsylvania Rule of Professional Conduct 8.4(d) already prohibits the conduct addressed in Rule 8.4(g) but is limited to legal proceedings. Rule 8.4(d) states: "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."²⁰ Without further evidence that there was a compelling interest to regulate speech outside of the administration of justice, the court

held that Rule 8.4(g) was not the least restrictive means of accomplishing its goals.²¹

The court also held that the rule violated the Fourteenth Amendment because it was unconstitutionally vague. The unclear definitions of various terms in the rule led the court to conclude that there was insufficient guidance to implement the rule in a “precise, consistent manner.”²²

The District Court held Pennsylvania’s Rule 8.4(g) to be unconstitutional and suspended its enforcement. Due to its similarity to the Model Rule, other jurisdictions implementing substantially similar rules should be on alert to similar challenges.

Analysis and arguments

The Rule (and its various iterations adopted in a number of states) is controversial, with legal scholars debating its appropriateness and constitutionality.

Some commentators believe the Rule to be overbroad and an unconstitutional infringement on free speech. Professor George W. Dent, Jr. argues that Rule 8.4(g) violates the First Amendment and suggests that the proponents of the Rule may have a more pernicious goal: “The speech code imposed by 8.4(g) may not be the end goal but merely one more step in the campaign to end free speech and to substitute a standard of partisan political correctness for what any American is allowed to say.”²³

Can the Rule be read to regulate lawyers’ conduct outside of their delivery of legal services, such as conduct at social events, simply because it is related to the practice of law? Is classroom teaching included within the ambit of the Rule? Professor Dent points to the legislative history of Rule 8.4(g) to illustrate the potential breadth of its coverage, which might include political discussions, letters to the editor, firm social functions, or any event in which the lawyer discusses the law.²⁴

He goes on to note how the Rule might be used perniciously:

New Rule 8.4(g), as illuminated by Comment 3, however, forbids speech that, in the opinion of the members of a tribunal, manifests “bias” – *i.e.*, is unreasoned – in enumerated categories in “conduct related to the practice of law.” The rule, then, is a weapon for the exercise of raw political power; the power to decide which views about public issues are well-reasoned and permitted and which “manifest ... bias or prejudice” and should be punished.²⁵

Professor Josh Blackman similarly urges caution in connection with Rule 8.4(g): “At bottom, this Rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.”²⁶

Others assert that it is a wholly appropriate regulatory exercise in an area badly in need of attention. Professor Latonia Keith argues that “continual cultural competency education is necessary to manifest a cultural shift within our profession.”²⁷

Professor Rebecca Aviel also supports Rule 8.4(g). “There is no obvious reason that truthfulness is a higher virtue for lawyers than nondiscrimination.... Whether we think of it as a ‘largely symbolic gesture’ or not: Rule 8.4(g) is a project to reshape the norms of the legal profession so that discrimination and harassment come to be seen as similarly grievous as misrepresentation and dishonesty.”²⁸

Professor Stephen Gillers similarly argues that Rule 8.4(g) is not simply a notice of conduct subject to discipline but also serves two loftier goals:²⁹

First, it tells the bar as a whole that its licensing authority deems the behavior the rule describes as unacceptable. A lawyer who looked at many current state ethics codes would not get that message because the codes have no rule or a quite narrow rule addressing biased or harassing conduct in law practice. Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct in law

practice, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.³⁰

Gillers dismisses the criticism that Rule 8.4(g) is “a sop to political correctness,” instead arguing that it is a response to a “real problem faced by members of the groups it aims to protect.”³¹

Should the Rule be applied to issues of diversity and inclusion?

As controversial as Rule 8.4(g) is in some quarters, its goal is to make the legal profession more fair. Comment 4 to Rule 8.4(g) states in part that “lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule.” Veronica Root Martinez asserts that the purpose of Model Rule 8.4(g) is not limited to disciplining harassing or discriminatory conduct, but “[i]nstead, the goals and objectives are aimed at achieving true inclusion and acceptance of all peoples within the profession.”³²

To accomplish this purpose, she states that Rule 8.4(g)’s opponents must be particularly persuasive in explaining why attorneys should retain the right to engage in discriminatory conduct and harassing speech and not yield that potential First Amendment right in order to maintain their law licenses.

