Vermont Bar Association

Seminar Materials

Ethical Dilemmas Confronting the Trial Lawyer

September 27, 2013
Lake Morey Resort
Fairlee, VT

Faculty:

S. Crocker Bennett, Esq.
Bill Leckerling, Esq.
Jim Murdoch, Esq. (Moderator)
Richard Rubin, Esq.
Jack Sartore, Esq.
Jim Spink, Esq.
Vermont Fellows of the American College of Trial Lawyers will discuss ethical issues presented in a series of video vignettes prepared by the College (all new ones for this year). Responses to these dilemmas will be discussed in relation to the Model Rules, the Vermont Rules, and the more aspirational Code of Pretrial and Trial Conduct of the College. Each of the participants will show one or more vignettes and then lead the audience in an analysis of the ethical challenges presented in the vignettes. The subjects will include lawyers' ethical obligations to clients, to the court, to the system of justice, as well as typical ethical problems that arise in trial.

 Speakers:

Jim Murdoch will be the moderator. The presenters are Jim Spink, Richard Rubin, Jack Sartore, Bill Leckerling and Crocker Bennett.
VERMONT BAR ASSOCIATION ANNUAL MEETING

ETHICS PRESENTATION BY VERMONT FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

September 27, 2013

Presenters:

James W. Murdoch, Esq., Moderator
James W. Spink, Esq.
R. Jeffrey Behm, Esq.
John T. Sartore, Esq.
E. William Leckerling, III, Esq.
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The American College of Trial Lawyers is composed of Fellows who represent the best of the trial bar in the United States and Canada. Founded in 1950, the College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. Through its Board of Regents, the General Committees and its State and Province Committees, the College engages in a wide variety of activities to further those purposes.

Fellowship is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Fellows are selected from among advocates who represent plaintiffs or defendants in civil proceedings of all types, as well as prosecutors and criminal defense lawyers. There are more than 5,800 Fellows of the College, including Judicial Fellows elected before ascending to the bench and Honorary Fellows, who have attained eminence in the highest ranks of the judiciary, the legal profession or public service.

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"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert, Chancellor-Founder, ACTL

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PREFACE

This syllabus and accompanying videos were prepared by subcommittees of the American College of Trial Lawyers' Legal Ethics and Professionalism Committee. They are intended for use by Fellows presenting litigation ethics and professionalism issues in CLE settings and to law students.

The syllabus and videos are an outgrowth of the American College of Trial Lawyers' Code of Pretrial and Trial Conduct (ACTL Code). The ACTL Code was approved by the ACTL Board of Regents in 2009. The goal of the ACTL Code is aspirational – an attempt to set forth the “best practices” of ethical and professional conduct rather than a set of minimum standards. The ACTL Code contains a Message from the Chief Justice of the United States. Chief Justice John Roberts captures the essence of the ACTL Code in these words:

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, “An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.
OBLIGATIONS TO CLIENTS

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer’s learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of the client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

ACTL Code, p. 3.
Problem 3

You undertake the representation of Peter in a divorce action. During the representation Peter acquires information suggesting that the couple's teen-aged daughter was fathered by someone else. Peter demands a paternity test. Your jurisdiction permits a husband to challenge parentage of a child born during the marriage if non-paternity can be established by clear and convincing evidence, including genetic testing. Your wife is outraged that Peter is seeking to challenge his relationship with the child and your partners fear the position being asserted will damage the firm’s reputation. Your daughter goes to the same school as Peter’s daughter and they are friends. You are personally conflicted over Peter’s position. Should you withdraw from the representation? Does it make any difference if you learned of the paternity issue before agreeing to undertake the representation?

Discussion of Problem 3

Model Rule 1.16(b)(4) provides that a lawyer may withdraw from representing a client “if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

The ACTL Code provides that it is not only the lawyer’s right but also the lawyer’s duty to employ “all appropriate means within the law to protect and enforce legitimate interests of a client;” to “never be influenced directly or indirectly by any consideration of self-interest;” and to “undertake unpopular causes if necessary to ensure justice.” ACTL Code, p. 3.

Under the Model Rules, an attorney would likely not create an ethical problem by withdrawing. The ACTL Code would suggest that unless the attorney could not effectively represent Peter because of the personal conflict the representation should continue.

