AMERICAN BANKRUPTCY INSTITUTE

2019 Delaware Views from the Bench

Ethics Track

Dealing with Difficult Clients and Counsel

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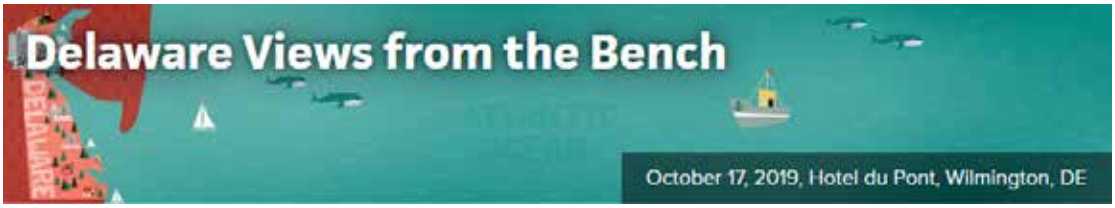

DEALING WITH DIFFICULT CLIENTS AND COUNSEL

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Assume that you are counsel for the Debtor. The Debtor's representatives complete the Schedules of Assets and Liabilities, and the Debtor's CFO signs the declaration. Your firm then files the Schedules with the Bankruptcy Court. A week before the deadline to object to confirmation of the Debtor's proposed plan of reorganization, the Debtor's CFO tells you that the Debtor did not list on Schedule B its equity interest in a foreign subsidiary worth $20 million.

QUESTIONS

1. **What is the first step that you take?**

- Talk to the client
  - DE
    - Rule 1.2(d), Comment #13
    - Rule 1.4(a)(5)
    - Rule 1.6, Comment #16
    - Rule 1.13, Comment #3
    - Rule 3.3, Comment #6
  - NY
    - Rule 1.4(a)(5)
    - Rule 1.2(d), Comment #13
    - Rule 1.6, Comment #14
    - Rule 1.13, Comment #3
    - Rule 3.3, Comment #6

2. **Assume that the Debtor is a corporation. If you talk to the Debtor's CFO and she refuses to disclose the equity interest, what is the next step?**

- "Up the ladder" discussions
  - DE
    - Rule 1.13, Comment #3
  - NY
    - Rule 1.13, Comment #3

3. **If the Debtor still refuses to amend Schedule B to disclose the equity interest, what is the next step?**

- Withdraw
  - DE
    - Rule 1.16(a)(1)

- Rule 1.16(b)(2)-(3)
- Rule 1.16, Comment #2
- Rule 1.16, Comment #7

- NY
  - Rule 1.16(b)(1)
  - Rule 1.16(c)(2)-(3)
  - Rule 1.16, Comment #2
  - Rule 1.16, Comment #7

4. Can you choose to withdraw or are you required to do so?

- Permissive

  - DE
    - Rule 1.16(b)(2)-(4)
    - Rule 1.16, Comment 7

  - NY
    - Rule 1.16(c)(2)-(3)
    - Rule 1.16, Comment 7

- Mandatory

  - DE
    - Rule 1.16(a)(1)
    - Rule 1.16, Comment #2
    - Rule 1.2(d)
    - Rule 3.3

  - NY
    - Rule 1.16(b)(1)
    - Rule 1.16, Comment #2
    - Rule 1.2(d)
    - Rule 3.3

  - Other
    - 18 U.S.C. § 152(1) and (3)

5. Should you say anything to U.S. Trustee's office upon your withdrawal? If so, what should you say?

- DE
  - Rule 4.1
  - Rule 4.1, Comments #1 and 3
  - Rule 1.6(b)(2) and (3)

- Rule 1.6, Comments #6, 7, 8

- NY
  - Rule 4.1
  - Rule 4.1, Comments #1 and 3
  - Rule 1.6(b)(3)
    - NY v Model Rule
  - Rule 1.6, Comments #6C, 6D, 6E

6. Should you say anything to counsel for the Creditors Committee upon your withdrawal? If so, what should you say?

- DE
  - Rule 4.1
  - Rule 4.1, Comment #1

- NY
  - Rule 4.1
  - Rule 4.1, Comment #1

- Other
  - Restatement (Second) of Torts § 551(2)(c)

7. Should you say anything to the Bankruptcy Court upon your withdrawal? If so, what should you say?

- DE
  - Rule 3.3

- NY
  - Rule 3.3

8. Assume that the Debtor's chapter 11 plan has already been confirmed when you discover the Debtor's failure to disclose the equity interest. Should you reveal the non-disclosure to the Court?

9. Should you reveal the non-disclosure to the Court if the Debtor's bankruptcy case has been closed?

10. What if the bankruptcy case is reopened?

II. HYPOTHETICAL II

Clients A, B and C jointly engage you to represent their ad hoc committee of noteholders to maximize chapter 11 distributions to noteholders. After your representation has concluded, Clients A and B are engaged in a lawsuit regarding their respective rights to distributions to noteholders under a chapter 11 plan. In that suit, Client B serves a subpoena on you in which Client B seeks a copy of a memorandum that Client A sent to you during your representation of the ad hoc committee. The memorandum relates to the maximization of recoveries in the chapter 11 case.

QUESTIONS

1. **Is Client A's memorandum discoverable in the litigation between Clients A and B?**

   - DE
     - Rule 1.7, Comments #30-31
   - NY
     - Rule 1.7, Comments #29-31
   - Restatement (Third) of the Law Governing Lawyers, § 75

2. **Assume that the litigation is between Clients B and C. Is Client A's memorandum discoverable?**

   - DE
     - Rule 1.7, Comments #30-31
   - NY
     - Rule 1.7, Comments #30-31
   - Restatement (Third) of the Law Governing Lawyers, § 75

3. **Assuming that the memo is privileged, can Client A waive the privilege in litigation between Client B and Client C?**

   - Restatement (Third) of the Law Governing Lawyers, § 75

4. **Assuming that the memorandum described how to increase Client A's recovery at the expense of Client B. Is the memo privileged in litigation between Client A and Client B?**

   - DE
     - Rule 1.7, Comments #30-31
   - NY
     - Rule 1.7, Comments #30-31
   - Restatement (Third) of the Law Governing Lawyers, § 75

5. **What should the attorney advise joint clients at the outset of joint representation?**

   - DE

- Rule 1.7, Comments #18 and 30-32
- NY
  - Rule 1.7, Comments #18 and 29-32.