The contours of Rule 8.4(g), however, haven’t been fleshed out yet: we don’t know how a state disciplinary authority would prove that an attorney had violated the rule; we don’t know if the First Amendment protects speech that conflicts with the rule; and, most of all, we don’t know if this is the best way to solve the problems of bias and promote diversity and inclusion. We do know, however, that our profession benefits from a diversity of voices and experiences.

WORKING FROM HOME

COVID-19 has tested us, and we have adapted. Bar associations across the nation also rose to the challenge to help us address the new realities of our practice in a manner that is consistent with our ethical obligations as attorneys.

The basic concepts

Model Rule 5.5 governs the unauthorized practice of law. Although the definition of “the practice of law” is fuzzy, here’s a basic guideline: it is the application of legal principles to a client’s particular circumstances. We can distinguish this working definition from general discussions of “what the law is.” Once a lawyer uses legal knowledge to help a client’s particular circumstances, though, that’s likely to be considered the practice of law. And states want to be able to monitor that practice. But when the pandemic hit and people couldn’t practice from their offices, they retreated to their homes or to other locations—some of which were in places in which they were not licensed to practice law.

In ABA Formal Opinion 495, the ABA’s Standing Committee on Ethics and Professional Responsibility made some inroads, all while hedging its bets:

If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee’s opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the “licensing jurisdiction”) even from a physical location where the lawyer is not licensed (the “local jurisdiction”) under specific parameters.

The opinion went on to develop some safe harbors:

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

the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.³³

The opinion goes on to say, unsurprisingly:

Comment [6] [to Rule 5.5(c)(4)] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely.

Several states have likewise developed their own advice for working remotely. California, for example, issued a Draft Formal Opinion Interim No. 20-0004, *Ethical Obligations When Working Remotely*.³⁴ And the Pennsylvania Bar Association Formal Opinion 2020-300 on Virtual Practice gave this advice:

At a minimum, when working remotely, attorneys and their staff have an obligation under the Rules of Professional Conduct to take reasonable precautions to assure that:

- All communications, including telephone calls, text messages, email, and video conferencing are conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information;
- Information transmitted through the Internet is done in a manner that ensures the confidentiality of client communications and other sensitive data;

- Their remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form;
- Proper procedures are used to secure and back up confidential data stored on electronic devices and in the cloud;
- Any remotely working staff are educated about and have the resources to make their work compliant with the Rules of Professional Conduct; and
- Appropriate forms of data security are used.

In a second opinion, ABA Formal Opinion 498, the ABA reminded us that Rules 1.1 (competence), 1.3 (diligence), and 1.4 (communication) still apply, naturally enough, to both the virtual and real practice of law. Rule 1.6 (confidentiality) created new worries for the virtual practice of law: When a lawyer shares a home with people who are not part of that lawyer's law practice, what special risks get created when the lawyer is working from home? Moreover, the supervisory rules (Rules 5.1 and 5.3) don't disappear just because the lawyers and non-lawyers who must be supervised aren't working down the hall from those who have the duty to supervise.

Here's the bottom line: First, all the rules regarding the unauthorized practice of law still apply. You are practicing law in the jurisdiction in which you are actually sitting while working remotely, but now the rules have some flexibility. The key consideration is how you hold yourself out to the public. In essence, you may not establish "an office or other systematic and continuous presence" where you aren't licensed. Every attorney potentially engaged in such practices should check the local rules, including both those of the state in which the lawyer is working and the places where the lawyer is barred, as both may have rules that apply. Second, technology is a blessing and a curse: exercise care and focus on cybersecurity. Third, you must always uphold your duties of clear communication, diligence, and competence, even while working remotely. Fourth, the ABA has a Cybersecurity Handbook to help implement security protocols.³⁵

The everyday realities of information technology

We have all seen the “I am not a cat” video where a lawyer in a Zoom court hearing accidentally appeared as a cat on screen. Although the widely shared video provided a much-needed moment of levity during the pandemic, it also serves as a reminder of our ethical obligations regarding technology. Comment 8 to Rule 1.1 says:

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

If you are not at a big firm with a cutting-edge IT department, you should consider hiring an IT consultant to advise as to the use of technology, including the purchase of new technology and its use. You must protect both your hardware and software systems from unauthorized access. Such measures may include encryption, anti-virus measures, security updates, secure routers, and measures to address stolen identities.

