

Recommended Reading

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Trade Secrets, Ethics and Maintaining Technological Competence

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This paper accompanies a live presentation in which the questions below, and certain others not included here, will be asked to the audience and the responses polled. The questions and discussion that follow will be based primarily on the hypothetical set of facts and a few additional factual scenarios. The intent of this exercise is to explore the potentially relevant ethical rules and considerations arising from the varying circumstances.

The discussion in this paper following the hypotheticals and questions contains much of the material useful in providing answers to the polled questions. You might find it more instructive, more entertaining and as to the audience participants perhaps provide some more helpful data if you do not read or review the material following the questions before providing your answers – this an ethics topic after all, so naturally, you are on your honor to answer according to these guidelines.

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Base Hypothetical: You represent a stodgy old life insurance company that has just acquired an insurtech start-up promising to reinvigorate the client’s business. The acquisition has barely closed, when a competitor of the start-up sues the start-up for unlawful use of the competitor’s trade secrets. The life insurance company’s General Counsel asks you to handle the trade secrets litigation.

In the meantime, a long-time vice-president with the insurance company is trying to figure out the brave new world of insurtech and has asked his assistant to do some searches for him and send him a few articles to review. The assistant does a few searches on the Internet and sends a series of links to articles. The assistant also reminds the VP that the assistant is leaving that evening on vacation. The VP clicks on a few of the links and starts to review the articles when the phone rings.

One of his children is on the line and is stumbling through the beginning of a mea culpa on a bunch of unpaid parking tickets that he has accrued while away at college. While listening to the tap dance, the VP receives an email from “Insurance.Journal” with the subject line “Get our inaugural edition on emerging issues in insurance and reinsurance for free.” The email, addressed to “Dear Insurance Company Executive,” invites the VP to click on a link to “Free inaugural edition.”

Still on the phone, the VP clicks on the link, but nothing happens, his child then relays the staggering figure due to the local police. Taken aback at this parking ticket peccadillo, the VP forwards the email from Insurance Journal to his assistant and asks if he can open and print out a copy of this publication’s article on insurtechs before the assistant leaves on vacation. The VP then heads out to talk with a friend to see about taking care of the parking tickets.

The next morning, the VP finds a typo-filled disjointed article vaguely discussing insurtechs on his desk with a note from his assistant saying this was from the link he sent

yesterday. The VP logs into his computer and sees a note pop-up indicating that all of his files and emails have been encrypted, but a key to unlock them will be provided if a ransom is paid. Neither the VP nor his assistant noticed that when one hovered over the link in the email from Insurance Journal, the link was to a website entitled, <http://insurancejournal.ru>.

* * *

Scenario 1:

The VP calls his IT department and they immediately alert the General Counsel. The General Counsel calls you and she asks what to do. She advises the ransom has to be paid within the next half hour. How would you advise the General Counsel?

- A. You ask if anyone else is having issues and if the VP can just use a different, new computer. The answer comes back only the VP has the problem and, yes, he can use a different computer. So you tell the GC just to toss the old computer and let the VP use the new one.
- B. You ask the GC if they can pay the ransom. The answer is yes, so you tell them to pay. They pay, get the key and the files are unlocked and everything works fine.
- C. You tell the GC to bring in a computer expert vendor and take a look at what happened and decide from there.
- D. You tell the GC you have no idea, but suggest they see if they have cyber insurance.

Scenario 2:

The VP, not wanting to look computer illiterate given the new direction of the company, instead of calling the IT department and General Counsel, calls his parking ticket problem child who is studying computer science to see if he can help. The young man, feeling suitably guilty for racking up all of the parking tickets, confidently says he can fix the problem. The son proceeds to set up a fake email account, removes the hard drive from his father's computer and negotiates the ransom to a manageable amount. The son has a digital currency wallet already (loaded with illegal gambling winnings) and pays off the ransom. The son gets the decryption key and connecting his father's hard drive to his own laptop, he uses the key to unlock the files. He checks everything works on his own laptop before disconnecting and putting the drive back into his father's computer and the VP's company is none the wiser and you hear nothing of the incident.

While the son was "fixing" the problem, you asked your insurer client to collect documents responsive to discovery requests in the trade secret litigation. You timely produce what is collected and state in various pleadings that your client's new subsidiary did not use trade secrets

of its competitor. Your production does not include several emails that, unbeknownst to you, were previously held ransom.

Time goes by and you receive an angry call from opposing counsel on the trade secret claim. Previously unproduced emails from the VP have been posted on the Internet. In some of those emails, employees from the insurtech start-up appear to have admitted to the VP that they used proprietary software belonging to the plaintiff. Opposing counsel accuses you of failing to produce responsive emails and of asserting defenses without a reasonable factual basis. Opposing counsel claims there is no way you adequately investigated your litigation positions and promises to seek appropriate sanctions against you and the client. Does opposing counsel have a solid argument?