If the attorney learned of the paternity issue before undertaking the representation, the ACTL Code is less clear. The ACTL Code recognizes that “(i)t is the right of a lawyer to accept employment in a civil case...” and provides that “the lawyer should not decline employment in a case on the basis of the unpopularity of the client’s cause or position.” ACTL Code, p. 3. On the other hand, the ACTL Code imposes an “obligation to undertake unpopular causes,” where necessary to “ensure justice.” Query whether vindicating the client’s position in this case is “necessary to ensure justice.”
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.—Amended June 17, 2009, eff. Sept. 1, 2009.
Rule 1.18. DUTIES TO PROSPECTIVE CLIENT

(a) A person who, in good faith, discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.6 would require or permit or as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.—
96-11 An attorney who has secured information from an individual in the context of a free initial office conference, in which legal advice has been sought and given in circumstances reasonably likely to create an expectation of confidentiality, is required to treat such information as if it had been received in the course of representation, even if the conference does not result in the individual engaging the attorney for further services. Any confidences or secrets obtained as a result of the conference continue to be protected thereafter, and the attorney may not disclose such information, even if the attorney determines that the individual has presented information to a tribunal that is contradicted by the information previously given to the attorney.
OBLIGATIONS TO THE COURT

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

ACTL Code, p. 4.
**Problem 5**

You are a member of an exclusive golf club with a highly rated golf course. A judge before whom you regularly appear and with whom you have a case currently pending is an avid golfer but lacks the financial means to join a private club and primarily plays public courses. The judge has commented in passing that he would enjoy the opportunity to play your course. Should you invite him? Query whether the same conclusion would apply if the judge reimbursed the attorney for the guest fees, food and drink? Would the same concern exist if you had no active cases pending before the judge? What if the judge was a long time personal or family friend or former colleague?

**Discussion of Problem 5**

**Model Rule 3.5** prohibits a lawyer from seeking to influence a judge “by means prohibited by law.” The annotation to **Model Rule 3.5** indicates that gifts that constitute “ordinary social hospitality” are generally permissible although gifts intended to influence the judge are not permitted.

The **ACTL Code** provides that “(i)n social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety.” **ACTL Code, p. 4.** In situations where an action is ongoing, and particularly if a decision on motions or a judgment is pending, extending an invitation under the circumstances in the hypothetical would likely create an appearance of impropriety.

If active cases were pending before the judge, the appearance of impropriety would remain even when the judge reimburses the costs. Where no active cases are pending with the judge, the appearance of impropriety would be minimal. The existence of a long-standing personal relationship with the judge would lessen concerns about the invitation being intended to influence the judge but, depending upon the status of the litigation, concerns about an appearance of impropriety must be considered.

In considering this problem, reference should also be made to multiple provisions in the **Model Code of Judicial Conduct.** For example, **Model Code Rule 1.2** provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Similarly, **Model Code Rule 3.1(c)** admonishes judges not to participate “in activities that would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality” and **Model Code Rule 3.13(a)** provides that a judge should not accept gifts “or other things of value, if acceptance … would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.” **Model Code Rule 3.13(b)(3),** however, permits acceptance of “ordinary social hospitality.” As noted in the comments to Model Code Rule 3.13, the rules focus on the risk that the benefit “might be viewed as intended to influence the judge’s decision in a case.” The prohibition against accepting, or under **Model Code Rule 3.13(c)** the obligation to report, the benefit is a function of the degree of that risk.
Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte

(1) with a judge or other person acting in a judicial or quasi-judicial capacity in a pending or impending adversary proceeding, unless authorized to do so by the Code of Judicial Conduct, by other law, or by court order;
Rule 3.5    ADMINISTRATIVE ORDERS AND RULES

(2) with a juror or prospective juror before the court clerk has certified that the juror's term of service is complete, except by leave of court for good cause shown and under such terms as the court shall determine; or
(c) communicate with a juror or prospective juror after the court clerk has certified that the juror's term of service is complete if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; or
   (d) engage in undignified or discourteous conduct which is degrading or disrupting to a tribunal.