The security of Dropbox or other cloud storage methods is of paramount concern when transmitting confidential documents. You need the surefire ability to lockout unauthorized collaborators, track access, and entry. Consider a system that encrypts data during transmission, such as Axel. Before commencing use of any system that populates forms through a cloud-based system, complete a thorough review of the security aspects of each program. Who can get to the information you put into cyberspace? Are there alternatives that provide better security?

Vet your retention agreements for consultants, vendors, and experts to make sure that they comply with your cybersecurity policies, or you might run afoul of Rules 5.1 and 5.3. Many clients are requiring law firms to sign and update cybersecurity policies.

Another concern when working remotely is protecting confidentiality. There are benefits and risks in all of the virtual communication and videoconferencing platforms: Zoom, Teams, Chime, etc. It is both difficult and necessary to keep up with all the latest security measures. Additionally, “smart speakers” such as Alexa and Google Nest are always listening.

Develop and test your Emergency Preparedness Plan. Everyone needs one, regardless of the size or type of office or company. It is easy to have a phone tree, but more complicated to develop and implement a data breach policy and a plan to communicate with clients in the event of a breach or of a ransomware attack.

For notices and service of process, there should be means to stay in touch with your team. Is anyone checking on what actually came to the office?

Finally, if you print at home, don’t forget to SHRED! And use a cross-cut shredder.

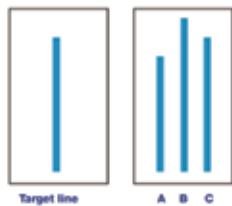
SOCIAL SCIENCE AND SOCIAL NORMS

Why do lawyers—smart lawyers who should know better—do things that violate our ethics rules? It’s easy to label these lawyers as greedy or evil, but most of the time, that’s not why they violate the rules. More often, it’s because lawyers, being human, are subject to countless cognitive errors.³⁶ We’re subject to errors involving our own patterns of thinking (psychology) and errors involving group dynamics (sociology). There are hundreds of ways that human thinking can go astray, but here are some cognitive errors that can explain, at least in part, why good lawyers do bad things.

Social pressure

Have you ever wondered why kids who have well-behaved friends get into trouble less than those kids who surround themselves with not-so-well-behaved friends? You’re aware of peer pressure, but peer pressure involves overt demands to behave in a certain way. Social pressure involves subconscious behavior. In a series of experiments by Solomon Asch,³⁷ Asch hired actors to interact with a

real experimental subject to do a “vision test.” That vision test asked those assembled (the actors and the experimental subject) to say which of the lines on one card (showing lines A, B, and C) was like the single line on the target card:



The actors had all agreed in advance to call out the same wrong answer every time the person administering the experiment brought up a set of these cards. Out of a set of 18 trials, 12 involved the actors giving the incorrect answer, and of those 12 “critical trials,” 75 percent of the experimental subjects gave the wrong answer at least once. In the control group, where there were no actors conspiring to give the wrong answer, only one percent of the subjects gave the wrong answer. After the experimental subjects were debriefed, the reasons for the wrong answers fell into two buckets: “I was embarrassed to call out a different line” or “I figured they had a better view of the cards.”

It doesn’t take too many people going in the wrong direction to take others with them. Two or three people in a group of eight or 10 can change the dynamics. Why does this matter? Let’s take billing behavior as an example. If a junior associate sees a senior lawyer fudge the amount of time that something took, even though Model Rule 5.2 tells the junior associate that she’s responsible for her own ethics decisions, that junior associate will be more likely to follow the senior lawyer’s lead and fudge her own hours, too. (That’s also why Model Rules 5.1 and 5.3 require managers and supervisors to establish ethical “guardrails” to encourage ethical behavior.)

