



Tickling Adam's Rib: A He Said/She Said Real-World Tour of Ethics Issues in Representing School Districts

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Presented at the 2016 School Law Practice Seminar, October 20-22, Portland, OR

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**NATIONAL SCHOOL BOARDS ASSOCIATION
SCHOOL LAW PRACTICE SEMINAR
PORTLAND, OREGON
OCTOBER 20-22, 2016**

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LAWYERS SHOULD NEVER MARRY OTHER LAWYERS. THIS IS CALLED IN-BREEDING; FROM THIS COMES IDIOT CHILDREN... AND OTHER LAWYERS.
– KIP LURIE, *ADAM'S RIB* (1949)¹

I. Introduction

As lawyers, we assume a variety of roles on behalf of our clients: advisor, advocate, negotiator, and evaluator. According to the Preamble to the ABA Model Rules of Professional Conduct, “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.” While the Rules often prescribe terms for resolving these conflicts, they are *rules of reason* and should be interpreted “with reference to the purposes of legal representation and of the law itself.” They do not “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”²

While the Rules provide a framework for the ethical practice of law, in seeking to zealously represent our clients, we may be called upon to find the work-around, the exception, the loophole, and the narrow escape. In doing so, the simple rules we learned in law school and in preparing for the MPRE become less black and white and clear cut. Many difficult issues of professional discretion arise as we attempt to navigate and comply with ethical rules.³ This paper endeavors to explore just a few of the ethical challenges and questions that may arise in the public school setting. In many instances, there are multiple right answers.⁴

II. Client-Lawyer Relationship

BUT THEN ACTING IS ALL ABOUT FAKING. WE’RE ALL VERY GOOD AT FAKING THINGS THAT WE HAVE NO COMPETENCE WITH.
– JOHN CLEESE

¹ For more on the authors, who bear little resemblance to Katherine Hepburn and Spencer Tracy, and whose children defy this quote, see the Postscript to this paper.

² MODEL RULES OF PROF. CONDUCT, Preamble & Scope [9], [14], [16].

³ *Id.* at [9].

⁴ This paper is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdiction are controlling. The opinions offered in this paper are those of the authors, and each case must be evaluated on the actual facts presented to the attorney. This paper is intended to be used for general information only and should not be considered legal advice. The scenarios are illustrative and entirely fiction; any similarity to actual persons, places, or events is purely coincidental. The scenarios often implicate numerous ethical rules; the discussion of specific rules is not intended to be exhaustive.

THE CODE OF COMPETENCE IS THE ONLY SYSTEM OF MORALITY THAT'S ON A GOLD STANDARD.
– AYN RAND

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.

What makes us *school attorneys*? What knowledge, skill, thoroughness, and preparation are reasonably necessary to undertake such representation? According to the American Bar Association Website on Sources of Certification, only the Florida Bar, Board of Legal Specialization and Education, offers specialization in “Education Law.”⁵ Those of us in other states create formal and informal practice groups and bar sections. This is not to say that specialization is required to demonstrate competence—certainly not, but it does illustrate the challenge in defining *school law*.⁶ Thankfully, “[i]n many instances, the required proficiency is that of a general practitioner.”⁷ Nevertheless, school attorneys serve in a unique practice niche. We know there is something different about us. We know we are special, but how does this impact our professional responsibility to provide competent representation?

1. The Facts (Scenario 1)

John Sharpe, Jr., moved back to his small hometown after he finished law school and passed the bar. He worked for two years in the county attorney’s office prosecuting misdemeanors before hanging out his own shingle. His father, a retired local physician, served as the school board president for 16 years. When the federal marshal handed the superintendent of schools an intimidating set of papers, the superintendent knew just who to call. “John Junior, this is Superintendent Starnes. I’ve got this piece of paper saying, ‘Greetings, you have been sued.’ Now I don’t know if that’s an oxymoron or another kind of moron, but I’m pretty sure some moron has sued us for something called a qui tam. This paper goes on for forty pages, claiming we defrauded the Medicare system using something called SHARS.⁸ It says we owe on the order of 50 million dollars in costs and penalties. I sure hope between you and that doctor dad of yours, you can get us out of this.” Not wanting to lose face with the superintendent (who previously served as principal of John’s high school), or lose a big opportunity for his fledgling law practice, John assures the superintendent that he is up to the challenge. Hanging up the phone, he scratches his head and mutters, “Qui tam. I wonder what that is.”

⁵ americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html#az.

⁶ To be sure, the label *school attorney* possesses a certain charm, but remember that a lawyer shall not state or imply that he or she is certified as a specialist in a particular field of law unless certified as a specialist by an accredited state authority. MODEL RULES OF PROF. CONDUCT R. 7.4(d).

