

Ethics Training justice AMERICORPS



Cristina Ritchie Cooper

Karen Grisez

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Sources of Discipline

- Applicable Sources of Law
(or: Who Can Get You in Trouble)
- Attorneys: - Law of the State Where Admitted
 - Law of the State Where You Are Practicing or Appearing in Matter in Question
 - Law of the State Where Conduct Occurred
 - PLUS: EOIR Rules (for those appearing before Immigration Court or BIA)
- How to Reconcile: Normally determine most conservative course of action and follow that.

Focus Today on ABA Model Rules

- Almost every state has a version identical or similar.
- You must identify and compare your applicable Codes of Professional Responsibility.

Supervision

ABA Model Rule 5.1

- Lawyers with supervisory authority over other lawyer(s) shall make reasonable efforts to ensure that the other lawyer(s) conform to the Rules of Professional Conduct.
- A lawyer shall be responsible for another lawyer's violation of the Rules if the attorney orders, or with knowledge of the specific conduct, ratifies it; or...knows of the conduct at a time its consequences could be avoided or mitigated but fails to take reasonable remedial action.

Supervision

ABA Model Rule 5.2 - Responsibilities of Subordinate Lawyer

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

But

- A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Supervision

ABA Model Rule 5.3

- Supervisory attorney is ultimately responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if
 - (1) the lawyer orders or with knowledge . . . ratifies the conduct involved; or
 - (2) the lawyer with direct supervisory authority knows of the conduct at a time when its consequences can be avoided or mitigation but fails to take reasonable remedial action.

Duty of Competence

- ABA 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.

Duty of Competence:

- Comments: a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.
- Need skills: analysis of precedent, evaluation of evidence, legal drafting.
- Can associate with lawyer of established competence in field.

Competence hypo:

- You are a new attorney and you have been assigned to represent a UAC in an asylum case. You have never done an asylum case before but you are nervous about taking on something completely new.
- Is there a problem with Duty of Competence?
- If so, why or why not?
- What can you do to satisfy this duty?

Duty of Diligence

- ABA Rule 1.3: Diligence
- A lawyer shall act with reasonable diligence and promptness in representing a client.

Duty of Diligence:

- Comment:
- A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
- A lawyer's work load must be controlled so that each matter can be handled competently
- A lawyer must manage the tendency toward procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions or the client's legal position can be destroyed. Delay can cause anxiety and undermine confidence in lawyer's trustworthiness

Duty of Diligence hypo:

- You represent an 18 year old boy from Central America who has been released to a local youth shelter. His case was terminated after you got the I-360 granted when he was still detained. He is waiting for you to file the I-485.
- You are not sure about this kid. You think he might have been in a gang. You think he might be lying about the facts of his SIJ case. You don't like him much. You take 6 months to file the I-485 b/c you have many detained cases, does this violate your duty of diligence?

ABA Model Rule 1.4 - Communications

- A lawyer shall:
- Promptly inform client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required;
- Reasonably consult with client about the means by which the client's objective are to be accomplished;
- Keep the client reasonably informed about the status of the matter;

Communications, con't

- Promptly comply with reasonable requests for information; and
- Consult with client about relevant limitation on the lawyer's conduct when lawyer knows that the client expects assistance not permitted by Rules or other law
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Communications Hypo:

- You represent A, a 15 year old girl from El Salvador who has applied for asylum and related forms of relief. The TA calls you to offer prosecutorial discretion and admin closure of the case. You think that is a terrible offer, since your client has an even chance of winning asylum, and PD will leave her with no status. However, you know your client is terrified of testifying in court because of the sensitive and traumatic events she experienced. What is your obligation to the client?
- Against your advice the client tells you she wants to take the offer, what do you do?
- After your client takes the offer, she changes her mind and wants to pursue asylum. What is your obligation?

Rule 1.6: Confidentiality of Information

- 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).
- A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - To prevent reasonably certain death or substantial bodily harm.

Confidentiality, con't

- A lawyer may reveal information:
 - To prevent client from committing a crime or fraud that is reasonably certain to result in substantial injury to financial interests or property of another and in having used lawyer's services;
 - To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted in the client's commission of a crime or fraud;
 - To secure legal advice about the lawyer's compliance with these rules;

Confidentiality con't:

- A lawyer may reveal information relating to the representation of a client:
 - To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client
 - To comply with other law or a court order; or
 - To detect and resolve conflict of interest arising from lawyer's change of employment
- A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to information relating to client

Confidentiality, con't

- What is Informed Consent?
- ABA Rule 1.0(e): "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Confidentiality, con't

- A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.
- The duty of confidentiality continues after the client-lawyer relationship has terminated.
- Duty of Confidentiality often conflicts with Duty of Candor to Court

Confidentiality, hypo:

- 16 year old client detained in a border-area facility tell you she was raped by her coyote on trip to U.S. She is concerned about venereal diseases and HIV. She is constantly anxious and worried and is about to be released to her mother in Virginia. The child's mother calls you and asks if anything is going on with her child, she notes distress in her voice.
 - Can you tell mother anything?
 - Can you tell clinician?
 - What do you do?