Diffusion of responsibility

Sometimes, someone will be aware of a violation but won’t report it to a supervisor or manager, perhaps out of fear of retaliation, but more often because the person believes that “someone else will report it.” If “everyone” knows about something, it’s less likely

that any one of the people in the “everyone” group will step forward. Imagine what that cognitive error does when someone in a firm sees someone else committing outright fraud. If only one person sees it (and that person isn’t afraid to report it, perhaps through an anonymous hotline), perhaps management will find out about the fraud.³⁸ But if five people witness the fraud, each of them is less likely to report it, cognitively speaking. And yet, report it we must, because we can’t run afoul of rules like Model Rule 3.3 (candor to the tribunal), Rule 3.4 (fairness to opposing party and counsel), Rule 4.1 (truthfulness in statements to others), and the dreaded “rat on” Rule 8.3 (reporting misconduct).

Cognitive dissonance³⁹

If we believe that we are good people, and we catch ourselves doing a bad thing, our brains will find a way to rationalize our bad behavior so that we can continue to think of ourselves as good people. That’s true of lawyers who see their colleagues doing something wrong, sit silently by, and let that bad behavior go unquestioned. Our favorite example of this behavior is the behavior of partner Mahlon Perkins and associate Joe Fortenberry in the *Kodak-Berkey* case. Perkins told the court, in the *Kodak-Berkey* antitrust case, that his law firm didn’t have certain documents (and thus couldn’t produce them) even as his associate Fortenberry was allegedly whispering in his ear that the firm *did* have those documents.⁴⁰ Not only did Perkins lie about the existence of the documents, but he lied on affidavits after the fact. Eventually, his conscience bothered him enough to come clean, and he served prison time for his falsehoods.⁴¹ Lesson: your brain may well get you to do things that will mortify you later, and admitting that you’ve done something wrong is hard when cognitive dissonance gets in the way.⁴²

We list these examples of cognitive errors to remind you of two things: first, not every bad act comes from a bad intent, and second, although an awareness of cognitive errors might help you avoid inadvertent bad acts, creating smart policies⁴³ will help even more.

SOCIAL MEDIA AND ETHICS

We're impressed by our friends who have managed to stay away from social media, as they have much more time in their days than those of us who play in the social media sandbox do. Most of the time, posting is harmless.⁴⁴ But lawyers need to think about some ethics rules that interact with our social media activities.

Think before you post (or tweet)

When we were growing up, our teachers warned us that our misbehavior would be on our permanent records. We didn't believe them. But the Internet is forever, and even a deleted post is recoverable, especially as a screenshot. Be careful not to include confidential information (Rule 1.6) in your posts and avoid making derogatory remarks.⁴⁵ Even in email, your words can go astray or be misinterpreted. Who among us hasn't regretted a "reply all"? Your tone in an email or social media post is clear in your mind, but the written word is different from the spoken word: your readers can't hear your gentle humor or how you're stressing certain words in your head as you type, and some words are inherently misleading in writing. (Our favorite example, in response to a request to forward a previously sent email that went astray, is "I resent that email.") Remember: anything that you put into writing can be blown up into an exhibit later. If you want to vent, do so in the privacy of your home.

Beware endorsements on LinkedIn

Model Rule 7.1 prohibits a lawyer from "mak[ing] a false or misleading communication about the lawyer or the lawyer's services." We've seen our friends make some creative statements on LinkedIn about our abilities. Although the generosity of those friends is heartwarming, leaving a false endorsement up on LinkedIn is a "communication about the lawyer's services" (see Rules 7.1 and 7.2(a) & (c)),⁴⁶ and the better practice is to delete and disallow endorsements. We're all for branding, but make sure that your branding avoids misrepresentation.

Getting clients from Groupon? Think again

It's tempting to think of new ways to attract clients, but the American Bar Association has warned us, in Formal Opinion 465 (2013), that deal-of-the-day marketing is a bad idea. In its abstract, that Formal Opinion warns us:

Lawyers hoping to market legal services using these programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising, competence, diligence, and the proper handling of legal fees. It is also incumbent upon the lawyer to determine whether conflicts of interest exist. While the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.⁴⁷