Historical Citation

Comment
[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Vermont Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges or masters, unless authorized to do so under the terms of the Code of Judicial Conduct or by other law or court order. A lawyer also may not communicate with a juror or prospective juror during the juror's term of service except with leave of court on good cause shown and on such terms as the court may determine, which should impose limits designed to protect the juror's privacy. Good cause for contact before completion of a juror's term might include independent research into the dynamics of the jury process, an attorney's desire to improve his or her trial skills, or investigation of juror misconduct.
[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the juror's term is complete. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.
[4] The advocate's function is to present evidence and argument so that the case may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
[5] The duty to refrain from degrading or disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

REPORTER'S NOTES—2009 AMENDMENT

V.R.P.C. 3.5 is amended to incorporate some of the changes in the Model Rule while retaining and updating provisions of the original Vermont rule that differed from the Model Rule. See Reporter's Notes to V.R.P.C. 3.5 (1999).
RULES OF PROFESSIONAL CONDUCT

Rule 3.5

VR.PC. 3.5(a), like Model Rule 3.5(a), is unchanged.

VR.PC. 3.5(b) continues to depart from the Model Rule by separating provisions concerning ex parte contact with judges and quasi-judicial officials from those concerning contact with jurors. Subparagraph (1) continues to refer expressly to the Code of Judicial Conduct and incorporates the reference to “impending” proceedings from V.C.J.C. Canon 3.B(7). The inclusion of “court order” (and the necessary stylistic change to “authorized by”) are “added to alert lawyers to the availability of judicial relief in the rare instances in which an ex parte communication is needed.” ABA Reporter’s Explanation.

VR.PC. 3.5(b)(2) is amended to provide a standard for permitting communication with a juror before the court clerk certifies that the juror’s term of service has ended. Such communication is prohibited except by leave of court for good cause shown and must not intrude on a juror’s privacy. See Comment [2]. A juror’s term of service is concluded when that juror has been summoned for voir dire three times within a two-year period pursuant to Rules 6 and 9 of the Rules for Qualification, List, Selection and Summoning of All Jurors. The clerk’s certification of that date has been selected because it is an easily identifiable event and assures that a juror will be free from inappropriate communication with a lawyer during a period when there is the possibility that the juror and lawyer might both be involved in the same subsequent case.

VR.PC. 3.5(c) adapts New Model Rule 3.5(c), incorporating the clerk’s certification of the end of a juror’s service as the time after which a lawyer may communicate with a juror without leave of court. The ABA Reporter’s Explanation is as follows:

Rule 3.5(b) [prohibiting ex parte communication with jurors “except as permitted by law”] has been held to be unconstitutionally overbroad when applied to post-verdict communications with jurors. See Rapp v. Disciplinary Board of the Hawaii Supreme Court, 916 F. Supp. 1525 (D. Hawaii, 1996). The Commission has proposed the addition of a new paragraph (c) that permits such communications unless prohibited by law or court order or the lawyer knows that the juror does not wish to be contacted. Also prohibited, of course, are communications involving misrepresentation, duress, coercion or harassment. The proposal permits mere post-verdict communication with jurors than the current Rule but affords the juror greater protection than did ABA Model Code of Professional Responsibility DR 7-108(D) which provided, “After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.”

VR.PC. 3.5(d) continues to retain language from DR 7-106(C)(6) of the Vermont Code of Professional Responsibility, adding the word “disrupting” to track the Model Rule.

Comments [2] and [3] are new to both the Vermont and Model Rules. They have been modified to reflect the differences between the rules discussed above.

Comment [5] “makes clear that paragraph (d) applies to any proceeding of a tribunal and calls particular attention to its applicability to depositions.” ABA Reporter’s Explanation.

REPORTER’S NOTES

The drafters modified ABA Model Rule 3.5(b) in order to clarify that not all ex parte communication with a judge is impermissible and to make this rule consistent with its Vermont Code counterparts. See DR 7-108 and DR 7-110(B).

The drafters also modified paragraph (c) to avoid a subjective standard of proof and to make it consistent with the Vermont Code. See DR 7-106(C)(6). The rule has also been made consistent with Canon 3B(7)(a) of the Vermont Code of Judicial Conduct.
CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. JUDICIAL DUTIES IN GENERAL. The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. In the performance of these duties, the following standards apply.