ABA Rule 1.7 Conflict of Interest – Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Hypos

- Dual Representation:

Your program accepts the case of J, a 17-year-old undocumented boy who is in removal proceedings. J's mother "M" is a US citizen and he has been reunified with her. J is applying for SIJS status, but you also agree to file a family petition for M on behalf of J. Over the course of the representation, while the I-130 is pending, M tells you that J has been drinking and using drugs and is hanging out with gang members. She wants to withdraw her petition for J but not tell him. What are your obligations?

ABA Rule 3.3, Duty of Candor

Rule 3.3 Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Duty of Candor to Court Hypos

- Asylum client admits to filing a fraudulent document with court before you were involved in the case. What is your obligation as counsel?
- Asylum client denies filing fraudulent document with court but you suspect document is false due to lack of letterhead, lack of seal, lack of official look/feel of document.
- Asylum client's oral testimony at trial conflicts with his I-589 and declaration. You are sure client told you he was kidnapped and assaulted by gang members 3 times, now he says 5. He testifies that his application is wrong on that point.
- How do you proceed?

Duty of Candor to Court (2)

- Teen client tells you he has made up facts about SIJ claim, including that his mother abandoned him and that his father is deceased. What do you do?
- Teen client gives you a birth certificate that says he is 17. You get dependency order then later find out his birth certificate was altered. He was actually 18 when you got order. What do you do?
- Client tells paralegal he sold drugs a few times when forced by gang, which probably makes him ineligible for adjustment of status. Does paralegal have to tell attorney?

Ethical Issues in Children's Cases

- Children are different than adults, aren't they?
- Are your ethical responsibilities as lawyer different?
- Duties are the same as to any client but may look different in children's cases
- Bottom line: Rules for client with diminished capacity govern.
See AILA Practice Advisory, [Ethical Issues in Representing Children in Immigration Proceedings](#), Jan. 29, 2015.

ABA Rule 1.14 Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ABA Rule 1.14, con't.

- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

See also [ABA Standards of Practice for Attorneys Who Represent Children in Abuse and Neglect Cases](#) and [ABA Section of Family Law Standards of Practice for Attorneys Representing Children in Custody Cases](#)

Rule 1:14 Client with Diminished Capacity (cont.)

- Comment 1-Normal client-lawyer relationship is based on assumption that client when properly advised and assisted, is capable of making decisions about important matters.
- Clients with diminished capacity often have ability to understand, deliberate upon and reach conclusions about matters affecting client's own well being
- Children as young as 5 or 6 may be regarded as having opinions that are entitled to weight in legal proceedings concerning their custody
- Law recognizes intermediate degrees of competency.

Rule 1:14 Client with Diminished Capacity (cont.)

- Comment 6-in determining extent of client's diminished capacity, lawyer should consider and balance factors such like:
 - Client's ability to articulate reason leading to a decision
 - Variability of state of mind
 - Ability to appreciate fairness of a decision
 - Consistency of a decision with the known long-term commitments and values of client
 - If appropriate, lawyer make seek guidance from an appropriate diagnostician

Rule 2.1 Advisor

- May intersect with Diminished Capacity Concerns
- Attorney shall exercise independent professional judgment and offer candid advice about law and other considerations such as:
 - Moral economic, social and political factors
 - Relevant to client's situation

Client Contact Issues

- How do you handle clients who run away, disappear or simply become unresponsive?
- Who can you tell? What can you reveal? Which rules are implicated?
 - Communication
 - Confidentiality
 - Duty of Candor to Tribunal
 - Conflict of Interest
 - Reporting Obligations

Grounds for Discipline - EOIR

- 8 C.F.R. 33§ 1003.102 – Grounds
- Charging a grossly excessive fee;
- Engaging in bribery or coercion;
- Knowingly or with reckless disregard making a false statement or willfully misleading, misinforming, threatening or deceiving any person;
- Soliciting professional employment;
- Is subject to a final order of disbarment or suspension, or has resigned, while a disciplinary investigation or proceeding is pending, from practice before any state or federal court, or executive branch or agency;

Grounds con't

- Knowingly or with reckless disregard making a false or misleading communication about qualifications or services;
- Engaging in rude or insulting, or obnoxious conduct that would constitute contempt of court;
- Having been convicted in any state or federal court of a serious crime;
- Knowingly or with reckless disregard falsely certifying a copy of a document as being true and complete;

Grounds con't:

- Engaging in frivolous behavior;
- Engaging in conduct that constitutes ineffective assistance of counsel;
- Repeatedly failing to appear for scheduled pre-hearing conferences or hearings in a timely manner without good cause;
- Assisting a person other than a practitioner to practice law before EOIR;
- Engaging in conduct that is prejudicial to the administration of justice;

Grounds con't:

- Failing to provide competent representation to a client;
- Failing to consult with a client concerning the objectives of the representation or abide by decisions of the client concerning how to achieve those objectives;
- Failing to act with reasonable diligence and promptness;
- Failing to maintain communication with a client;

Grounds con't

- Failing to disclose to an adjudicator, controlling legal authority known to the practitioner that is directly adverse to the position of the client if not disclosed by opposing counsel;
- Failing to submit a signed Notice of Entry of Appearance in any case where the practitioner has engaged in “practice” and “preparation” as those terms are defined in the regulations; and

Grounds con't:

- Repeatedly filing notices, motions, or briefs that contain boilerplate language that evidences a failure to competently and diligently represent the client.
- Any individual who believe an immigration attorney or representative has engaged in criminal, unethical, or unprofessional conduct while practicing before EOIR **may** file a complaint with the EOIR Disciplinary Counsel. Form EOIR-44 to file complaint.

What constitutes “Representation?”

- 8 C.F.R. §§ 1.2 and 1001.1(m):
- Representation before the Board and USCIS includes practice and preparation as defined in paragraphs (i) and (k) of this section.

Practice and Preparation defined:

- 8 C.F.R. §§ 1.2 and 1001.1(i): practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board.

Practice and preparation con't

- 8 C.F.R. §§ 1.2 and 1001.1(k): preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.

Mandatory Reporting Laws

- All states have statutes identifying people required to report suspected or known child maltreatment
 - Almost all enumerate professions whose members are mandated reporters, e.g. social workers, health care professionals, school officials
- Mandatory vs Permissive Reporting
 - *Must* everyone else report?

Reporting Laws: Privileged Communications

- Statutory recognition of the right to maintain confidential communications between professionals and clients
- All but 3 states addressed some form of PC within mandatory reporting requirements (as of 2013)
- Lawyer-client privilege as grounds *not* to report suspected abuse articulated in statutes in: AL, AZ, DE, FL, ID, IL, KY, MD, MI, MO, NV*, NH, ND, OH*, OR, PA, RI, TX*, WV, WY

* In limited circumstances

Conflict with Confidentiality Rule?

- MR 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless:
 - Client gives informed consent;
 - Disclosure impliedly authorized in order to carry out the representation; or
 - Disclosure permitted by 1.6(b) exceptions

Confidentiality, cont.

- Under MR 1.6, lawyer *may* reveal confidential information :
 - When reasonably believes disclosure necessary to **prevent reasonably certain death or substantial bodily harm**. MR 1.6(b)(1)
 - Exceptions for extreme cases vs. trend of expanding grounds
 - To comply with a law or court order MR 1.6(b)
 - E.g. of runaway teenage client

Confidentiality, cont.

From ABA Standards of Practice for Attorneys Who Represent Children in Abuse and Neglect Cases (1996), commentary to SP B-4(3):

- Generally, “the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer’s counseling function.”
- When a substantial danger of serious injury or death exists, lawyer “must take the minimum step which would be necessary to ensure the child’s safety, respecting and following the child’s direction to the greatest extent possible consistent with the child’s safety and ethical rules.”

Confidentiality, cont.

- Consequences of revealing information about client vs. withholding information
 - Safety of child
 - Relationship with child
 - Relationship with judge

Reporting Requirements: Non-lawyers

- MR 5.3: Responsibilities Regarding Nonlawyer Assistance
 - Someone employed or retained by or associated with a lawyer
 - Lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with lawyer's professional obligations. MR 5.3(b)
 - Lawyer may be held responsible of actions of nonlawyer
 - If knows or ratifies
 - Has management authority and knows of conduct

Reporting Laws: Non-lawyers

- Paralegals – MR 5.3
- Social Workers – MR 5.3, professional standards
- Statutory exclusions: Certain mandated reporters not required to report when employed by a lawyer who is providing representation on a criminal, civil, or delinquency matter and basis for suspicion of abuse arises solely in the course of that representation. D.C. Code § 4-1321.02(b)

Reporting Laws Checklist

- Review relevant employer policies
 - Mandatory reporting
 - Guidelines on revealing client confidences
 - Nonlawyer assistance agreements
- Look up your state's mandatory reporting law
 - If reporting required by *all* residents, is information acquired through lawyer-client relationship excluded?
 - If reporting required only by certain professionals, are exceptions articulated for lawyers or employees of legal professionals?
 - If you're a mandatory reporter, consider what to include in early discussions with client
- Consider your state's confidentiality rules and/or MR 1.6
 - Consequences of disclosing vs not disclosing
 - Ethics opinions on point?