III. HYPOTHETICAL III

Opposing counsel rarely returns your calls, is condescending, called you a clown, is regularly rude, showed up an hour late for a meeting, is generally inconsiderate when addressing scheduling issues, refuses to consider mediation or settlement even though both sides have risk of losing, and refuses to stipulate to facts not reasonably in dispute.

QUESTIONS

1. **What should you do?**

- DE
  - Principles of Professionalism
- NY
  - Standards of Civility

IV. APPLICABLE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT AND ACCOMPANYING COMMENTS

Overview of the Delaware Rules of Professional Conduct	
Rule 1.1 – Competence	**Rule 1.1** requires a lawyer to "provide competent representation to a client." Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective.
Rule 1.2 – Scope of Representation	**Rule 1.2(d)** prohibits a lawyer from counseling or assisting a client in "conduct that the lawyer *knows* is criminal or fraudulent," and authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client." Even if the lawyer does not have the requisite knowledge under **Rule 1.2(d)**, furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under **Rule 1.1**. ▪ **Comment [10] to Rule 1.2** states that the lawyers "is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed." Further, a lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent, and the lawyer *must*, therefore, withdraw from the representation of the client in the matter. *See Rule 1.16(a).* ▪ In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 4.1.*
Rule 1.4 - Communication	**Rule 1.4(a)(5)** provides that a lawyer "shall" . . . "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."
Rule 1.6 – Confidentiality of Information	**Rule 1.6(a)** states that "[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)." ▪ After withdrawal and the termination of the client-attorney relationship, the duty of confidentiality continues. *See Rule 1.9(c)(2).* **Rule 1.6(b)** gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to, among other things, (i) prevent reasonably certain death or substantial bodily harm (**Rule 1.6(b)(1)**), (ii) prevent the client from committing a future crime or fraud (**Rule 1.6(b)(2)**), (iii) prevent, mitigate, or rectify substantial injury to the financial interests or property of another and in furtherance of which the client has utilized the lawyer's services (**Rule 1.6(b)(3)**), or (iv) defend the lawyer against an accusation of wrongful conduct (**Rule 1.6(b)(5)**).

	▪ The scope of **Rule 1.6(b)(3)** is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting. ▪ Like the ABA Model Rule 1.6(b)(3) (and unlike New York's Rule 1.6), Delaware's **Rule 1.6** permits disclosure merely to protect property or financial interests. (New York's Rule 1.6(b)(3) permits disclosure in such context only when the lawyer has given an opinion or made the representation).
Rule 1.7 - Conflict of Interest: Current clients	**Rule 1.7** addresses an attorneys representation of joint clients. Comments 18 and 30-32 address informed consent and the effects on confidentiality and the attorney-client privilege in the joint client context.

Rule 1.13 – Organization as Client	**Rule 1.13(b)** mandates that the lawyer "proceed as is reasonably necessary in the best interest of the organization" when she "*knows* that an officer, employee or other person associated with the organization is engaged in action or 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 is likely to result in substantial injury to the organization." Such measures may include "referring the matter to higher authority in the organization…" (**Rule 1.13(b)(3)**). **Rule 1.13(c)** permits the lawyer to resign (in accordance with **Rule 1.16**) if her efforts under **1.13(b)** fail.
Rule 1.16 – Declining or Terminating Representation	Pursuant to **Rule 1.16(a)**, a lawyer *shall not* represent a client or, where the representation has commenced, *shall withdraw* from the representation if "the representation will result in violation of the rules of professional conduct or other law." (**Rule 1.16(a)(1)**). **Rule 1.16(b)** *permits* a lawyer to withdraw from representation of a client when, among other things, (i) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent (**Rule 1.16(b)(2)**), (ii) the client has used the lawyer's service to perpetrate a crime or fraud (**Rule 1.16(b)(3)**), (iii) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement (**Rule 1.16(b)(4)**), or (iv) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Rules of Professional Conduct (**Rule 1.16(c)(13)**).

Rule 3.3 – Conduct Before a Tribunal	**Rule 3.3(a)(1)** prohibits the lawyer from *knowingly* making a "false" statement of law or fact to a tribunal or from failing to correct a "false" statement "of material fact or law" previously made by the lawyer. ▪ If the lawyer made a statement of material fact that is false (inaccurate), the obligation is not simply to "withdraw" it but rather to correct it, which may require the explicit disclosure of confidential information. **Rule 3.3(a)(3)** prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client, or the lawyer's witness offers false material evidence. **Rule 3.3(b)** states that "[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."
Rule 4.1(b) – Truthfulness in Statements to Others	**Rule 4.1(b)** prohibits a lawyer from failing to disclose a material fact when disclosure is necessary to avoid assisting a client's criminal or fraudulent act. **Rule 4.1(b)** excepts disclosures prohibited by **Rule 1.6**, but if disclosure is not prohibited because a state's rules include a prevention clause, **4.1(b)** appears to require disclosure.
Rule 8.4 – Misconduct	**Rule 8.4** prohibits a lawyer from, among other things, (i) violating (or attempting to violate) the Rules of Professional Conduct, knowingly assisting another in doing so, or do so through acts of another (**Rule 8.4(a)**); (ii) engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer (**Rule 8.4(b)**); or (iii) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (**Rule 8.4(c)**).

A. Rule 1.1 – Competence

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

Del. Lawyers' R. Prof'l Conduct 1.1

Comments to Rule 1.1

…

[5] *Thoroughness and preparation*. — Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

B. Rule 1.2 – Scope of Representation

Rule 1.2(d) provides as follows:

> A lawyer *shall not* counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent, but a lawyer *may* discuss the legal consequences of any proposed course of conduct with a client and *may* counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Del. Lawyers' R. Prof'l Conduct 1.2(d) (emphasis added)

Comments to Rule 1.2

…

[9] *Criminal, fraudulent and prohibited transactions*. — Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See Rule 1.16(a)*. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 4.1*.