B. ADJUDICATIVE RESPONSIBILITIES.
   (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
   (2) A judge should be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
   (3) A judge shall require order and decorum in proceedings before the judge.
   (4) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.
   (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.
(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges
from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. ADMINISTRATIVE RESPONSIBILITIES.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and other subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. DISCIPLINARY RESPONSIBILITIES.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Vermont Code of Professional Responsibility should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Vermont Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.
E. DISQUALIFICATION.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding, or is to serve as factfinder in a case in which the judge has conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter pursuant to Section 3E(7)(d);

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows* that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the fourth degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary* economic interests,* and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. REMITTAL OF DISQUALIFICATION. A judge disqualified by the terms of Section 3E for any reason other than personal bias or prejudice concerning a party may disclose on the record the basis of the judge's disqualification and may advise the parties and their lawyers that they may consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding.

G. DISCLOSURE AND CONSENT. A judge shall disclose to the parties any fact or matter relevant to the question of impartiality that, in
the judge's view, may require disqualification under Section 3E(1). Unless a party promptly moves to disqualify, the judge may continue to participate in the proceeding.
CANON 4

A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations

A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. demean the judicial office; or
3. interfere with the proper performance of judicial duties.

B. AVOCATIONAL ACTIVITIES. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

C. GOVERNMENTAL, CIVIC OR CHARITABLE ACTIVITIES.

1. A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law,* the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

2. A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law,* the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

3. A judge may serve as an officer, director, trustee or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law,* the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or nonlegal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or...
(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or nonlegal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law,* the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. FINANCIAL ACTIVITIES.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family*, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family,* or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall relinquish investments and other financial interests that might require frequent disqualification.
(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household* not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law,* the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as wedding, anniversary or birthday, if the gift is commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds $150,00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

E. FIDUCIARY ACTIVITIES.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary,* except for the estate, trust or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary* if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
A.O. 10 Canon 4  ADMINISTRATIVE ORDERS AND RULES

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary* capacity.

**F. SERVICE AS ARBITRATOR OR MEDIATOR.** A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.*

**G. PRACTICE OF LAW.** A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.*

**H. COMPENSATION, REIMBURSEMENT AND REPORTING.**

(1) COMPENSATION AND REIMBURSEMENT. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) PUBLIC REPORTS. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. This report shall be made in such a form as may, from time to time, be directed by appropriate order of the Supreme Court and shall be filed annually as a public document in the Office of the Court Administrator by January 31, for the previous calendar year:

1. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.*

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OBLIGATIONS TO THE SYSTEM OF JUSTICE

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

ACTL Code, pp. 5-6.
**Problem 6**

You represent a defendant in a complex litigation which has just begun. For internal budgeting purposes, you have advised your management committee to anticipate that the litigation will require the services of multiple attorneys and will likely generate six figure fees over each of the next few years. Your client believes that an aggressive defense will cause the plaintiff to abandon its claims and has instructed you not to pursue settlement discussions. Based upon your initial analysis of the case and prior experience with opposing counsel, you believe an early mediation or neutral case evaluation would likely result in a settlement. Should you encourage and seek permission from your client to propose early alternative dispute resolution procedures? What if the opposing party initiates a request for mediation? What if the Court requests that the parties mediate?

**Discussion of Problem 6**

The Model Rules do not address a lawyer’s obligation to encourage use of alternative dispute resolution. The ACTL Code, while recognizing that a lawyer should never be reluctant to take a case to trial, directs lawyers to “educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.” ACTL Code, pp.5-6.

While the decision is ultimately up to the client, under the facts of the hypothetical an early ADR effort would appear to be in the client’s best interest. The spirit, if not the letter of the ACTL Code, would suggest that an effort should be made to encourage the client to authorize pursuit of ADR.

The impact of an early settlement on the firm’s revenues should never be a factor in advising the client on his or her options. **Obligations to Clients – Fidelity to the Client’s Interests.** ACTL Code, p. 3’ Model Rule 1.7, Comment 10 – “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.

If the opposing party initiates the request for mediation, the Model Rules and the ACTL Code would require that the client be advised of the request. If mediation appeared to be in the client’s best interest, the ACTL Code would counsel in favor of encouraging the client to agree. If the Court requests (rather than orders) that the parties mediate, in most cases the client’s best interest would likely be served by encouraging compliance, although the decision remains with the client.
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. 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.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer
would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought. Common forms of ADR include arbitration, mediation, and early neutral evaluation. Cf. V.R.C.P. 16.3. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 1.4. COMMUNICATION

(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 1.7. 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.