We want to concentrate on three aspects of that option: (i) making sure that the "deal" doesn't create a current client or potential client relationship; (ii) managing the client's expectations about what you can do; and (iii) avoiding conflicts of interest. These points are straightforward. First, if a person forms a reasonable belief that you are her lawyer, you are, so any deal-of-the-day "coupon" has to state clearly that "until a consultation takes place with the lawyer, no client-lawyer relationship exists and that such a relationship may never be formed if the lawyer determines there is a conflict of interest, the lawyer is unable to provide the required representation, or the lawyer declines representation for some other reason."⁴⁸ Second, if the deal-of-the-day involves something simple, but the person sitting in front of you has a complex issue, an engagement letter that doesn't set forth the maximum numbers of hours or say "your case's complexity may vary" can land you in hot water.⁴⁹ And finally, you have no idea, when someone buys a Groupon, if that person will make it past your firm's conflicts check. So, as Gary Larson once drew in a fabulous cartoon, "... [n]ature says: 'Do not touch.'"⁵⁰

Social media isn't private

You can have all of your settings limited to family and friends, but all it takes is one friend to take one screen shot for that image, or post, or tweet to go viral. "Private" ... *isn't*. Period.⁵¹

Bottom line for social media: Think before you engage. That permanent record is, in fact, permanent.

PRIVILEGE AND CANDOR

Confidentiality

The lawyer-client relationship is based on trust and confidence:

Rule 1.6: A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted....

The law's protection of confidential communications between lawyer and client and attorney work product helps promote justice by providing a client with assurance that she can speak freely with her counsel and receive forthright advice. But some lawyers try to use the privilege as a tactic and attempt to prevent disclosure by overextending its bounds.

As noted by the DC Court of Appeals in *Permian Corp. v. United States*:

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.⁵²

By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding

the fruits of an attorney's trial preparations from the discovery attempts of the opponent.

Because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed,⁵³ and courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure.⁵⁴ The attorney-client privilege is not designed for such tactical employment.

Acting competently to preserve confidentiality

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.⁵⁵

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

Subsequent disclosure

The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.⁵⁶

A subsequent disclosure through a voluntary act constitutes a waiver even though not intended to have that effect. It is important to distinguish between inadvertent waiver and a change of heart after voluntary waiver. Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure.

Once the client knows or reasonably should know that the communication has been disclosed, the lawyer must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege. Otherwise, apparent acceptance of the disclosure may reflect indifference to confidentiality.

In *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, the court set forth the factors to be considered when inadvertence is claimed to be excusable:

In considering all the circumstances that may justify a finding of inadvertent waiver, the *Hartford Fire Ins. Co.* court examined the following elements: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the “overriding issue of fairness.”⁵⁷

Candor toward the tribunal

Rule 3.3 states:

(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;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(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.

Having offered material evidence in the belief that it was true, a lawyer 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.

A lawyer submitting or permitting the submission of false evidence is subject to discipline.⁵⁸ Certain violations may be remedied through appropriate sanctions. Criminal liability exists for perjury or subornation of perjury. Knowing use of perjured testimony may be a basis for disqualifying the lawyer from further representation, granting a new trial, vacating a judgment, or setting aside a settlement based on the false evidence. A litigant has no damages remedy against an opposing lawyer for an alleged perjurious client.

CONFLICTS WITH CONFLICTS WAIVERS

For the conflicts rules themselves, see Rules 1.7, 1.9, and 1.18. The basic issue with conflicts waivers is that they require informed consent from both clients—and the more information that you disclose (to help with the “informed” part of “informed consent”), the more you risk revealing confidential information about one or both clients, in potential violation of Rule 1.6. Further, waivers are revocable:

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client, and whether material detriment to the other clients or the lawyer would result.⁵⁹

Consent requires consultation, and you should get those consents in writing. Sparse “form” conflict

letters may not be sufficient.⁶⁰ But remember, not every conflict is waivable.⁶¹

The hot issue now is advance waivers: asking your client to consent to future, not yet known conflicts described in general terms. As a general rule, advance waivers are permissible, but individual waivers will be enforced only where the client providing the waiver gave informed consent. That informed consent must comply with Rule 1.7(b). Comment 22 to Rule 1.7 states in part:

The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

In practice, courts have recognized and enforced broad and open-ended advance conflict waivers granted by sophisticated clients, but there are cases in which courts have considered advance waivers invalid because the consent was not “informed” consent.⁶² One example is *Mylan Inc. v. Kirkland & Ellis LLP*.⁶³ In that case, Mylan sued Kirkland & Ellis (K&E), seeking K&E’s disqualification from representing the Israeli pharma company Teva in Teva’s hostile \$40 billion bid for Mylan. In response to Plaintiff’s Motion for Preliminary Injunction, the US District Court reviewed the advance waiver that Mylan provided in an engagement letter with K&E and ultimately concluded that the advance waiver was ineffective. Among other things, the magistrate explained that the advance waiver was not “informed” consent,

because there was no specific reference to potential takeover bids in the waiver, so the advance waiver was not “informed” as to that type of work.