…

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act

contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. *See Rule 1.4(a)(5)*.

C. Rule 1.4. – Communication.

Rule 1.4(a) provides, in relevant part, as follows:

A lawyer *shall*:

. . .

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

Del. Lawyers' R. Prof'l Conduct 1.4 (emphasis added).

D. Rule 1.6. – Confidentiality of information.

Rule 1.6 provides, in relevant part, as follows:

(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:

. . .

(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;

. . .

Del. Lawyers' R. Prof'l Conduct 1.6 (emphasis added)

Comments to Rule 1.6

…

[6] *Disclosure adverse to client*. — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See Rule 1.2(d)*. See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is

regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

…

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *See Rules 1.2(d), 4.1(b), 8.1 and 8.3*. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See Rule 3.3(c)*.

E. Rule 1.7. Conflict of interest: Current clients.

Rule 1.7 provides as follows:

> (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.

Comments to Rule 1.7

….

[18] *Informed Consent.* — Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See Rule 1.0(e) (informed consent)*. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. *See Comments [30] and [31]* (effect of common representation on confidentiality).

….

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See Rule 1.4*. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's

trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See Rule 1.2(c).*

F. Rule 1.13. – Organization as client

Rule 1.13 provides, in relevant part, as follows:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a *violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization*, the lawyer *shall* proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
>
> > (1) asking for *reconsideration* of the matter;
> >
> > (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
> >
> > (3) *referring the matter to higher authority in the organization*, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer *may resign* in accordance with Rule 1.16.

> (d) 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.

Del. Lawyers' R. Prof'l Conduct 1.13 (emphasis added)

Comments to Rule 1.13

…

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

…

[5] *Relation to Other Rules*. — The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

G. Rule 1.16. – Declining or terminating representation.

Rule 1.16 provides, in relevant part, as follows:

> (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;
> >
> > …

(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 service to perpetrate a crime or fraud;

(4) a 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.

Del. Lawyers' R. Prof'l Conduct 1.16 (emphasis added)

Comments to Rule 1.16

…

[2] *Mandatory Withdrawal*. — A lawyer ordinarily *must* decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

…

[7] *Optional Withdrawal*. — A lawyer *may* withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer *reasonably believes* is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

…

[9] *Assisting the Client upon Withdrawal*. — Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. *See Rule 1.15*.

H. Rule 3.3. – Candor toward the tribunal

Rule 3.3 provides, in relevant part, as follows:

> (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.
>
> (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 paragraph (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 which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

…

Del. Lawyers' R. Prof'l Conduct 3.3 (emphasis added)

Comments to Rule 3.3

…

[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 . . . 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.

[3] *Representations by a Lawyer*. — The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. *See also the comment to Rule 8.4(b)*.

…

[5] *Offering Evidence*. — Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer *knows* that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer *must* refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

…

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's *reasonable belief* that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See Rule 1.0(f)*. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only *prohibits* a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. . . .

[10] *Remedial Measures*. — Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised

when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer *must take reasonable remedial measures*. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is *reasonably necessary* to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

…

[12] *Preserving Integrity of Adjunctive Process*. — Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) *requires* a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or *has engaged* in criminal or fraudulent conduct related to the proceeding.

…

[15] *Withdrawal*. — Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent *reasonably necessary* to comply with this Rule or as otherwise permitted by Rule 1.6.

I. Rule 4.1. – Truthfulness in statements to others.

Rule 4.1 provides, in relevant part, as follows:

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* when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Del. Lawyers' R. Prof'l Conduct 4.1 (emphasis added)

Comments to Rule 4.1

[1] *Misrepresentation*. — A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. *Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements*. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] *Statement of Fact*. — This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] *Crime or Fraud by Client*. — Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

J. Rule 8.4. – Misconduct

Rule 8.4 provides, in relevant part, as follows:

It is professional misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, *knowingly assist or induce another to do so* or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

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

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

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

Del. Lawyers' R. Prof'l Conduct 8.4 (emphasis added)

Comments to Rule 8.4

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

[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, which 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.

V. APPLICABLE NEW YORK RULES OF PROFESSIONAL CONDUCT AND ACCOMPANYING COMMENTS

Overview of the New York Rules of Professional Responsibility	
Rule 1.1 – Competence	**Rule 1.1(a)** requires a lawyer to provide "competent representation to a client." Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective.
Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer	**Rule 1.2(d)** prohibits a lawyer from counseling or assisting a client in "conduct that [the lawyer *knows*] is criminal or fraudulent," and authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client." Even if the lawyer does not have the requisite knowledge under **Rule 1.2(d)**, furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under **Rule 1.1(a)**. ▪ **Comment [10] to Rule 1.2(d)** states that the lawyer's obligations are "to avoid assisting the client" and to "remonstrate with the client" when the representation will result in violation of the Rules or other law. **Rule 1.2(f)** permits a lawyer to refuse to participate in conduct that the lawyer *believes* to be unlawful, even if there is support for an argument that the conduct is illegal. Under these circumstances, the lawyer *may* withdraw from the representation (under **Rule 1.2(f)** and **Rule 1.16(c)(2)**), whereas when the lawyer *knows* (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional Conduct, the lawyer *must* withdraw under **Rule 1.16(c)(1)**.
Rule 1.4 - Communication	**Rule 1.4(a)(5)** provides that a lawyer "shall" . . . "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."
Rule 1.6 – Confidentiality of Information	**Rule 1.6(a)** states that "[a] lawyer shall not knowingly reveal confidential information … or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person." ▪ After withdrawal, the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise noted in **Rule 1.6**. **Rule 1.6(b)** gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to, among other things, (i) prevent reasonably certain death or substantial bodily harm (**Rule 1.6(b)(1)**), (ii) prevent the client from committing a future crime (**Rule 1.6(b)(2)**), (iii) withdraw opinions previously given by the lawyer and reasonably believed by her to still be relied upon by a third person where the lawyer has discovered that the opinion is being used to further a crime or fraud (**Rule 1.6(b)(3)**), or (iv) defend the lawyer against an accusation of wrongful conduct (**1.6(b)(5)**). ▪ In exercising her discretion under **Rule 1.6(b)(2)**, a lawyer should consider those factors set out in **Comment [6A] to Rule 1.6**. ▪ The scope of **Rule 1.6(b)(3)** is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