- A. No. There is no way you could have known about the missing emails.
- B. Not as to you, but maybe the client.
- C. Yes. Courts do not take kindly to avoidable misrepresentations.

Scenario 3:

The VP is a good friend of yours and knows you are helping the Company with the Trade Secret litigation. Knowing only that his computer is locked, and before calling the IT department or the Company's General Counsel, the VP calls you and asks for your advice on responding the ransom-ware demand.

What do you do?

- A. Tell the VP not to worry. You will take care of everything.
- B. Request a dual representation agreement from the VP and Company to allow you to help the VP.
- C. Advise the VP to call the Company's IT department and/or report the ransom demand to the General Counsel?

In the course of helping the VP, you find out there is damaging evidence about the trade secret matter as well as information that also might harm the VP, what do you do?

- A. Continue to represent the Company and VP.
- B. Continue to represent the Company, but do not disclose the information harmful to the VP.
- C. Disclose the discovered evidence and withdraw from representing both your friend and Company.

Scenario 4:

You are a partner in a 3-attorney firm. Unbeknownst to you, one of your partners receives an email from Insurance.Journal inviting your partner to submit an article for the inaugural edition on emerging issues in insurance and reinsurance. The email, addressed to “Dear Insurance Practitioner,” invites your partner to click on a link. Looking to boost the marketing of your firm, he clicks on the link. Your computer is fine, but your partner’s has seized up. He knows you are busy with the trade secret litigation. He and your other partner assess the situation. They talk with your IT vendor. They decide to discard the seized up computer and set up a new. Everything seems fine. They do not tell you. A month or so later, your client calls saying their new insurtech’s proprietary software is all over the Internet. The client wants you to investigate the source of the leak and take appropriate action.

Does your client have a claim against you and/or your firm? Are you and/or your partners subject to discipline for an ethics violation?

- A. Yes. You had an obligation to protect your client’s information and did not satisfy it. You call your E&O carrier and hope for the best.
- B. No. Your partners acted reasonably to determine what occurred and proceeded based on that understanding.

Does your answer change if you are in a satellite office of a nationwide law firm?

- A. Yes.
- B. No.

Does your answer change if an associate’s computer, rather than a partner’s, was hacked?

- A. Yes.
- B. No.

Scenario 5: The trade secret dispute is being aggressively litigated with local media paying close attention. As the matter is ramping up for trial, word of the VP’s hacked computer and inability to access the records gets out to opposing counsel. You have filed a motion to stay the litigation to determine the details of the hacking and ability to access the records. Opposing counsel makes a statement to the news media that “this is just the latest delay tactic seeking to avoid ever bringing their lying and brazen misconduct in stealing trade secrets worth millions of dollars before a jury.”

Anything wrong with opposing counsel’s statement to the press?

- A. No. This sort of puffery happens all the time and is protected by the First Amendment.
- B. It depends on how close to trial the statement was made.
- C. Yes, it is always wrong to speak in such manner about an active case.

* * *

Scenario 1 Comments:

These all might be defensible responses. Here, the primary consideration for the lawyer is the duty of technological competence under Model Rule of Professional Responsibility 1.1, in particular comment 8, “[t]o 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.” The means by which the lawyer satisfies this obligation is relative as the state of technology is constantly changing. The ABA has recognized this, for example, noting the lawyer can satisfy this obligation either through the lawyer’s own study and investigation or by employing or retaining qualified lawyers and non-lawyer assistants consistent with Rule 5.3. If you have the technical knowledge sufficient to assess the state of infiltration, exfiltration, the nature of the information accessed without authorization and the various State and Federal laws that might be implicated, then you might not need to associate with others that do. But, as the uses and abilities of technology steadily increase, it becomes more likely that a single lawyer will have to rely on others and outside experts to satisfy the lawyer’s duty of technological competence.

In respect of a lawyer’s own computer systems, ABA Formal Opinion 483 provides a comprehensive examination of the duty of technological competence and the factors to consider in satisfying it when the lawyer’s (not the client’s) computer system has been hacked. In short, “Model Rule 1.4 requires lawyers to keep clients ‘reasonably informed’ about the status of a matter and to explain matters ‘to the extent reasonably necessary to permit a client to make an informed decision regarding the representation.’ Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.” And, of particular interest to the trade secret lawyer in this context is the related ABA Formal Opinion 477R, which strongly suggests that if the lawyer is housing a client’s trade secrets on its system or communicating over the Internet with the client or others about such information that there is an obligation to use heightened standards of protection including data encryption.

