

Attorney Ethics

Resource 13

Resource 13 will promote a discussion about the potential resources for dealing with complicated ethical issues, including conflicts of interest.

- Read and discuss the attached article by Donald R. Lundberg: "IN THE SOLUTION, Dealing with an Ethics Complaint." GPSOLO Magazine, October/November 2010.
- Read the attached Scope section in the Preamble of the New Mexico Code of Professional Conduct.
- Discuss the difference between a code of ethics and a code of professionalism.
- Point out the attached Professionalism Bibliography from the American Bar Association Center for Professional Responsibility
- Read and discuss "Ethics 101 – Conquering Ethical Dilemmas" by the American Bar Association Young Lawyer's Division, 2007.
- Show the new lawyer "The New Mexico Advisory Ethics Opinions Summaries from 1983 to Present" under Ethics Opinions at:
http://www.nmbar.org/Nmstatebar/About_Us/Ethics_Advisory/Ethics_Advisory.aspx
- Discuss the resources for resolving ethical questions provided by the State Bar of New Mexico's Ethics Advisory Committee at 800-326-8155 and:
http://www.nmbar.org/Nmstatebar/About_Us/Ethics_Advisory/Ethics_Advisory.aspx and the American Bar Association's ETHICSearch Research Service:
http://www.americanbar.org/groups/professional_responsibility/resources.html
- Review the structure of the New Mexico Rules of Professional Conduct from Rule 16-100 NMRA through Rule 16-805 NMRA; identify the particular rules which impact your specific practice area and review and discuss these rules.

***GPSOLO* October/November 2010**

IN THE SOLUTION

Dealing with an Ethics Complaint

By Donald R. Lundberg

The lawyer discipline system casts a wide net—intentionally so. If the system discouraged grievances, meritorious ones would as likely be discouraged as frivolous ones. Public protection suffers when valid complaints never make their way to bar counsel's office. (In this article, I will call the lawyer discipline prosecutor and associated lawyers "bar counsel"; I will call an initial complaint from a third party to bar counsel a "grievance.")

Let's look at some numbers from the 2008 ABA Survey on Lawyer Discipline Systems: An active lawyer had 8.4 chances in 100 of having a grievance filed against him or her. There were better than 50–50 odds that the grievance was dismissed on its face, and better than 50–50 odds that an opened grievance was dismissed after preliminary investigation. Only 5,048 lawyers were formally charged with misconduct in 2008 after a finding of probable cause. That's a miniscule third of a percent of all practicing lawyers. Around one-half of a percent of grievances led to a formal charge of misconduct. In other words, a lot falls by the wayside on the way to formal discipline. Is that a reason to relax? Not really. Try arguing to bar counsel that, statistically, it's not your turn yet.

This is an article about dealing with grievances, not about preventing them. There is a lot of good stuff out there about avoiding grievances. Read it. If you disregard that sage advice, I'll guarantee there will be more than one grievance in your future. If you are cavalier about your ethical duties, I can't be of much help to you. But even conscientious lawyers open their mail to discover that someone has filed a grievance against them. What to do?

For starters, you can hope that it is a notice of facial dismissal. Your heart stops beating, you open the envelope, read its contents, breath a sigh of relief, and life goes on pretty much as before, right? Not so fast. Use it as a learning opportunity. What could you have done to have avoided the grievance in the first place? Maybe nothing—fair enough. But maybe it could have been prevented. How much better to have never been grieved than to have had a grievance dismissed?

But this time, you draw the short straw. The grievance is going to be investigated. You will be asked to respond in writing. Correct that—more than likely it will be called a "demand." And that's an important word, because even if you committed no other misconduct, failing to cooperate can itself be a violation of ABA Model Rule of Professional Conduct 8.1(b). Plus, other bad things can happen. In my state of Indiana and in many others, your law license can be suspended until you decide to cooperate. It's human nature to want to avoid unpleasantness. Even so, deal with it. Don't put it off. It doesn't get better with time.