	▪ Unlike ABA Model Rule 1.6(b)(2), New York's **Rule 1.6** does not similarly permit disclosure merely to protect property or financial interests (unless the "future crime" exception otherwise applies) absent an opinion or representation by an attorney.
Rule 1.7 - Conflict of Interest: Current clients	**Rule 1.7** addresses an attorneys representation of joint clients. Comments 18 and 29-32 address informed consent and the effects on confidentiality and the attorney-client privilege in the joint client context.
Rule 1.13 – Organization as Client	**Rule 1.13(b)** mandates that the lawyer "proceed as is reasonably necessary in the best interest of the organization" when she *knows* that an officer, employee, or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization. Such measures may include "referring the matter to higher authority in the organization…" (**Rule 1.13(b)(3)**). **Rule 1.13(c)** permits the lawyer to reveal confidential information (only if permitted by **Rule 1.6**) and resign (in accordance with **Rule 1.16**) if her efforts under **1.13(b)** fail.
Rule 1.16 – Declining or Terminating Representation	**Rule 1.16(b)** *requires* a lawyer to withdraw from representation of a client when, among other things, (i) the lawyer *knows* (or reasonably should know) that the representation will result in a violation of the Rules of Professional Conduct or of the law (**Rule 1.16(b)(1)**) or (ii) the lawyer *knows* (or reasonably should know) that the client is bringing the legal action, conducting the defense, or asserting a position or otherwise having steps taken "merely for the purpose of harassing or maliciously injuring a person." (**Rule 1.16(b)(4)**). **Rule 1.16(c)** *permits* a lawyer to withdraw from representation of a client when, among other things, (i) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent (**Rule 1.16(c)(2)**), (ii) the client has used the lawyer's services to perpetrate a crime or fraud (**Rule 1.16(c)(3)**), (iii) the client insists upon taking action with which the lawyer has a fundamental disagreement (**Rule 1.16(c)(4)**), or (iv) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Rules of Professional Conduct (**Rule 1.16(c)(13)**).
Rule 3.3 – Conduct Before a Tribunal	**Rule 3.3(a)(1)** prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer. ▪ If the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather to correct it, which may require the explicit disclosure of confidential information. **Rule 3.3(a)(3)** prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client, or the lawyer's witness offers false material evidence. **Rule 3.3(b)** states that "[a] lawyer who represents a client before a tribunal 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, even if this requires disclosure of information otherwise protected by **Rule 1.6** as confidential information.

Rule 4.1(b) – Truthfulness in Statements to Others	**Rule 4.1(b)** prohibits a lawyer from failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a client's fraud. **Rule 4.1(b)** excepts disclosures prohibited by **Rule 1.6**, but if disclosure is not prohibited because a state's rules include a prevention clause, **4.1(b)** would seem to require disclosure.
Rule 8.4 – Misconduct	**Rule 8.4** prohibits a lawyer from, among other things, (i) violating (or attempting to violate) the Rules of Professional Conduct or *knowingly* assisting another in doing so (**Rule 8.4(a)**); (ii) engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer (**Rule 8.4(b)**); or (iii) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (**Rule 8.4(c)**).

A. Rule 1.1 – Competence

> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> …
>
> (c) A lawyer *shall not* intentionally:
>
> > (1) fail to seek the objectives of the client through reasonably available means *permitted by law* and these Rules; or
> >
> > (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.1. (emphasis added)

> ***Comments to Rule 1.1***
>
> …

Comment #5: "Competent handling of a particular matter includes inquiry into and analysis of the factual and *legal* elements of the problem, and use of methods and procedures meeting the standards of competent practitioners…"

B. RULE 1.2(d) – Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2(d) provides as follows:

> A lawyer *shall not* counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is illegal or fraudulent, except that the lawyer *may* discuss the legal consequences of any proposed course of conduct with a client.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.2(d). (emphasis added)

Comments to Rule 1.2

Comment #9: "Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer *knows* is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

Comment #10: "When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is *required* to avoid assisting the client, for example, by drafting or delivering documents that the lawyer *knows* are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer *must* advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. *See Rules 1.4(a)(5) and 1.16(b)(1)*. Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer *is required* to withdraw. *See Rule 1.16(b)(1)*. In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 1.6(b)(3); Rule 4.1, Comment [3]*."

Comment #12: "Paragraph (d) prohibits a lawyer from assisting a client's illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity."

Comment #13: "If a lawyer comes to *know* or *reasonably should know* that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client's instructions, the lawyer *must* consult with the client regarding the limitations on the lawyer's conduct. *See Rule 1.4(a)(5)*."

C. RULE 1.4 – Communication

Rule 1.4 provides as follows:

> (a) A lawyer *shall*:
>
> > (1) promptly inform the client of:
> >
> > > (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(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 a client's 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 these Rules 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.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.4. (emphasis added).

D. RULE 1.6 – Confidentiality of Information

Rule 1.6 provides as follows:

(a) A lawyer *shall not* knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information *to the extent* that the lawyer *reasonably* believes necessary:

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

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.6 (emphasis added)

Comments to Rule 1.6

Comment #6: Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

Comment #6A: The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under

paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

Comment #6B: Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass-distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

Comment #6C: Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

Comment #6D: Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

Comment #6E: Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." *See Rule 1.16(b)(1)*, requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law.

Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

…

Comment #9: A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

…

Comment #14: Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

…

Comment #15A: Withdrawal – If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer *must* withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. *See Rules 1.13(b) and (c).*

E. RULE 1.7 – Conflict of Interest: Current Clients

Rule 1.7 provides as follows:

> (a) Except as provided in paragraph (b), a lawyer *shall not* represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(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.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.7. (emphasis added)

Comments to Rule 1.7

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See Rule 1.0(j)*. The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. *See* Comments [30] and [31] concerning the effect of common representation on confidentiality.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute

between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

. . .