⁷ MODEL RULES OF PROF. CONDUCT R. 1.1, cmt. [1].

⁸ The School Health and Related Services (SHARS) program allows Texas school districts to request Medicaid reimbursement for certain health-related services that are medically necessary and reasonable to facilitate the participation of children with disabilities in the educational program.

2. The Question

- Has John violated the first rule of ethics?

3. The Framework

Every model rule contains comments that provide guidance on the issues implicated by the rule. Common terms may have too broad a definition to lend themselves to easy application. The comments clarify the underlying purpose of the rules, making their application easier. The comments serve as guides to interpretation, but the text of each rule is authoritative.⁹

Comment 1 to Rule 1.1 not only states that *competence* sometimes only requires the proficiency of a general practitioner, it also explains that multiple factors affect the determination of competence:

- a) the relative complexity and specialized nature of the matter;
- b) the lawyer's general experience;
- c) the lawyer's training and experience in the field in question;
- d) the preparation and study the lawyer is able to give the matter; and
- e) whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.¹⁰

According to Comment 2, "a newly admitted lawyer can be as competent as a practitioner with long experience. . . . Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."¹¹ As to thoroughness and preparation, Comment 5 recognizes that the required attention and preparation are determined in part by what is at stake, including the complexity of the matter and the potential consequences.¹² Finally, Comment 6 suggests that a lawyer should obtain *informed consent*¹³ from the client before retaining other lawyers outside the lawyer's own firm to assist in the provision of legal services, and must reasonably believe that the other lawyers' services will contribute to the competent representation of the client.¹⁴

⁹ MODEL RULES OF PROF. CONDUCT, Preamble & Scope [21].

¹⁰ MODEL RULES OF PROF. CONDUCT R. 1.1, cmt. [1].

¹¹ *Id.* at cmt. [2]

¹² *Id.* at cmt. [5]

¹³ " '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." MODEL RULES OF PROF. CONDUCT R. 1.0(e).

¹⁴ MODEL RULES OF PROF. CONDUCT R. 1.1, cmt. [6]; *see also* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 98-411 (1998) (discussing lawyer-to-lawyer consultation and reminding the practitioner that consultations with outside attorneys should include client consent if a *hypothetical* discussion is likely to reveal confidential information that would prejudice the client or that the client would not want disclosed).

4. The Reality

Does it affect the analysis that the only other lawyer in town practices oil and gas, family, and criminal law? What if John currently only has a car wreck case and a dog bite case on his desk? Does it matter that John's civil procedure professor, for whom he served as teaching assistant, wrote a book titled *False Claims Act: Federal Whistleblower Litigation*? Does it make a difference if the district served a dozen students with medical needs or a hundred of them?

5. The Analysis

John has not violated Rule 1.1's requirement to provide competent representation at this point. This is somewhat of a trick question, just like many ethics questions. John has not yet spoken to the true client: the board of trustees. John probably has some understanding of the fact that the engagement for representation will be by the board, not by the superintendent, given that his father was board president for over a decade. John has time to weigh the factors, consider his level of competence, present a scope of representation to the board, and, if appropriate, get board approval of an engagement letter for the specified professional services. This could include a proposal to engage his former law professor on the matter, assuming compliance with other rules.¹⁵

After evaluating the factors, can John ethically undertake the representation? Unquestionably, the matter is complex and specialized, but at the end of the analysis, it appears to be a single cause of action for fraud. The law is well-developed in this area; thus, gaining familiarity will not be particularly challenging. John appears to have time on his hands for preparation and study. He also has a tailor-made resource in his professor. While he evidently has no prior experience with the False Claims Act, part of the field in question is litigation, and there is little doubt that, as a former prosecutor, he knows his way around the courtroom; however, civil litigation and criminal prosecution are very different. The most compelling factor ultimately may be his general experience because it seems unlikely, given his work to date, that he is licensed in federal court. Depending on the jurisdiction, this could thwart his ability to effectively and immediately represent the district. Perhaps, on balance, all the factors will make the representation appropriate, or perhaps not, but he has a moment to consider the issue fully before making a commitment to the board concerning his competence. Ultimately, “[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.”¹⁶

John has assured the superintendent that he is up to the task, which may get him an audience with the board, but he has not held himself out as an expert or specialist in school law, Medicare, or federal fraud litigation. Thus, he also has not run afoul of Rule 7.4(d)'s prohibition on implying certification or specialization. John's compliance with Rule 1.1 will turn on his ability to get up to speed, practice in federal court, and find sufficient resources or support in his defense of the district.¹⁷

¹⁵ MODEL RULES OF PROF. CONDUCT R. 1.1, cmt. [6], (citing Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law)).