Comment

...

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).
A lawyer in all professional conduct must be honest, candid and fair.

ACTL Code, p. 3.

A lawyer must not attempt to introduce evidence or to make any argument that the lawyer knows is improper.

ACTL Code, p. 12.

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness, and courtesy of the trial process.

ACTL Code, p. 11.
Problem 12

During voir dire, in a personal injury case, defense counsel asked a member of the venire (1) whether he had ever suffered a personal injury in an accident and (2) whether he had ever filed a lawsuit. The venire member responded to both questions in the negative. Based on an examination of court records, the defense already knew that the venire member had filed an action seeking damages for personal injuries allegedly suffered in an accident and had received a substantial jury verdict at trial. The defense decided to use available peremptory strikes on other members of the venire and did not strike the venire member who filed a personal injury lawsuit.

The jury returned a substantial verdict for plaintiff. In a post trial motion, must defense counsel disclose that they already knew of the venire member’s injuries and lawsuit at the time the question was asked during voir dire? Should counsel have revealed to the judge the falsehood as soon as it occurred during voir dire? Does counsel have a duty to self-report a violation of Model Rule 3.3?

Discussion of Problem 12

“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 . . . .” Model Rule 3.3(a)(1). Comment (2) to Model Rule 3.3(a) makes it clear that an advocate cannot engage in any conduct that undermines the integrity of the adjudicative process. Even though a lawyer has an obligation to present the client’s case “with persuasive force,” that duty “is qualified by the duty of candor.” Moreover, “[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact. . . .”

The filing of a post trial motion based on the failure of a venire member to answer truthfully questions asked in voir dire is at least an implicit representation to the court that the lawyer relied on the answer in deciding not to use a strike. Failure to disclose the attorney’s prior knowledge of the juror’s injuries would appear to be in conflict with the Model Rules. The ACTL Code yields the same result. A lawyer should not “make any argument that the lawyer knows is improper.” ACTL Code, p. 12. In addition, the ACTL Code provides under Qualities of a Trial Lawyer that a lawyer must be honest and candid in all professional conduct. ACTL Code, p. 3. The filing of a post trial motion under these circumstances would be “improper” and would not be “honest and candid.”

The issue of whether the falsehood should have been reported during the voir dire process is addressed by Model Rule 3.3(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.” Model Rule 3.3(b).

The lawyer should have revealed the juror’s falsehood during voir dire. The longer she waits, the more she can be criticized for her own failure to reveal the fraud.
As to the issue of reporting a violation to disciplinary authorities, ABA Model Rule 8.3(a), which requires reporting of ethical violations, does not require self-reporting. But some states, such as Ohio, replaced the ABA’s language in 8.3(a) of “another lawyer has committed a violation” with language that applies to “any” lawyer. That language, according to the comments, was intended to continue the Ohio requirement of self-reporting of ethical violations. If two lawyers are involved in a violation of 3.3, it could be argued that they have a duty to report each other under the ABA’s “another lawyer” version of 8.3. This illustrates the folly of failing to report the falsehood immediately.
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.

[Amended June 17, 2009, effective Sept. 1, 2009.]

Comment
[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

VT R PROF COND Rule 3.3
Vermont Rules of Professional Conduct, Rule 8.4

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) engage in a “serious crime,” defined as illegal conduct involving any felony or involving any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a “serious crime”;

(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) discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual

[Amended June 17, 2009, effective Sept. 1, 2009.]

Comment

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

VT R PROF COND Rule 8.4
RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT

(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.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information gained by a lawyer while participating in a lawyer assistance program approved by the Vermont Bar Association or as a member of the Professional Responsibility Committee of the Vermont Bar Association or otherwise protected by Rule 1.6.

[Amended June 17, 2009, effective Sept. 1, 2009.]
Relevant VBA Advisory Ethics Opinions

95-07 Where a client knowingly testifies falsely regarding a material matter and where the case remains pending before the court for decision when the client's attorney learns that the client testified falsely, the attorney has a duty to call upon the client to reveal the false testimony to the court prior to the court's decision, and if the client refuses, the attorney must make the disclosure.