Scenario 2 Comments:

The safe answer here is C, but both A and B are possible depending on whether the lawyer can establish the steps taken during the document collection effort were reasonable and there was not an undue reliance on the client to confirm everything responsive was provided. The upshot is that a lawyer may well face Federal Rule of Civil Procedure 11 sanctions for presenting inaccurate information to the Court or for failing to reasonably investigate what the client has said is true. Model Rule 3.1 and 3.3 reflect this risk as well. Under Rule 3.1 “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or 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.” And, Rule 3.3(a)(1) confirms that a lawyer shall not knowingly “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”. In a chilling example of the potential ramifications, lawyers for a nitrogen ice cream seller filed a complaint against a competitor including claims for patent infringement and trade secret misappropriation. *Sub Zero Franchising, Inc. v. Frank Nye Consulting, LLC d/b/a The Artic Scoop*, Unpubl. Case No. 2:15-cv-00821-BSJ, D. Utah, Central Division (April 27, 2018). In respect of the trade secret issues, the Court determined that the allegations of misappropriation in the complaint and subsequent identification of a series of individuals with alleged knowledge to support the claim of misappropriation of trade secret information were demonstrably false upon a review of available information. The Court did not accept counsel’s assertion that they relied on their client’s representations when an investigation and subsequent litigation activity should have revealed the inaccuracy to the lawyers. The Court levied a sanction against the firm totaling \$361,840 in fees and costs incurred by the Defendants stating: “[t]he Court finds that the pattern of continuous and repeated misconduct by [counsel] in violation of Rule 11 and 28 U.S.C. §1927, which began with the filing of the original Complaint and continued throughout this case, warrants the imposition of the sanction of Defendants’ entire reasonable attorneys’ fees, costs and expenses incurred in this case. All of Defendants’ fees, costs and expenses were incurred as a direct and proximate result of [counsel’s] violations of Rule 11 and 28 U.S.C. §1927 in this case. Such sanctions are necessary to compensate Defendants for the abusive litigation tactics of [counsel], including in forcing Defendants to defend against claims and allegations which should never have been filed. Such sanctions are warranted to compensate Defendants for the fees and expenses incurred due to [counsel’s] unreasonable and vexatious multiplication of proceedings in this case. Such sanctions are necessary to reimburse Defendants for their out of pocket costs and to make Defendants whole.” *Id.*

The failure to investigate implausible or impossible theories was also behind a sanction levied by a United States District Judge in the Northern District of California against the counsel and the client totaling \$222,937. *Smart Wearable Technologies, Inc. v. Fitbit Inc.*, Unpubl. Case No. 3:17-cv-05068-VC, N.D. Cal. (June 27, 2018) (“The conduct of both Smart Wearable and its lawyers in this litigation was plainly irresponsible and frivolous. Fitbit sent Smart Wearable a letter in May 2017 putting Smart Wearable’s lawyers on notice of why the accused devices did not infringe on the theories that Smart Wearable had asserted. But even though Fitbit gave Smart Wearable a Fitbit engineer’s declaration, an invitation to inspect the source code at Fitbit’s offices, and the bill of materials for an accused device, Smart Wearable and its lawyers did not amend their infringement contentions (or even inspect the source code until much later). Instead, Smart Wearable boldly continued to assert its implausible (and, as the unrebutted evidence at summary judgment showed, impossible) theories of infringement at the case management conference on October 3, 2017. Moreover, Smart Wearable failed to conduct an adequate investigation into the plausibility of its claims by refusing to do a teardown of the devices – even after being informed that the devices did not contain or use the sensors as Smart Wearable alleged.”

Scenario 3 Comments:

Answer B to the first question is probably clear because unknown conflicts might arise, as indicated in the second question. The answer to the second question raises some trickier issues.

ABA Model Rule 3.3 prohibits attorneys from making false statements to a tribunal or failing to correct a statement once known to be false. *Id.* (“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.”). Model Rule 8.4 similarly prohibits attorneys from engaging in conduct involving dishonesty.

When representing multiple clients, if one client appears to have participated in or known of the misuse of the alleged trade secret information, the other clients may become interested in pointing the finger at one another. Here, the company defendant may wish to distance itself from the VP or the VP may wish to keep the information damaging to him from getting out. It may become impossible to satisfy both clients and your own ethical obligations. Absent a sufficient agreement at the outset to handle a conflict arising subsequently, the client’s positions might require withdrawal from representation of both. See e.g., Model Rule 1.16(a)(1) (requiring withdrawal if “the representation will result in violation of the rules of professional conduct or other law”). The comments to Rule 1.7 further provide that “whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client.” The attorney in that situation might be forced to withdraw from representing all of the joint clients. *Id.*; *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984); *Carroll v. Superior Court*, 1012 Cal. App. 4th 1432, 124 Cal. Rptr. 2d 891 (2002).