¹⁶ *Id.* at cmt. [4]

¹⁷ Notably, recent amendments to the Rules added Comment 8 to Rule 1.1 to emphasize the lawyer's obligation to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant

THE WORLD IS MADE UP FOR THE MOST PART OF MORONS AND NATURAL TYRANTS, SURE OF THEMSELVES, STRONG IN THEIR OWN OPINIONS, NEVER DOUBTING ANYTHING.

– CLARENCE DARROW

YOU CANNOT SHAKE HANDS WITH A CLENCHED FIST.

– INDIRA GANDHI

B. Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4,¹⁸ shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. . . .**
- (b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.**
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.**
- (d) 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.**

Discerning the client’s views regarding the objectives of representation can prove challenging, particularly when the *client* speaks through a governing board composed of individuals. Often the lawyer’s opinions, both on social mores and legal requirements, may differ from a majority of the board. Likewise, occasions may arise when a seasoned school attorney may want to control the school district client’s decisions because of the board members’ relative lack of experience in the realm of school controversies. The converse can also occur when one or more lawyers serving on a school board exert considerable influence on the lawyer providing representation. It is important to identify the respective roles and responsibilities of the lawyer and the client to create a collaborative and successful relationship.

technology”; a lawyer should be aware of social media as a source of potentially useful information and be competent to obtain it. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 14-466 (2014) (quoting MODEL RULES OF PROF. CONDUCT R. 1.1, cmt. [8] and discussing propriety of lawyer reviewing jurors’ internet presence).

¹⁸ Rule 1.4 governs communication in the client-lawyer relationship; the rule uses the words *promptly* and *reasonably* with disturbing frequency, and requires the lawyer to “keep the client reasonably informed about the status of the matter. . . .” MODEL RULES OF PROF. CONDUCT R. 1.4(a)(3).

1. The Facts (Scenario 2)

Ms. O'Hare represents Trinity School District. She has attended board meetings for several years. She has become increasingly uneasy about the invocation before Trinity School District board meetings. It seems to O'Hare that the solemn observation has become more sectarian and proselytizing, making it constitutionally suspect. She was not surprised to get a phone call: "O'Hare, this is Board President Fallwell. I've just received a letter from a lawyer for a group called Freedom from Religious Fervor, or FFRF, threatening to sue us. I don't know what they are talking about, but apparently they have some problem with Jesus. If they are really for freedom, then they better get to know Jesus. This confirms my belief that God got me elected to assure that our kids are protected from the heathens eroding our community values. I need a letter from you fast, stating that our invocations are legal." The call leaves Ms. O'Hare wondering if she should withdraw in light of her growing concerns over the prayers and the fact she is an atheist.

2. The Question

- **Should Ms. O'Hare withdraw because her views differ from Fallwell's?**

3. The Framework

The comments to Rule 1.2 begin with the explicit admonition that the rule "confers upon the client the *ultimate authority* to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."¹⁹ While our scenario does not yet implicate the lawyer's responsibility to keep the client informed under Rule 1.4, that additional requirement ensures that the client receives the information necessary to make informed decisions related to the representation. Even when clients are well-informed, they may not agree with their lawyers concerning the means to be used to accomplish the client's objectives. While clients generally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, lawyers usually defer to the client regarding issues such as the expense to be incurred and concern for third persons who might be adversely affected.²⁰ The lawyer should endeavor to find a mutually acceptable resolution when disagreements arise, but each party can end the relationship if necessary.²¹ Fortunately, "[at] the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a *material change* in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization."²² This can provide particular utility in the representation of boards. In this scenario, the independence of the lawyer from the client's views must be considered in evaluating the representation. Comment 5 addresses this independence: "Legal representation should not be denied to those . . . whose cause is controversial or the subject of popular disapproval. By the same token, representing a

¹⁹ MODEL RULES OF PROF. CONDUCT R. 1.2, cmt. [1] (emphasis added).

²⁰ *Id.* at cmt. [2].

²¹ *Id.*; see also MODEL RULES OF PROF. CONDUCT R. 1.16 (addressing withdrawal).

²² MODEL RULES OF PROF. CONDUCT R. 1.2, cmt. [3] (emphasis added).

client does not constitute approval of the client’s views or activities.”²³ In situations where client objectives and the means to achieve them may be inconsistent with the lawyer’s willingness to provide representation, the issues can and should be addressed at the outset of representation.²⁴

4. The Reality

Does it matter that the Board Secretary, Martin Modern, calls O’Hare the next day asking what strategies might be employed to keep Fallwell’s zealotry in check and initiate negotiations with the FFRF? What if Fallwell is a preacher and Modern is a lawyer? As a lawyer, can Modern communicate directly with FFRF? What if an outside organization has offered to have its lawyers defend the district for free if litigation ensues?