If you have to respond, here are ten helpful tips:

1. **Take it seriously.** Don't be flip or cavalier. Carve out plenty of time to fully attend to the matter and not feel rushed. You must approach it as one of your highest priorities.
2. **Get current.** Read over your jurisdiction's rules of professional conduct. Study the procedural rules. Bar counsel I know will not intentionally lay procedural traps, but they aren't your babysitters. Ask bar counsel for procedural guidance if you need it, but don't waste their time posing questions that are clearly answered by the rules.
3. **Use proper form.** Know the expectations for form of response. Is there a file or case number that should be referenced? Is there an accepted form of caption? Does it need to be signed under penalty of perjury? Whether it does or not is immaterial—you still have a duty to be complete and truthful. Proofread thoroughly. Sloppy work for yourself signifies sloppy work for clients. A response submitted through counsel may only need to be signed by your lawyer. Consider co-signing it. Demonstrate that you personally stand by it. Avoid submitting lengthy responses by fax. They are hard to read. If you are sending a hard copy, avoid wasting trees by faxing it, too.
4. **Be on time.** Know your due date. Calendar it. Be early for a change. Learn your bar counsel's views on and procedures for obtaining extensions of time. Don't ask for an extension of time unless you need it—get the misery over with. Make any extension request in writing and solicit a written response. Do not assume an extension will be granted, so make your request well before the deadline and state the reasons why you need additional time. In my experience, requests for short extensions of time are readily granted upon a credible statement of good cause. Requests for longer or additional extensions require a stronger showing, supported by detailed reasons and supporting documentation. Deliver your response by a method that provides proof of delivery.
5. **Be complete.** Summary denials, as if you were answering a civil complaint, are not helpful to bar counsel. The grievant has had the opportunity to tell a story. Now it's time to tell yours. Many grievants are uneducated, unsophisticated, or inarticulate. It is concededly difficult to respond to such a grievance, but be generous in your reading of it—bar counsel will. Avoid being dismissive simply because it is not elegantly stated. If you are still in the dark about some aspect of the grievance, ask bar counsel for guidance. Remember, the focus of a preliminary investigation is primarily on facts. You are not foreclosed from addressing the legal merits of a grievance, but you should not do so at the expense of the facts. Client confidentiality is not a bar to allowing you to defend yourself (ABA Model Rule of Professional Conduct 1.6(b)(5)). If the grievant is not a client or former client, work with bar counsel to prevent necessary disclosures of confidential client information from falling into the wrong hands.
6. **Verify the facts.** Never trust your memory on factual matters. Thoroughly refamiliarize yourself with your file. Do not commit yourself to facts that you are not certain are true. Making a false statement in a response is an invitation to worse trouble. If your factual assertions are qualified in any way, say so.
7. **Document your response.** Support your response with appropriate documentation, especially as to factual matters that are highly material or in dispute. If you don't have direct knowledge of important facts, supply sworn statements from third parties to bolster those facts or direct bar counsel to other individuals who possess direct knowledge. If

access to important records is outside your control, bar counsel might have the authority to subpoena them. Solicit bar counsel's assistance to obtain those records.

8. **Moderate your tone.** Personal attacks or emotional diatribes are not helpful. It is largely immaterial to bar counsel that your client is a bad person. Even bad guys are entitled to ethical, legal representation. Where there are differing versions of material facts, highlight factors that might reflect favorably on your credibility or adversely on the credibility of your accuser without resorting to name calling or gratuitous revelations of immaterial, but embarrassing, client confidences.
9. **Consider legal representation.** Consult with an objective legal advisor, especially one who knows the lawyer discipline system well. Now is the time to think of yourself as a client, not a lawyer. Should every responding lawyer hire counsel? Certainly not. But if you don't hire counsel, it should be because you have consciously decided against it. If the matter goes beyond preliminary investigation, revisit the decision to hire counsel. The stakes are getting higher. The fact that a lawyer is represented is welcomed by bar counsel and is never taken as a sign of culpability. Even if you don't formally hire counsel, you are well advised to have another trusted lawyer review your response before submitting it.
10. **Cooperate fully.** Invite further inquiry from bar counsel and offer to make additional materials available to assist with the investigation. Bar counsel view the investigation as a process directed at finding out what really happened. Convey a tone of shared commitment to that project.