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See Rule 1.4*. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See Rule 1.2(c)*.

F. RULE 1.13 – Organization as Client

Rule 1.13 provides, in relevant part, as follows:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of

the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization *or a violation of law that reasonably might be imputed to the organization, and (ii) 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. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking *reconsideration* of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) *referring the matter to higher authority in the organization*, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and *may resign* in accordance with Rule 1.16.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.13. (emphasis added)

Comments to Rule 1.13

…

Comment #3: When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer *knows* that the organization is *likely to be substantially injured* by action of an officer or other constituent that *violates a legal obligation to the organization or is in violation of law that might be imputed to the organization*, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization,

the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

Comment #4: In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. *See Rule 1.4*.

…

Comment #6: The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, *this Rule does not limit or expand* the lawyer's responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

Comment #7: The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

Comment #8: A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

G. RULE 1.16 – Declining or Terminating Representation

Rule 1.16 provides, in relevant part, as follows:

…

(b) Except as stated in paragraph (d), a lawyer *shall* withdraw from the representation of a client when:

(1) the lawyer *knows or reasonably should know* that the representation *will result in a violation of these Rules or of law*;

…

(4) the lawyer *knows or reasonably should know* that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of *harassing or maliciously injuring any person*.

(c) Except as stated in paragraph (d), a lawyer *may* withdraw from representing a client when:

(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 with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

…

(11) withdrawal is permitted under Rule 1.13(c) or other law;

> (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
>
> (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.
>
> (d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 1.16 (emphasis added)

> ***Comments to Rule 1.16***
>
> …
>
> Comment #2: A lawyer ordinarily *must* decline or withdraw from representation under paragraph (a), (b)(1) or (b)(4), as the case may be, if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.
>
> …
>
> Comment #7: Under paragraph (c), a lawyer *may* withdraw from representation in some circumstances. The lawyer has the option to withdraw if withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer *reasonably believes* is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action with which the lawyer has a fundamental disagreement.
>
> …
>
> Comment #9: Even if the lawyer has been unfairly discharged by the client, under paragraph (e) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. *See Rule 1.15*.

H. RULE 3.3 – Conduct Before a Tribunal

Rule 3.3 provides, in relevant part, as follows:

> (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 or use 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 before a tribunal 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) 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.
>
> …

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 3.3 (emphasis added)

> ***Comments to Rule 3.3***
>
> …
>
> Comment #2: "…Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not 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 by evidence that the lawyer knows to be false."
>
> Comment #3: "…The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also Rule 8.4(b), Comments [2]-[3]*."
>
> Comment #5: Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A

lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

Comment #6: If a lawyer *knows* that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer *must* refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

…

Comment #8: The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's *reasonable belief* that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an *obvious* falsehood.

Comment #9: "Although paragraph (a)(3) *prohibits* a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false…"

Comment #10: A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer *must take reasonable* remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is *reasonably necessary* to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

…

Comment #12: Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) *requires* a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or *has engaged* in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related

to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

…

Comment #15: A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent *reasonably necessary* to comply with this Rule or as otherwise permitted by Rule 1.6.

I. RULE 4.1 – Truthfulness in Statements to Others

Rule 4.1 provides as follows:

> In the course of representing a client, a lawyer shall not *knowingly* make a false statement of fact or law to a third person.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 4.1 (emphasis added)

Comments to Rule 4.1

Comment #1: A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. *Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements*. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, *see Rule 8.4*.

Comment #2: This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Comment #3: Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. *See Rule 1.16(c)(2)*. Sometimes it

may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. *See Rules 1.2(d), 1.6(b)(3)*.

J. RULE 8.4 – Misconduct

Rule 8.4 provides as follows:

A lawyer or law firm shall not:

> (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 illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (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:
>
> > …
> >
> > (2) to achieve results using means that violate these Rules 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;
>
> …
>
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

New York Rules of Professional Conduct (2009) as amended (through June 1, 2018), § 8.4 (emphasis added)

Comments to Rule 8.4

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

Comment #2 – Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

VI. APPLICABLE RESTATEMENT SECTIONS

A. Restatement (Second) of Torts § 551 -- Liability for Nondisclosure

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

B. Restatement (Third) of the Law Governing Lawyers § 75 – The Privilege of Co-Clients

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Comments:

a. *Scope and cross-references*. This Section states the attorney-client-privilege rules that apply when co-clients have communications with the same lawyer. The privilege applies only if the other conditions of §§ 68- 72 are met, except that Subsection (1) qualifies the requirement of § 71 that the communication be in confidence and Subsection (2) qualifies the rule of § 79 concerning waiver. On invoking the privilege, see § 86. Subsection (2) modifies the normally applicable rules of waiver (see §§ 78- 80) in the case of a subsequent proceeding in which the co-clients are adverse.

On the duration of the privilege, see § 77. On representation of multiple clients with conflicts of interest, see §§ 121- 122 and §§ 128- 131. On confidentiality obligations when representing co-clients, see § 60, Comment l.

A communication subject to the privilege for co-clients may be made through a client's agents for communication and a lawyer's agents for communication and other agents (see § 70).

b. *The co-client privilege*. Under Subsection (1), communications by co-clients with their common lawyer retain confidential characteristics as against third persons. The rule recognizes that it may be desirable to have multiple clients represented by the same lawyer.

c. *Delimiting co-client situations*. Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun. However, clients of the same lawyer who share a common interest are not necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties and the lawyer in light of the circumstances (see § 14).
Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client's lawyer (see § 76).

The scope of the co-client relationship is determined by the extent of the legal matter of common interest. For example, a lawyer might also represent one co-client on other matters separate from the common one. On whether, following the end of a co-client relationship, the lawyer may continue to represent one former co-client adversely to the interests of another, see § 121, Comment e. On the confidentiality of communications during a co-client representation, see Comment d hereto.

d. *The subsequent-proceeding exception to the co-client privilege*. As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications

involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the lawyer generally precludes the lawyer from keeping information secret from any one of them, unless they have agreed otherwise (see § 60, Comment l).

