

## New Partners

WWW.NYLJ.COM

MONDAY, FEBRUARY 2, 2009

# Raising the Bar on Professional Conduct

## A primer on the new rules.

BY EMILY MADOFF

**I**T WAS the year of professional improprieties: three distinguished lawyers jailed for paying off plaintiffs, another prominent lawyer arrested on charges of impersonating his own client and pedaling phony bonds, a governor who allegedly sought to sell a Senate seat and a pillar of the financial community disclosing he had been allegedly running a \$50 billion Ponzi scheme (Bernard Madoff, no relation to the author). It may seem the bar for acceptable professional conduct keeps getting lowered and all the publicity about those bad apples may create the illusion that straying from the righteous path is an option. To the contrary, as a new partner, yours are the obligations not only to resist such temptation, but to be certain that others are doing so as well.

Effective April 1, 2009, New York is adopting a new code of professional responsibility which is similar in content and format to the ABA Model Rules. The Rules of Professional Conduct (“the Rules”) will replace the existing disciplinary rules. Following is a Rules primer.

### You Are Every Lawyer

The single most important factor to bear in mind is that everything you do reflects on all other lawyers, and of course, particularly reflects on your partners. Professional stereotyping is rampant; the population at large tends to believe all lawyers are like the lawyers they personally experienced or those they read about or see on television or in movies.

In order to address the need to maintain the integrity of the profession, the soon to be replaced Disciplinary Rules state “[a] lawyer should avoid even the appearance of professional impropriety.” Model Code of Professional Responsibility Canon 9 (1980). The new Rules retain the sentiment but, perhaps because appearances are in the eye of the beholder and thus subjective, this language does not appear in the new Rules. In place of the prohibition against the appearance of impropriety, the new Rules contain guidelines that describe a lawyer as an “Advisor” stating:

In representing a client, a lawyer shall exercise independent professional judgment and

render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client’s situation. (Rule 2.1)

Lawyers can draw upon their general knowledge in addition to their legal knowledge, synthesize many considerations, and then employ their good judgment to give counsel.

**A lawyer must be competent and diligent. If you know you do not possess the required skill to handle a matter, then associate with a lawyer who does or do not accept the retention. Competent representation requires “legal knowledge, skill, thoroughness and preparation.” (Rule 1.1) Diligence means that a lawyer should not neglect a legal matter entrusted to her and should act promptly in representing a client.**

You work for your clients. You are the advisor, but your clients are the decision makers, and you must abide by your clients’ decisions, provided you do not believe their proposed conduct would be unlawful. You may, however, exercise professional judgment and not assert a client’s position if doing so would not prejudice your client’s rights.

**Lawyers must be tattletales. If you know that another lawyer has acted, or intends to act, in a manner that raises a significant question as to that lawyer’s honesty, trustworthiness or fitness to practice law such as to violate the Rules, then you are required to report such knowledge to the appropriate authority—even if that lawyer is a supervising attorney, a partner or any other employee of your firm. And, “just following orders” is not an excuse. If you violate the Rules or any law at the instruction of a supervising attorney or partner, you do so at your own risk. You are responsible for your own acts.**

### Clients

Lawyers have special relationships to their clients, and the Rules have a paramount concern with defining and maintaining the integrity of that relationship. In order to be an advisor, a lawyer must be a good communicator so she is able to impart the information her clients require to make decisions about their cases. “You wouldn’t understand” is the antithesis of good professional conduct.

One of the cornerstone concepts of professional responsibility is “informed consent.” The Rules define informed consent as denoting “the agreement

by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.” (Rule 1.0(j)). In order for your clients to give informed consent, you must be able to make yourself clearly understood by them.

Communication also involves promptly advising your clients of any material developments in their cases, promptly responding to your clients’ requests, and generally keeping them reasonably well-informed of the status of their matters.

The lawyer/client relationship necessarily involves a high degree of trust. You must keep confidential your clients’ confidential matters. The Rules define broadly the term “confidential information,” as it includes any information your client designates as confidential as well as that information protected by the attorney-client privilege and that information likely to be embarrassing or detrimental to your client. There are certain limited exceptions to the duty to keep information confidential, which include such things as preventing death or bodily injury, and preventing your client from committing a crime.