These tips won't help much if you have committed serious misconduct. They will, however, optimize your chances of being sifted out of the system when you've done your best to be an ethical lawyer.

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New Mexico Rules of Professional Conduct

PREAMBLE, SCOPE AND TERMINOLOGY

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

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

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibility as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial, or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other

rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should". Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under [Rule 16-106](#), and they may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer from a government agency may have authority on behalf of the government to decide upon settlement on whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the lawyer-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under [Rule 16-106](#) should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative. Research notes were prepared to compare counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the model rules, and are not intended to affect the application or interpretation of the rules and comments.

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See [Comment, Rule 16-110](#).

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a [law firm](#) organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the [belief](#) is [reasonable](#).

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of [reasonable](#) prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

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Professionalism Articles

Professionalism Articles

Teaching Professionalism

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Minow, *Making Global Lawyers for the 21st Century – Keynote Address to the FutureEd 2 Conference at Harvard Law School* (2010)

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George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 La. L. Rev. 467 (2002).

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Ethics 101 – Conquering Ethical Dilemmas

Presented at the American Bar Association Young Lawyers Division Baltimore, MD Fall 2006 Conference

The American Bar Association has compiled the Model Rules of Professional Conduct. These Model Rules are an excellent resource for information regarding ethical issues in the practice of law. Each state's attorney licensing body sets the standards of professional responsibility and you should check with your state for the rules affecting practice in the state you are licensed. Most state's rules vary in some fashion from the ABA Model Rules.

The following are a selection of hypotheticals involving a variety of ethical issues that you might face in the practice of law. The responses are based on the ABA Model Rules. They are not answers to the ethical dilemmas, and may not include all of the possible issues raised by the hypothetical. You should check to see whether the cited rules are different in your state. The responses provided are not to be construed as legal advice, nor should you rely on these hypotheticals or the responses when confronting an ethical issue. They are merely intended to increase your awareness of possible ethical issues and to serve as a starting point in evaluating a response to those issues. The hypothetical scenarios are provided by Lawrence Fox, former chairman of the ABA Standing Committee on Ethics and Professional Responsibility, and partner of Drinker Biddle & Reath LLP.

Hypothetical 1:

Q: You meet with a prospective client to discuss a personal injury matter. You tell the person her claim is really weak, and you don't think you will take it on. She leaves disappointed and two months later she calls asking how her case is going. You search your memory as to who she is, remember vaguely the conversation and suddenly realize the statute of limitations expired three weeks ago.

R: This hypothetical poses several issues related to the client-lawyer relationship. Model Rule 1.18 discusses duties to prospective clients and states, in part:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

Prospective clients do not receive the same protection afforded to clients. Comment 1 to Model Rule 1.18 reads: Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Telling a prospective client that "you don't think you will take it on" is not clear. In this context, it would be important to make your intentions clear to the prospective client at the end of the consultation, and provide documentation of the same. Since a client may be relying on what you say, a letter to the prospective client explaining that you are not taking the case may also include a recommendation to seek another attorney and an explanation of the statute of limitations.

It may be prudent to follow the rules relating to terminating representation found at Model Rule 1.16, which states in part:

(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.

Hypothetical 2:

Q: Your colleague goes to a beauty contest to try to become counsel for a defendant accounting firm in a multi-defendant case. Before your colleague hears back from the accounting firm, one of the director defendants calls you and asks if you will represent her.

R: Issues raised by this hypothetical include, but are not limited to, direct contact with a prospective client, an organization as a client, and conflicts of interest. It is unclear from the hypothetical whether or not "your colleague" works with your firm or not. Regardless, going to a beauty pageant (or anywhere else) to solicit business may violate Model Rule 7.3, which regulates direct contact with prospective clients. The rule states, in part:

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

1. is a lawyer; or
2. has a family, close personal, or prior professional relationship with the lawyer.