Whether communications between the lawyer and a client that occurred before formation of a joint representation are subject to examination depends on the understanding at the time that the new person was joined as a co-client.

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients (see § 60, Comment l).
A co-client may also retain additional, separate counsel on the matter of the common representation; communications with such counsel are not subject to this Section.

e. *Standing to assert the co-client privilege; waiver*. If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been the source of the communication or previously have known about it.

The normal rules of waiver (see §§ 78- 80) apply to a co-client's own communications to the common lawyer. Thus, in the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the lawyer, so long as the communication relates only to the communicating and waiving client.

One co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer. If a document or other recording embodies communications from two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.

Disclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons.

VII. "NOISY WITHDRAWAL" IN GENERAL

Model Rule 1.2(d) precludes an attorney from participating in a client's criminal or fraudulent conduct. *See Ryan Morrison, Turn Up the Volume: The Need for "Noisy Withdrawal" in A Post Enron Society,* 92 Ky. L.J. 279, 304 (2004). Model Rule 3.3 precludes an attorney from, *inter alia*, submitting false evidence to a tribunal. An attorney should advise a client of such limitations if the client expects such unethical assistance. *See Rule 1.4(a)(5)*.[1]

If representation will result in a violation of Rule 1.2(d), Rule 3.3, or "other law," the lawyer *must* withdraw from the representation. *See Rule 1.16(a)(1)*. A lawyer *may* seek to withdraw from representing a client if the client persists in conduct involving the lawyer's services that the lawyer reasonably believes to be criminal or fraudulent or if the client has used the lawyer's services to commit a crime or fraud. *See Rule 1.16(a)(2)-(3)*.

Withdrawing from representation under Rule 1.16 is not the lawyer's only consideration. A lawyer must consider the issue of what information, if any, a lawyer must,[2] or may, disclose upon withdrawing from representation of a client. In other words, can or should the lawyer make a "noisy withdrawal." *See generally Implementation of Standards of Professional Conduct for Attorneys (Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02), 2003 WL 24100016, at *7-8*. Obviously, a lawyer may have liability to her client for improperly disclosing confidential, privileged information. A lawyer, however, also may have liability to foreseeable third parties if the attorney learns that her services are being used to further a criminal or fraudulent scheme and such third parties rely on the lawyer's work product. *See John P. Freeman, Current Developments*

[1] Pursuant to Rule 1.13, "up the ladder" reporting may be appropriate when the client is a corporation or other legal entity. *See In re Teleglobe Commc'ns Corp.,* 493 F.3d 345, 369 (3d Cir. 2007), *as amended* (Oct. 12, 2007) ("While there is much debate over how corporate counsel should go about promoting compliance with law (e.g., the usefulness of 'noisy withdrawal' requirements versus going up the corporate chain with concerns), both sides of the debate seem to see in-house counsel as the 'front lines' of the battle to ensure compliance while preserving confidential communications."). Rule 1.13 was amended after the Enron catastrophe. *Ryan Morrison, Turn Up the Volume: The Need for "Noisy Withdrawal" in A Post Enron Society,* 92 Ky. L.J. 279, 305-06 (2004). "Model Rule 1.13 operates almost exactly like the SEC's up-the-ladder provision. When an attorney discovers fraud within her corporate client, she is required to look out for the best interests of the entity and prevent harm to it. This is done by 'refer[ring] the matter to higher authority in the organization,' even all the way up to the board of directors. . . . But, unlike the SEC's provision, the Model Rule states if the entity's 'highest authority insists upon or fails to address threatened or ongoing' unlawful conduct, the attorney is allowed to disclose confidential entity-client information to prevent substantial injury to the entity-client." *R. Morrison, Turn Up the Volume: The Need for "Noisy Withdrawal" in A Post Enron Society,* 92 Ky. L.J. at 306.

[2] *David D. Dodge, Lawyers As Police? What's New in Confidentiality, Ariz. Att'y 12, 15 (Feb. 2004)* ("Withdrawal is the lawyer's basic protection against a dishonest client. The only issue that should remain after such a withdrawal is whether the lawyer should report the client's activities to others, and/or should disavow any work product generated as a result of a client's deception, especially if it's to avoid assisting in the client's criminal or fraudulent act. This means that, in some instances, just withdrawing from representing a dishonest client may not be enough. Some sort of additional disclosure may be required to protect third parties and, last but not least, to protect the lawyer from claims brought by those third parties if they claim to have been injured by acts about which the lawyer could have warned them. In other words, your liability with respect to client dishonesty is now more heightened than ever: It is no longer restricted to liability under the ethics rules but, as discussed below, may now trigger liability under the tort system to nonclients.").

in Lawyer Liability: Coping with the Fraudulent Client, Del. Law. 27, 28 (Dec. 1993) *(citing Restatement (Second) of Torts § 551(2)(c))*.

In August 1991, the ABA Committee on Ethics and Professional Responsibility proposed to amend Model Rule 1.6 to permit, but not require, a lawyer to disclose a client's criminal or fraudulent scheme if the client used the attorney's services to commit such crime or fraud. The ABA House of Delegates, however, rejected the proposed amendment. *See Daniel J. Pope and Hellen Whatley, Defense Counsel Journal,* Vol. 63, No. 4, at 543 (Oct. 1996).