This duty to maintain your clients’ confidences extends to “prospective clients,” that is, those persons who discuss the possibility of forming an attorney/client relationship with you, to the extent of any information discussed during that meeting. But, this duty cannot be used to sabotage you, and a person is not considered to be a “prospective client” if there is a unilateral divulging of information to you or if the information is shared for the purpose of disqualifying you from handling a materially adverse representation.

You must avoid conflicts of interest, either those that would arise by representing clients with differing interests in the same matter or if your professional judgment may be impaired by your own business or personal interests. Also, if you formerly represented a client, you cannot represent another person in a related matter if that client’s interests are materially adverse, unless you obtain that client’s informed consent.

Questions as to whom you owe a duty may easily arise if your client is an organization, particularly if you develop a relationship with a principal with whom you frequently interact. The organization,

not the individual, is your client. You cannot favor your friend at the organization in any way that may harm the organization. If you know your friend is doing something wrong, you could first try to stop her, but then you have a duty to report her to the appropriate authorities at the organization.

Partners' conflicts of interest issues are imputed to each other. Thus, it is important that your firm has a system in place to check for any conflicts of interest before you are retained. The firm should maintain a database of current and previous engagements against which proposed engagements may be checked.

You cannot negotiate a business relationship with a client (for example, the joint purchase of an office building) as you would with anyone else because once a person has been your client, you never may totally remove your lawyer's hat. Any business transaction with a client must be fair to the client (as opposed to a true arm's-length negotiation), you must advise the client to seek independent legal counsel, and you must obtain your client's informed consent to the arrangement. Also, you cannot solicit gifts from a client, including testamentary gifts. Although it should go without saying, the Rules provide you cannot demand sex as a condition to represent a client, and in a matrimonial matter, you may not have a sexual relationship with a client during the pendency of the action.

The Rules regarding your clients' money are simple. Don't commingle their money with yours, and don't take their money. (Beware that billing more time than you actually expend on a matter is a form of taking your clients' money.)

One New York rule that has changed within the past few years relates to expenses in contingent cases. Lawyers may advance the costs of the litigation, and the repayment of those costs may be dependent on the outcome of the litigation. However, you may not advance or guarantee financial assistance to a client.

### Other Lawyers and Third Parties

The most damaging accusation made about lawyers is that they are deceitful. The Rules leave no wiggle room. "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." (Rule 4.1)

In practice, this rule and other related rules provide that lawyers may not pretend a proposition is a law if it is not, they may not hide decisions contrary to their clients' position, even if their opponents have missed it, and they may not hide or destroy meaningful evidence. For example, say you are representing a client in a hotly contested litigation. Your client has delivered to you boxes of documents, which she has not reviewed. In the course of reviewing the documents for production, you find a document that will elate your opponent and may well cause your client to lose the case. No one but you has reviewed the documents. The devil tempts you to throw the document in the trash. Do not do that. You must produce the document. That said, if there is a legitimate basis upon which to conceal the document, such as privilege, then you may withhold the document according to the rules of discovery.

This quandary is just one example of why competence is so important. A lawyer must know what she may legitimately withhold. If the integrity of our legal system is not a sufficient deterrent to ward off temptation, then you should be assured that no

one document or series of documents is an isolated fact, and that, eventually, your opposing counsel is likely to find the truth, thereby destroying your reputation and your client's case along with it.

The Rules require an attorney to correct a false statement of material fact or law previously made to a tribunal and to take remedial action, including disclosing confidential client information. Also, delaying tactics in a litigation are prohibited.

Further to the need for truthfulness in the practice of law, lawyers cannot offer inducements to witnesses for their testimony, nor offer to compensate witnesses contingent upon the witnesses' testimony or the outcome of the litigation. The prohibition against contingent compensation applies even if the lawyer is retained on a contingent fee basis and thus only will be compensated for fees and any witness or other expenses advanced if she is successful in the litigation.