Counsel can address these concerns about potential conflicts in a multiple-representation context through use of a retention letter that identifies any known potential conflicts, obtains consents and waivers of the conflict and describes the handling that will occur if they arise (e.g., counsel will continue on behalf of one entity but not others should conflict arise). Advance handling of conflicts is provided for in Rule 1.7 (b) (“(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”). Depending on the nature of the discovered information and respective positions of the clients, the safe route may be to select Answer C, withdraw and protect yourself from an ethics violation. See e.g., *LBDS Holding Company, LLC v. ISOL Technology Inc. et al*, Civil Action No. 6:11-cv-00428-LED (E.D. Tex. May 15, 2015). In *LBDS*, a jury awarded plaintiff \$25 million. Plaintiff’s counsel later learned from an anonymous sources that the verdict was based on fabricated evidence. Counsel advised LBDS to disclose the false evidence issue to the court. LBDS declined to do so. LBDS’s counsel reported the misconduct to the district judge by filing a motion to withdraw as counsel for LBDS. The court vacated the jury verdict and counsel escaped any discipline.

Scenario 4 Comments:

With limited exceptions, a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent. See Model Rule 1.6(a). Similarly, a lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. See Model Rule 1.6(c). There is little doubt unauthorized release of your client's trade secret information would be potentially devastating, but whether you have violated Rule 1.6 because your computer was hacked is a more challenging issue, requiring an analysis of the protections you had in place and your response to the hack. Not all data breaches necessarily trigger an ethical violation or obligation, as there is usually a bad actor behind the event, but as ABA Formal Opinion 451 identified, lawyers are obligated to employ reasonable efforts to monitor technology and resources connected to the Internet, external data sources and external vendors providing services.

The ABA in its Formal Opinion 483 explained, "...based on lawyers' obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data. Without such a requirement, a lawyer's recognition of any data breach could be relegated to happenstance – and the lawyer might not identify whether a breach has occurred, whether further action is warranted [See, Model Rules 1.6 and 1.15], whether employees are adhering to the law firm's cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties [See, Model Rules 5.1 and 5.3], and how and when the lawyer must take further action under other regulatory and legal provisions. Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information."

But, once a data breach is suspected or known, Model Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. The risk for an ethical violation then, comes when the lawyer has failed to take reasonable efforts to detect or avoid data loss or cyber-intrusions and that failure is the cause of the breach. The lawyer also needs to disclose the extent of the data breach to the client. (See Model Rule 1.4.)

Scenario 5 Comments:

The answer here is probably B. While many might consider A, particularly if they watch a lot of cable news, consider, for example, Texas Disciplinary Rule of Professional Conduct 3.07(a) which provides: "In the course of representing a client, a lawyer shall not make an extrajudicial statement a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding." Of course, a reasonableness standard and material prejudice set the bar fairly high, but what may really determine the potential problem with the statement is both its nature and when in the course of the proceeding it is made. Was it before a jury is empaneled, during trial, on appeal? A case with similar facts was addressed in Ethics Opinion No. 683, 82 Tex. B. J. 370 (May, 2019). There the statement was made while the case was on appeal and when it was not yet clear if the matter would ever be

tried. The Committee considered that the appeal was certainly “adjudicatory proceeding” but that judges are less susceptible to being materially prejudiced by extrajudicial statements. Given the timing of the statement and potential impact only on judges, there was not a substantial likelihood of materially prejudicing an adjudicatory proceeding. As mentioned in answer A, however, there are First Amendment protections also implicated. See *Gentile v State Bar of Nevada*, 501 U.S. 1030 (1991). The Court in *Gentile* reversed a disciplinary action against a criminal defense lawyer on the grounds the statements, while aggressively criticizing the “crooked” police and calling several witnesses “liars”, were describing the “general nature of the defense”.

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Excerpts of Referenced Rules of Professional Responsibility

Noted in the preceding were a number of rules of professional responsibility. The text of these rules are provided below for reference:

ABA Model Rule of Professional Conduct

Rule 1.1 Competence

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

Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

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

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

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

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

Rule 1.6 Confidentiality Of Information

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

Rule 1.7 Conflict Of Interest: Current Clients

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

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.13 Organization As Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

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

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

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;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(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;

(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;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or 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.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(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.

(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.

(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.

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

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

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

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

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

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

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

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

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

(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.

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Texas Disciplinary Rules of Professional Conduct

Rule 3.07 Trial Publicity

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. A lawyer shall not counsel or assist another person to make such a statement.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraphs (a) and (b)(1)-(5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

- (4) except when prohibited by law, the identity of the persons involved in the matter;
- (5) the scheduling or result of any step in litigation;
- (6) a request for assistance in obtaining evidence and information necessary thereto;
- (7) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (8) if a criminal case:
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person ;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.