81-01 An attorney must maintain his client's confidences if he finds out from his client that his client made false representations to him which resulted in an agreement disposing of a criminal case. If, however, the attorney receives information from someone other than his client that clearly establishes his client intentionally committed a fraud upon a person or tribunal, the attorney must call upon his client to rectify the same. If his client refuses or is unable to do so, the attorney must himself reveal the fraud to the affected person or tribunal.

82-07 A lawyer who subsequent to settling a personal injury action learns from the client additional information that might have reduced the settlement may not disclose this information to the opposing party to rectify any deception that might have been caused.

79-03 Attorney interviewing juror after a criminal or civil trial prior to end of juror's service on current jury panel.
Relevant ABA Formal Ethics Opinions

Client Perjury

- Criminal defendant insists on giving, Formal Opinion 87-353
- Disclosure, Formal Opinion 92-366
- Disclosure obligations of a lawyer, Formal Opinion 98-412
- Withdrawal in response, Formal Opinion 87-353
- Lawyer’s responsibility with relation to client perjury, Formal Opinion 87-353

Reporting Misconduct of Another Lawyer

- In-house ethics counsel may have duty to report misconduct of consulting lawyer to disciplinary authorities subject to the firm’s consent, Formal Opinion 08-453
- Impaired lawyer, Formal Opinion 03-431
- Nonpracticing lawyer, Formal Opinion 04-433
- Reporting misconduct by In-House Ethics Counsel not required where it would be based on information relating to the representation of the client, Formal Opinion 08-453
Problem 13

After a favorable jury verdict in a personal injury case, but before the expiration of the time to appeal from the judgment entered on that verdict, plaintiff’s counsel properly conducted interviews with the jurors, who had been discharged by the court. One juror informed plaintiff’s counsel that he had suffered injuries similar to those suffered by plaintiff, but was unsuccessful in the lawsuit he filed. He said that he knew from his own experience how painful and severe plaintiff’s injuries were. Defendant’s counsel had asked during voir dire whether any member of the venire (1) had suffered a personal injury or (2) had ever filed a lawsuit. The juror’s response to each question was negative.

Should plaintiff’s counsel report this conversation to the court and defendant’s counsel?

Discussion of Problem 13

“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.” Model Rule 3.3(b).

Model Rule 3.3(c) provides that the duties in Model Rule 3.3(b) “continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by [Model Rule 1.6].” The juror in question had engaged in fraudulent conduct and disclosure to the court and defendant’s counsel are “reasonable remedial measures” required by Model Rule 3.3(b).

Likewise, under the ACTL Code, a failure to report the juror’s conduct “would undermine the fairness and impartiality of the administration of justice . . . .” ACTL Code, p. 11.

While the lawyer should explain his obligations to the client, the client’s wishes cannot control in this situation.
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.

[Amended June 17, 2009, effective Sept. 1, 2009.]

Comment
[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.
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 required by paragraphs (b) or permitted by paragraph (c).

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:
   (1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or
   (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; or
   (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.

(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:
   (1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act;
   (2) to secure legal advice about the lawyer's compliance with these rules; or
   (3) 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.

[Amended June 17, 2009, effective Sept. 1, 2009.]
Relevant VBA Advisory Ethics Opinions

95-07 Where a client knowingly testifies falsely regarding a material matter and where the case remains pending before the court for decision when the client’s attorney learns that the client testified falsely, the attorney has a duty to call upon the client to reveal the false testimony to the court prior to the court’s decision, and if the client refuses, the attorney must make the disclosure.

81-01 An attorney must maintain his client’s confidences if he finds out from his client that his client made false representations to him which resulted in an agreement disposing of a criminal case. If, however, the attorney receives information from someone other than his client that clearly establishes his client intentionally committed a fraud upon a person or tribunal, the attorney must call upon his client to rectify the same. If his client refuses or is unable to do so, the attorney must himself reveal the fraud to the affected person or tribunal.

82-07 A lawyer who subsequent to settling a personal injury action learns from the client additional information that might have reduced the settlement may not disclose this information to the opposing party to rectify any deception that might have been caused.