In *Worldspan L.P. v. Sabre Group Holdings, Inc.*, Alston & Bird represented Worldspan in tax matters for a number of years.⁶⁴ In the engagement letter, Worldspan granted Alston & Bird an advance waiver that stated that the firm would not take on matters substantially related to its work for Worldspan, or matters that would involve the use of confidential information against Worldspan. Worldspan later sued Sabre Group, and Alston & Bird appeared to represent Sabre. In response to Worldspan’s motion to disqualify the firm, the US District Court held that the advance waiver was invalid because it did not say anything about directly adverse litigation, and six years had passed since the advance waiver had been negotiated and when the firm had appeared on behalf of Sabre. The court concluded that the consent was not “informed” and granted the motion to disqualify the firm.⁶⁵

CONCLUSION

We have discussed several ethics issues in this article, but the overarching principle is the same: As fiduciaries, we must have a heightened sense of our duties. Whether we’re working from home, asking for conflicts waivers, or engaging in public discourse, we must remember to put our clients’ interests ahead of our own. 📌

Notes

- 1 Matter of Abrams, 488 P.3d 1043 (Colo. 2021).
- 2 CO ST RPC Rule 8.4(g).
- 3 Matter of Abrams, 488 P.3d at 1048.
- 4 Id. at 1049.
- 5 Id. at 1050, 1052.
- 6 Id. at 1053.
- 7 Id. at 1053-1054.
- 8 Id. at 1054 (“Any objective person would find that Abram’s specific use of an anti-gay slur in communicating with his clients about the presiding judge violated Rule 8.4(g). The word is pervasively understood as any anti-gay slur.”).
- 9 Greenberg v. Goodrich, 593 F. Supp. 3d 174 (E.D. Pa. 2022).
- 10 Id. at 218.