In 1992, the ABA Ethics and Professional Responsibility Committee ("PRC") issued its Formal Opinion 92-366 (1992), which addressed Model Rules 1.2(d), 1.6, 1.16(a)(1) and "noisy withdrawal" in the context of the facts from the fraudulent scheme of O.P.M. Leasing Services ("O.P.M."). *See id.* The O.P.M. fraud involved a lawyer's issuance of an opinion letter to O.P.M.'s bank based on factual representations from O.P.M. The president of O.P.M. subsequently admitted that the factual representations upon which the lawyer relied in issuing the opinion letter were false. *Id.*. The president then fired the lawyer, advising that O.P.M. intended to conceal the misrepresentations from successor counsel and continue the fraud against O.P.M.'s bank. *Id.*

The sharply-divided PRC (5-3) concluded as follows:

- Pursuant to Model Rules 1.2(d) and 1.16(a)(1),[3] the lawyer must withdraw from the representation relating to the fraud and, if the lawyer's representation of the client "is likely to be known" and "relied upon" by the fraud victims, from all other representations of the client;
- Rule 1.6 precludes a lawyer from disclosing a client's prior fraud or the client's intent to continue a fraudulent scheme;
- If the client intends to continue the fraudulent scheme, the lawyer, to comply with Rule 1.2(d), must advise the bank that the lawyer disavows the opinion because the withdrawal from representation alone does not put the bank on notice that something is amiss;
- The client's termination of the lawyer did not eliminate the lawyer's ability to make a "noisy withdrawal" under the comment to Rule 1.6; and
- If the client, however, does not intend to continue its fraudulent scheme, Rule 1.6 precludes the lawyer cannot withdraw the opinion, make a "noisy withdrawal," or advise anyone of the factual misrepresentations.

See "Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud," Formal Opinion 92-366 (Aug. 8, 1992); see generally Michael Ariens, "Playing Chicken": An Instant History of the Battle over Exceptions to Client Confidences, 33 J. Legal Prof. 239, 267-69 (2009).

The overwhelming majority of states that have adopted a version of the ABA Model Rules have rejected the ABA's limited version of Rule 1.6 and, instead, have adopted a rule that contains a provision authorizing an attorney to disclose confidential information to prevent or rectify

[3] The PRC read the term "representation" as including the lawyer's consenting to the client's continued use of the lawyer's opinion in furtherance of criminal or fraudulent conduct.

criminal or fraudulent conduct by a client. *See D. Pope et al., Defense Counsel Journal, Vol. 63, No. 4, at 543.*

In 2003, Model Rule 1.6 was amended by the addition of permissive (not mandatory) disclosures to prevent or rectify crimes or fraud. Thus, as modified, Rule 1.6 expressly allowed for "noisy withdrawal." *See Gregory M. Duhl, The Ethics of Contract Drafting, 14 Lewis & Clark L. Rev. 989, 1033 (2010).*

Under the current version of Rule 1.6, the mandatory disclosure provision of Rule 4.1(b) has great significance. *See generally John A. Humbach, Shifting Paradigms of Lawyer Honesty, 76 Tenn. L. Rev. 993, 1009 (2009).* Rule 4.1(b) provides that "a lawyer *shall not knowingly . . . fail* to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6*." *See Rule 4.1(b) (emphasis added).* Rule 1.6 now permits the disclosure of confidential information to (i) prevent a client's commission of a crime that is likely to result in substantial injury to the financial interests or property of another and (ii) to mitigate or rectify the consequences of, criminal or fraudulent actions in which the lawyer's services are being or had been used. *See Rule 1.6(c)(2) and (c)(3).* Thus, Rule 4.1 can be read to require a lawyer to disclose material facts to a third party to avoid assisting a client's criminal or fraudulent acts because Rule 1.6 no longer prohibits such disclosure.[4]

Disclosure of confidential information also is *required* when necessary to satisfy a lawyer's duty of candor to the tribunal under Rule 3.3. *See "Lawyer's Responsibility with Relation to Client Perjury," Formal Opinion No. 87-353 (April 20, 1987)* ("withdrawal can rarely serve as a remedy for the client's perjury."). Although withdrawal may avoid the lawyer's participation in the submission of false evidence, Rule 3.3(a)(4) requires a lawyer to take "reasonable remedial measures" when the lawyer offered false evidence. *See Rule 3.3(a)(4); see generally 42 N.J. Prac., Discovery § 4.372.*

In the bankruptcy context, the Second Circuit Bankruptcy Appellate Panel declared as follows:

> [B]ecause counsel for the debtor in possession has fiduciary obligations not ordinarily foisted upon the attorney-client relationship, the attorney for the debtor in possession may not simply resign where the client refuses the attorney's advice concerning the client's fiduciary obligations to the estate

[4] "By using the word 'may' in the introductory clause, this new amendment to Rule 1.6 appears to permit but not require lawyers to disclose client information for the protection of others. However, when the newly amended version of Rule 1.6 is read in combination with the already existing language of Rule 4.1(b), the Model Rules now indeed appear to charge lawyers with an ethical obligation to disclose." *J. Humbach, Shifting Paradigms of Lawyer Honesty, 76 Tenn. L. Rev. at 1008.* "Although the language of Rule 4.1 has not changed, the newest amendments to Rule 1.6 have radically altered the practical meaning of its final clause, viz. 'unless disclosure is prohibited by Rule 1.6.'" *Id. at 1009.* Although the plain language of Rules 1.6 and 4.1 supports such a "duty to warn," *see id., Lawrence Hamermesh, the Reporter for the ABA Task Force on Corporate Responsibility* (the "Task Force"), which recommended the 2003 amendments to Rule 1.6, disclaimed any intention or expectation that the Task Force was recommending a mandatory disclosure obligation. Id. at 1010.

> and its creditors. Counsel must do more, informing the court in some manner of derogation by the debtor in possession.