Knowing more about "your colleague" is important for the imputation of conflicts of interest. Model Rule 1.10 reads, in part:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Representing an organization and or its directors should call to mind Model Rule 1.13, which states, in part:

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

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(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.

(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.

Hypothetical 3:

Q: An existing client of your firm (you did his will) calls up to arrange an appointment for two friends and himself. "We want to start a business," he tells you. Two days later your friend shows up with the other two. Their new business will be funded by your friend. One of the other two is going to be the CEO, and the third is going to assign his patent rights to the new enterprise. How do you proceed?

R: Again, this hypothetical calls into question your relationship with each potential client, as well as your ability to handle the business. You did your friend's will, but are you competent to form a business? See Model Rule 1.1, which states:

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

As a former client, you may have still have duties to your friend under Model Rule 1.9. Be aware of conflicts of interest. Rule 1.7 states, in part:

(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.

Additionally, be mindful of the rules for prospective clients and representing an organization found in Model Rules 1.18 and 1.13 respectively.

Hypothetical 4:

Q: Your client hands you some very damaging documents. In the course of document discovery you show them to the partner who says, "Where did they come from?" "From the client's German subsidiary," you answer. Partner turns to you and says, "File an objection to the request for the production of documents, telling them it is burdensome to look through our German facility."

R: This hypothetical poses several issues both for you and your partner. We will only consider ethical issues affecting your part in this hypothetical. The first rule that this situation would appear to violate is Model Rule 3.4, which requires fairness to the opposing party and counsel. This rule states in part that a lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party...

Complying with the partner's direction would also appear to violate Model Rule 3.3. This rule requires candor toward the tribunal and states in part:

(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.

In this hypothetical, though the firm partner has told you to engage in this behavior, you would still likely be held responsible for violating ethical rules based on Model Rule 5.2. This rule outlines the responsibilities of a subordinate lawyer and states, in part:

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(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person...

Some states, and the Model Rules also call for an attorney who knows that another attorney has violated the Rules of Professional Conduct to report that attorney to the appropriate professional authority. Model Rule 8.3 covers the reporting of professional misconduct and states, in part:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority...

Hypothetical 5:

Q: While you are with your client, the other side calls up and asks for an additional ten days to respond to the complaint. You grant the extension. But when you hang up, the client tells you, "That is the last extension you are ever going to grant in my matter."

R: Model Rule 2.1 spells out the role of the lawyer as advisor. This rule requires the lawyer to exercise independent professional judgment and render candid advice. And further states, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Under Model Rule 1.2, the scope of representation and allocation of authority between client and lawyer and states:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Hypothetical 6:

Q: You are preparing your client for a deposition. You ask him if he ever smoked marijuana. He asks, "What's that got to do with the case?" You reply, "Nothing, but you may be asked that question." Client admits that he smoked marijuana, but he never inhaled. The next day, at the deposition, your client is asked whether he ever smoked marijuana. His answer is, "Never."

R: The confidentiality of information is explained in Model Rule 1.6 and should always be considered when evaluating your duties with regard to your client's communications with you. The rule provides:

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

As worthy of consideration in this scenario is Model Rule 4.1 that focuses on the truthfulness in statements to others, and states, in part that:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Lastly, you should also consult Model Rule 3.3 governing candor toward the tribunal. This rule provides, in part, that:

(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.

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(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

The Model Rules of Professional Conduct are designed to assist lawyers conquer their ethical dilemmas. The current text of the Model Rules, complete with all amendments to date can be viewed on the web at http://www.abanet.org/cpr/mrpc/model_rules.html. You may also purchase a hard copy online or call the ABA Service Center at 800-285-2221 and ask for PC #2150016. Additional information is also available at <http://www.abanet.org/cpr/home.html>.