- 11 *Id.* at 219.
- 12 *Id.* at 209-210. (“It is a stretch to consider statements made by attorneys outside of [the context of a pending case or the administration of justice] to be considered professional speech merely because it is uttered by an attorney”).
- 13 *Id.* at 212.
- 14 *Id.*
- 15 *Id.* at 211.
- 16 *Id.* at 214 (citation omitted).
- 17 *Id.*
- 18 *Id.* at 215.
- 19 *Id.* at 218.
- 20 PA ST RPC Rule 8.4(d).
- 21 Greenberg, 593 F. Supp. 3d at 218.
- 22 *Id.* at 225.
- 23 G. Dent, Jr., Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political, 32 Notre Dame J.L. Ethics & Pub. Pol’y 135, 182 (2018) (“Perhaps proponents of Rule 8.4(g) do not intend to comply with First Amendment precedent; perhaps they intend to initiate a ‘cultural shift’ in the meaning of the First Amendment and of the role of free speech in our society. It may once have been axiomatic that free speech protected not only thoughts we like but also ‘the thought we hate.’ Being offended by the speech of others was once considered a small price for vigorous debate in a democracy. The political right strived to muzzle speech; the left struggled to keep it free. Now the left seeks to throttle speech, [such] as in college speech codes ... Proponents of the rule cite the special role of lawyers, but they acknowledge no value in free speech for lawyers or anyone else”).
- 24 *Id.* at 142-143 (“The Ethics Committee Report refers to ‘organized bar-related activities to promote access to the legal system and improvements in the law.’ The latter would include any talk or debate about possible legislation. The Report also mentions ‘social activities in connection with the practice of law.’ This would include a firm golf outing or lunch with a client and any event at which a lawyer discussed the law. If a lawyer travels to a law-related event, the entire journey is ‘connect[ed] with the practice of law.’ Any talk to any group by a lawyer about the law would be “conduct related to the practice of law.” A letter to the editor of a newspaper or an entry on a blog or in other social media would seem to be ‘conduct related to the practice of law’ if the author is identified as a lawyer.”)
- 25 *Id.* at 145.
- 26 Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law, 30 Geo. J. Legal Ethics 241, 265 (2017).
- 27 Keith Latonia, Cultural Competency in a Post-Model Rule 8.4(g) World, 25 Duke J. Gender L. & Pol’y 1, 41 (2017) (“In the face of a legal profession and judicial system replete with bias, discrimination and harassment, the American Bar Association is to be commended for tackling a controversial topic and successfully inserting an anti-discrimination and anti-harassment provision into the black letter of our Rules of Professional Conduct.”).
- 28 Rebecca Aviel, Rule 8.4(g) and the First Amendment: Distinguishing between Discrimination and Free Speech, 31 Geo. J. Leg. Ethics 31, 76 (2018).
- 29 See Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 195 (2017).
- 30 *Id.* at 200.
- 31 *Id.* at 199.
- 32 Veronica Martinez, Combating Silence in the Profession, 105 Va. L. Rev. 805, 835 (2019).
- 33 (Footnote omitted.)
- 34 Available at <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000027511.pdf>. See also District of Columbia Court of Appeals Committee on Unauthorized Practice of Law Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic, <https://www.dccourts.gov/sites/default/files/2020-03/CUPL-Opinion-24-20.pdf>; Supreme Court of Florida, Opinion No. SC20-1220 issued May 20, 2021 by the Supreme Court of Florida, available at <https://www.floridasupremecourt.org/content/download/743446/opinion/sc20-1220.pdf>.
- 35 The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals, Second Edition.
- 36 For a marvelous book that describes hundreds of these errors, see Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (ABA 2022).
- 37 For a short description of the Asch social conformity experiment, see, e.g., Saul McLeod, Solomon Asch - Conformity Experiment, Simply Psychology (2018), available at <https://www.simplypsychology.org/asch-conformity.html#:~:text=Solomon%20Asch%20conducted%20an%20experiment,to%20the%20ambiguous%20autokinetic%20experiment>.
- 38 Of course, if management is perpetrating the fraud, that’s another story. See, e.g., Enron, WorldCom, Wells Fargo, Volkswagen, Countrywide.
- 39 For a nice write-up explaining cognitive dissonance, see Saul McLeod, Cognitive Dissonance, Simply Psychology (2018) <https://www.simplypsychology.org/cognitive-dissonance.html>.
- 40 For a down-and-dirty description of what happened, you can read the one-page version of this story in Ethics In Practice: Lawyers’ Roles, Responsibilities, And Regulation (D. Rhode, editor, 2003) 95 https://www.google.com/books/edition/Ethics_in_Practice/66Ocm0OrlVIC?hl=en&gbpv=1&dq=mahlon+perkins&pg=PA95&printsec=frontcover. Apparently, Fortenberry himself denied that he ever whispered in Perkins’s ear about the documents. See C. Evan Stewart, The Associate’s Dilemma: Joe Fortenberry, Mahlon Perkins, and the Kodak Antitrust Trial, Fed’l Bar Counsel Q. 26, 29 (June/July/Aug. 2021), <https://www.cohengresser.com/app/uploads/2021/08/Federal-Bar-Council-Quarterly-Jun-Jul-Aug-2021.pdf>.