79-03 Attorney interviewing juror after a criminal or civil trial prior to end of juror’s service on current jury panel.
Relevant ABA Formal Ethics Opinions

Client Perjury

- Criminal defendant insists on giving, Formal Opinion 87-353
- Disclosure, Formal Opinion 92-366
- Disclosure obligations of a lawyer, Formal Opinion 98-412
- Withdrawal in response, Formal Opinion 87-353
- Lawyer's responsibility with relation to client perjury, Formal Opinion 87-353

Reporting Misconduct of Another Lawyer

- In-house ethics counsel may have duty to report misconduct of consulting lawyer to disciplinary authorities subject to the firm's consent, Formal Opinion 08-453
- Impaired lawyer, Formal Opinion 03-431
- Nonpracticing lawyer, Formal Opinion 04-433
- Reporting misconduct by In-House Ethics Counsel not required where it would be based on information relating to the representation of the client, Formal Opinion 08-453
**Problem 14**

During rebuttal at trial, plaintiff’s counsel calls a witness who is president of Ajax Corporation, which is the largest client of the law firm in which defendant’s counsel is a partner. Defendant’s counsel has worked with the witness in many cases during previous years and also represented the witness personally in some cases. The interests of neither Ajax Corporation nor of the rebuttal witness would be affected by the result of the trial. As a rebuttal witness, the president of Ajax Corporation was not listing in pretrial disclosures of witnesses.

*Is defendant’s counsel limited in the cross examination of the rebuttal witness because of the witness’s status as a client and officer of a client? Can defendant’s counsel or any other member of his firm even cross-examine the witness?*

**Discussion of Problem 14**

A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses.

ACTL Code, p. 11.

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent …” **Model Rule 1.6(a)**

“…, a lawyer shall not represent a client 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, …” Model Rule 1.7(a)(1) and (2). Comment [6] to Model Rule 1.7 provides that “a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, …”

The issues raised in this hypothetical are discussed in depth in *Freivogel on Conflicts* (www.freivogel.com). Under ABA Op. 92-367, Defendant’s counsel likely faces a disqualifying conflict absent informed written consent from both clients. Complicating this hypothetical, however, is that the conflict did not appear until the witness was offered in rebuttal at trial. What if the judge would not permit withdrawal at this late state in the proceedings? Could defendant’s counsel proceed with cross-examination if it would not require disclosure of confidential information of Ajax or the witness? What if Ajax nonetheless refuses to consent?
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.—Amended June 17, 2009, eff. Sept. 1, 2009.

If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, 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. See Rule 1.9. See also Comments [5] and [28].

Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.15. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s cause less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
ABA Forma Op.92-367
A.B.A.

ABA Comm. on Ethics and Professional Responsibility, Formal Op.92-367

American Bar Association

LAWYER EXAMINING A CLIENT AS AN ADVERSE WITNESS, OR CONDUCTING THIRD PARTY DISCOVERY OF THE CLIENT

- A lawyer who in the course of representing a client examines another client as an adverse witness in a matter unrelated to the lawyer's representation of the other client, or conducts third party discovery of the client in such a matter, will likely face a conflict that is disqualifying in the absence of appropriate client consent. Any such disqualification will also be imputed to other lawyers in the lawyer's firm.

- An attorney should not be permitted to put himself in a position where, even unconsciously, he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another.

- When a lawyer is called upon to cross-examine her own client, the lawyer may well be torn between a "soft," or deferential, cross-examination, which compromises the representation of the litigation client, and a vigorous one, which breaches the duty of loyalty to the client-witness.

- A lawyer's general familiarity with how a client's mind works is relevant and useful information and may be disqualifying information within the contemplation of Rule 1.8(b), which generally prohibits a lawyer from using information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation.

- Obviously, if the lawyer has acquired specific confidential information relevant to the cross-examination, the lawyer may, instead of using it, overcompensate and fail to cross-examine fully, for fear of misusing it, and thereby fail adequately to represent the litigation client.

- A sufficient solution may be to provide for other counsel, also representing the litigation client, to deal with the client-witness. Where local counsel as well as principal counsel are involved in a litigation, the disqualification applying to one of these will not ordinarily affect the other. Otherwise, a satisfactory solution may be the retention of another lawyer solely for the purpose of examining the principal lawyer's client. (but see VBA Advisory Opinion 2008-4, FN1)
Relevant VBA Advisory Ethics Opinions

92-15
98-12
98-13
2006-05
2008-4
2010-2