Zeisler & Zeisler, PC v. Prudential Ins. Co. of Am. (In re JLM, Inc.), 210 B.R. 19, 26 (2d Cir. B.A.P. 1997) (citing to *Connecticut Rules of Professional Conduct 1.13(c), 1.16 , & 3*.3). *See also In re Grasso*, 586 B.R. 110, 158 (Bankr. E.D. Pa. 2018) ("Whatever the reason for the issuance of the Unauthorized Post–Petition Payment, once Winterhalter became aware of the Debtor's failure to comply with his fiduciary obligations, Winterhalter was required to disclose the Debtor's misconduct.") (citing *In re Food Mgmt. Grp., LLC, 380 B.R. 677, 708 (Bankr. S.D.N.Y. 2008*) (recognizing that although counsel's duty "may not rise to the level of a policeman for the debtor's postpetition conduct," counsel "cannot simply close his or her eyes to matters having an adverse legal and practical consequence for the estate and creditors."); *In re Source Enterprises*, 2008 WL 850229, *14 (Bankr. S.D.N.Y. March 27, 2008) (recognizing that attorney for debtor "was obligated to advise the Debtor of, among other things, its fiduciary duties as well as of his view that BEGS's control was putting the Debtor in breach of such duties."); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 847 (Bankr. C.D. Cal. 1991) (positing that upon suspicion of debtor's dishonesty or neglect of fiduciary duty to the estate, attorney has duty to ask probing questions, demand full and reasonably corroborated responses, and if "still unsatisfied or ethically uncomfortable, immediately bring the unresolved concerns to court's attention by way of a motion to be relieved as counsel or in some other way."); *C.R. Bowles, Jr. & Prof. Nancy B. Rapoport, Debtor Counsel's Fiduciary Duty: Is There A Duty to Rat in Chapter 11?, Am. Bankr. Inst. J. (Feb. 2010), at 16, 65* ("Inside the world of bankruptcy, though, it is because DIP counsel really represents the estate qua estate and not just the DIP itself that DIP counsel has a clear duty to rat on those running the DIP. Courts have uniformly held that in cases in which management has engaged in misconduct, DIP counsel has the duty to disclose this misconduct in some manner.") (footnote omitted); *see generally In re United Utensils Corp.*, 141 B.R. 306, 309 (Bankr. W.D. Pa. 1992) ("If the debtor is not fulfilling its fiduciary obligation to the estate, it is the responsibility and duty of Debtor's counsel to bring such matters to the attention of the court."); *In re Matthews*, 154 B.R. 673, 681 (Bankr. W.D. Tex. 1993) ("the attorney could alert the U.S. Trustee, the court, or another interested party that, despite the attorney's best efforts, the schedules are incomplete or inaccurate"); *In re Saturley*, 131 B.R. 509, 519 (Bankr. D. Me. 1991) ("the attorney should alert the trustee that, notwithstanding the debtor's best efforts, the schedules are incomplete so that the trustee may then investigate as appropriate. Again, withdrawal may be the appropriate step."); *C.R. Bowles, Jr., Noisy Withdrawals: Urban Bankruptcy Legend or Invaluable Ethical Tool?, Am. Bankr. Inst. J. 26 (Oct. 2001).*

In summary, a "noisy withdrawal may be necessary to satisfy the lawyers obligations to avoid assisting the client in illegal or fraudulent conduct (Model Rule 1.2), to be candid to a tribunal (Model Rule 3.3) or to avoid misleading a third party (Model Rule 4.1). But a noisy withdrawal is also likely to anger and imperil a client." *Michael Downey, 11 Tips on How to Cease Representing A Troublesome Client, Law Prac. 16, 17 (January/February 2015)*. Thus, "disaffirmance should . . . go no further than necessary to accomplish its purpose of avoiding the lawyer's assisting the client's fraud." *J. Humbach, Shifting Paradigms of Lawyer Honesty, 76 Tenn. L. Rev. at 1004; Susan M. Freeman, Are DIP and Committee Counsel Fiduciaries for their Clients' Constituents or the Bankruptcy Estate? What Is A Fiduciary, Anyway?, 17 ABI L. Rev. 291, 323 (2009)* ("a lawyer can 'wave a red flag' without disclosing a specific client

confidential communication"). To minimize potential liability, "a lawyer considering a noisy withdrawal should consult with a legal ethics or risk management attorney before proceeding." *Id.*

VIII. CONFIDENTIALITY IN JOINT REPRESENTATIONS

The attorney-client privilege exists between joint clients and their common attorneys as to third parties. Third parties may obtain privileged communications upon waiver by all joint clients. A co-client, however, may unilaterally waive the privilege regarding its communications with the joint attorney, but cannot unilaterally waive the privilege for the other joint clients or any communications that relate to those clients. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 145-46 (D. Del. 2009).

In New York, the "joint-client privilege" can extend the attorney-client privilege when the same attorney acts for two parties having a common interest. *Rudow v. Cohen*, 1988 WL 13746, at *3 (S.D.N.Y. Feb. 18, 1988). A joint defense privilege covers conversations between actual or potential co-defendants and their attorney or attorneys for any common defense purpose; the content of such communications may not be disclosed without the consent of all co-defendants. *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989). Actual or potential litigation is a prerequisite for application of the joint defense privilege. *Id*. Communications relating to litigation planning or limitation of possible liability may be subsumed under this rubric, so long as the contacts relate to a common defense. *Id*.

In Delaware, the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation, and even in purely transactional contexts. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007). In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived. *Matter of Bevill, Bresler & Schulman Asset Mnagement Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).

A joint client cannot reasonably expect that, following the conclusion of a joint representation, the joint attorney will keep information from other joint clients. The only people joint clients can reasonably expect to withhold privileged communications from are third parties or strangers to the joint representation. *See Newsom v. Lawson*, 286 F.Supp. 3d 657, 664 (D. Del. 2017). As a result, a joint attorney may not withhold from one joint client privileged communications from the joint representation, even if the other (non-party) joint client refuses to consent to the disclosure.

Waiver of the joint-client privilege may not be effected absent the consent of both parties to the common interest arises where the parties subsequently become adverse to each other in litigation. Under these circumstances, neither co-client may assert the privilege against the other. *MacKenzie-Childs LLC v. MaKenzie Childs*, 262 F.R.D. 241, 249 (W.D.N.Y. 2009). However, in a lawsuit between an attorney and a client based on an alleged breach of a duty arising from the attorney-client relationship, attorney-client communications relevant to the breach are *not* protected by the attorney-client privilege. The breach of duty exception is not limited to the single client, single lawyer context. *Id*. at 665. Importantly, a joint client is entitled to only those

communications relevant to the matter of common interest that was the subject of the joint representation. Communications where one or more joint client is not present are also discoverable. *Id*.

IX. LINKS TO DE PRINCIPLES OF PROFESSIONALISM AND NY STANDARDS OF CIVILITY

Delaware – https://www.dsba.org/publications/principles-of-professionalism/

New York - https://www.nycourts.gov/courts/ComDiv/NY/newyork_judges_links.shtml