- 41 Lying to the court and serving time isn't a one-off. For another classic case, this one about John Gellene, see Milton C. Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004).
- 42 To see how cognitive dissonance played a role in Enron's downfall, see <https://www.youtube.com/watch?v=9ejzBYus8qE> (a scene from *Enron: The Smartest Guys in the Room* (Magnolia Home Pictures 2005)).
- 43 To learn how behavioral economics can help you create smart policies, take a look at Cass R. Sunstein and Richard H. Thaler, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009).
- 44 Beware of posting vacation pictures while you're out of town. That is an open invitation to criminals.
- 45 Whether or not your jurisdiction has adopted the controversial Rule 8.4(g) ("It is professional misconduct for a lawyer to ... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law"), posting nasty things lessens you as a person. There are countless studies about how reading awful tweets affects mental health. Cf., e.g., Angela Watercutter, *Doomscrolling Is Slowly Eroding Your Mental Health*, *Wired* (June 25, 2020), <https://www.wired.com/story/stop-doomscrolling/>. Moreover, if you're ever planning to apply for a new job, you can be sure that someone in HR is reading your publicly available posts.
- 46 Pennsylvania Bar Association's Formal Op. 2014-300 (<https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf#search=%22linkedin%22>) is a wonderful compilation of social media dos and don'ts related to the ethics rules.
- 47 ABA Formal Op. 465 (2013) at 1.
- 48 *Id.* at 4.
- 49 *Id.* at 5 (footnotes omitted) ("The lawyer should assess the amount of time and effort necessary to complete the matter, and, if the offer limits the number of hours of legal services the lawyer is obligated to provide, should address the possibility that the allotted time may expire before the representation is concluded. Where appropriate to the scope of services to be provided, the lawyer has an obligation to communicate the fact that additional services may or will be required to complete the representation beyond those included in the deal, and to advise whether the client will be obligated to pay additional fees in that event, and if so, in what amount or at what hourly rate.").
- 50 See generally Opinion R-25, State Bar of Michigan Professional Ethics Committee, available at https://www.michbar.org/opinions/ethics/numbered_opinions/R-025.
- 51 This life lesson is akin to the life lesson that every microphone is a "hot mic."
- 52 665 F.2d 1214, 1219-20 & n.11 (D.C.Cir.1981).
- 53 See *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d at 675; 8 J. Wigmore, *Evidence* § 2291, at 554 (McNaughton rev. 1961).
- 54 See Wigmore, *supra* note 53, at § 2327.
- 55 See Rules 1.1, 5.1, and 5.3.
- 56 For a fun take on how easily clients can think that something is protected just by calling it privileged, look at some of the tweets from Zen Lawyer Journey, https://twitter.com/zenlawyerjourn1?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.
- 57 136 F.R.D. 179, 184 (E.D. Cal.1991) (citing *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal.1985) (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985)).
- 58 See *Attorney Grievance Comm'n v. Kahn*, 431 A.2d 1336, 1346 (Md.1981).
- 59 Rule 1.7, cmt. 21; see also D.C. Bar Assoc., *Ethics Opinion 317—Repudiation of Conflict of Interest Waivers* (discussing the complication of a lawyer's good faith reliance on such a waiver), available at <https://www.dcb.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-317>.
- 60 See, e.g., *Florida Ins. Guar. Ass'n. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990) (conflict letter written in general terms held insufficient). Cf. *Office of Disciplinary Counsel v. Witmark*, 522 A. 2d 522 (Pa. 1987) (consent given at conclusion of engagement ineffective).
- 61 Humans—and yes, lawyers are still humans—have an almost infinite capacity to make certain types of cognitive errors that get them into hot water. It's far easier to talk yourself into thinking that a direct conflict isn't actually direct, or that you won't have your duty to one client materially limit your ability to represent a different client. For a marvelous book that discusses these types of cognitive errors, see Jennifer K. Robbennolt & Jean R. Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making* (2d ed. 2021).
- 62 Cf. Am. Bar. Assoc., *Formal Opinion 05-436* (May 11, 2005), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_05_436.authcheckdam.pdf; N.Y. State Bar Assoc. *Ethics Opinion 990* (November 12, 2013), available at <https://nysba.org/ethics-opinion-990/>; District of Columbia Bar *Ethics Opinion 309 – Advanced Waivers of Conflicts of Interest*, <https://www.dcb.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-309>.
- 63 Case No. 2:15-cv-00581, 2015 WL 12733414 (W.D. Pa. Jun. 9, 2015) (described in <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2015/kirkland-ellis-teva/>).
- 64 5 F. Supp. 2d 1356 (N.D. Ga. 1998).
- 65 Cf. *Macy's Inc. v. J.C. Penney Corp.*, 2013 NY Slip Op. 04891 (App. Div., 1st Dept. June 27, 2013) (affirming the trial judge's denial of J.C. Penney's motion to disqualify Jones Day from representing Macy's); *Galderma Laboratories v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013) (enforcing the conflicts waiver).