The Rules are crystal clear regarding the division of fees between lawyers, and lawyers and non-lawyers. Among lawyers, it is impermissible to divide fees with a lawyer who is not associated with the same firm unless the client is given full written disclosure regarding the division of fees and the fee is not excessive. On the other hand, a lawyer may not share fees with a non-lawyer nor form a partnership with a non-lawyer. Along the same lines, a lawyer may not compensate anyone for recommending her legal services or to obtain employment by a client. Even when one lawyer recommends another lawyer, a referral fee is only permissible based upon each lawyer's contribution to the case.

The Rules attribute a collegial relationship among lawyers. You may not communicate about the subject of a matter with another party to that matter if that party is represented by a lawyer. In that circumstance, lawyers are restricted to communicating with each other. If a party is not represented, the opposing lawyer may communicate with her, but cannot imply that the lawyer is herself disinterested or give any legal advice to the other party, except to recommend that she retain her own counsel.

### Advertising and Solicitations

In the last few decades, after computerized research, the biggest change in the practice of law has been in connection with lawyers' advertising. The Rules are explicit about what constitutes permissible advertising.

Advertising is defined as any communication aimed at securing business. Client testimonials are permissible, provided the client does not have a pending legal matter involving the attorney. The use of celebrities, voice-overs and depictions of fictionalized events also are permissible so long as the advertising attorney makes full disclosure.

However, the Rules ban advertisements that "rely on techniques to obtain attention that demonstrate a clear and intentional relevance to the selection of counsel, including portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." (Rule 7.1(c)(5)) For example, a lawyer's advertisement showing her photographed sitting on her desk in a provocative pose would be banned, as would an advertisement showing giant lawyers towering over skyscrapers.

Lawyers may not state they "specialize" in any particular field of law, but may identify the fields in which they practice.

The Rules retain the ban on monikers, nicknames and mottoes, such as "heavy hitter," that imply the

ability to obtain results because the assertions cannot be backed up by bona fide professional ratings. Statements that are reasonably likely to create an expectation about results a lawyer can achieve must be accompanied by the disclaimer that "[p]rior results do not guarantee a similar outcome."

Many types of advertisements must contain the disclosure "Attorney Advertising," and every advertisement must contain the name, principal office address and telephone number of the lawyer or law firm.

Web sites generally are considered to be attorney advertising, and the advertising rules apply. Often law firms will include the notice "Attorney Advertising" on every page of their Web sites. The Rules also forbid redirecting users from a Web site with a name that implies an ability to obtain results (for example "www.dreamteam.com") to the attorneys' main site.

Attorneys must retain copies of advertisements for three years and copies of Web solicitations for one year.

Solicitations, as distinguished from advertisements, are targeted at specific recipients, for example, all passengers who traveled on the Titanic and relatives of the victims. Solicitations may not be made by in-person or telephone contact or by real-time or interactive computerized communication. That is, you could not stand at the pier and hand out your business card to Titanic passengers, nor call or e-mail them to offer your legal services.

Solicitations made in writing or by computer-accessed communication (which differs from an e-mail in that the client must find the solicitation and click on the link) that are directed to pre-determined recipients, if prompted by a specific occurrence (such as the sinking of the Titanic) must disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal needs.

The Rules provide a new prohibition in connection with mass torts, which apply both to plaintiffs' attorneys and defendants' attorneys. No unsolicited communication in connection with specified incidents involving claims for personal injury or wrongful death (such as the sinking of the Titanic) shall be disseminated before the 30th day after the date of the incident. (If a filing must be made prior to the 30th day as a legal prerequisite, then no solicitation shall be made before the 15th day after the date of the incident.)

The new Rules also affirm the responsibility of attorneys to undertake pro bono work and to contribute to services for the poor.

### Conclusion

The obligations set forth in the Rules are substantially the same as their predecessor, the Code of Professional Responsibility, but are more accessible and understandable, and are generally consistent with the national standards for attorney conduct. This article is not meant to be an exhaustive examination of all the Rules, but rather an overview of the general principals controlling good conduct. The complete Rules may be found at [www.nycourts.gov/rules/jointappellate/](http://www.nycourts.gov/rules/jointappellate/).

New Rules, new partners: it is your responsibility to raise and maintain the integrity of the legal profession.