5. The Analysis

Ms. O’Hare need not withdraw simply because she may disagree with the current invocation practices. The scenario certainly implicates the need to set clear expectations concerning the representation with the entire board and not just through individual discussions with a few board members. This conversation must include details as to the objectives of the representation and specific limitations on the activities in which O’Hare is authorized to engage. Conversely, O’Hare should provide explicit information as to any role in which she is unwilling to serve. These parameters should be outlined in an engagement letter approved by the board.

O’Hare’s status as an atheist does not necessarily disqualify her. In fact, she can represent the district in this matter unless her own beliefs render her unable to provide zealous representation. According to Comment 1 to Rule 1.3 pertaining to diligence, “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”²⁵ If O’Hare is willing to take up the cause, but desires to step out if it goes to court and let the outside organization take over, she certainly may do so. A lawyer may limit her role to a specific matter or set of tasks. Because clients may assume a lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal, any doubts about whether a client-lawyer relationship still exists should be clarified by the lawyer in writing.²⁶

Finally, if Board Secretary Modern wants to broker some resolution, he cannot formally do so without authorization from the board. Modern apparently can, however, communicate directly with the FFRF without its lawyer’s consent. The prohibition of Rule 4.2 on lawyers communicating with represented parties only applies to lawyers when *representing a client*.²⁷

²³ *Id.* at cmt. [5].

²⁴ *See id.* at cmt. [6] (noting that “the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.”).

²⁵ MODEL RULES OF PROF. CONDUCT R. 1.3, cmt. [1].

²⁶ *Id.* at cmt. [4].

²⁷ MODEL RULES OF PROF. CONDUCT R. 4.2.

Presumably, Modern will not be *representing* the district; although he is a representative of the district, he is not serving as its lawyer. Nevertheless, after getting board authorization, Modern would be wise to call the FFRF lawyer who sent the letter before contacting the organization directly. While Modern may talk to FFRF, the rules do not permit O’Hare to control the content of those communications or negotiations.²⁸

HE’S THE KIND OF MAN A WOMAN WOULD HAVE TO MARRY TO GET RID OF.
– MAE WEST

NEVER TRY TO IMPRESS A WOMAN, BECAUSE IF YOU DO SHE’LL EXPECT YOU TO KEEP UP THE
STANDARD FOR THE REST OF YOUR LIFE.
– W. C. FIELDS

C. Rule 1.6: Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:**
 - (1) to prevent reasonably certain death or substantial bodily harm;**
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;**
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;**
 - (4) to secure legal advice about the lawyer’s compliance with these Rules;**
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, . . . ;**
 - (6) to comply with other law or a court order**
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

²⁸ *Id.* at cmt. [4]; *see also* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 11-461 (2011) (discussing advising clients regarding direct contact with represented persons and discouraging “scripting” or “masterminding” the communication).

School attorneys can talk to numerous people in the course of representing school districts. But sometimes it is not entirely clear whose communications and information are confidential. What do you do during an interview of a district employee when he asks, “Is this conversation just between you and me?” This depends on the circumstances leading to the interview. Rule 1.6 contemplates disclosures that are *impliedly authorized* to carry out the representation. For all the particularity of Rule 1.6(b), Rule 1.6(a) remains quite vague. A lawyer’s success in advocacy may hinge on strategically timed disclosure of sensitive information. Must the benefit of such revelations be certain before a disclosure is *impliedly authorized*?

1. The Facts (Scenario 3)

The American Association of Public Schools Risk Management Fund (AAPS RMF) provides employer’s legal liability risk coverage to Salem’s Lot School District. The RMF hired Stefan King to defend the district and one of its high school assistant principals in a civil lawsuit claiming deliberate indifference toward a female student following the arrest of a high school algebra teacher, Al Frankenstein, for an improper relationship with the student. During the police investigation, Assistant Principal Leturno gave a statement indicating she was unaware of any unusual conduct by the teacher that could have signaled the impropriety. The district has a well-publicized anti-harassment policy, a reporting policy for suspected child abuse or neglect, grievance policies providing multiple avenues for relief, and a Title IX coordinator. During preparations for Principal Leturno’s deposition, she asks attorney King if she can tell him something “off the record.” Before King can answer, Leturno says, “For a while I’ve thought Al was kind of creepy. We went out a couple of times, and I eventually had to threaten to have him assigned to another campus to get him to stop calling me. I never knew he was involved with that girl, but I did see them talking in the parking lot—frequently. I also found the two of them behind a locked door a couple of months ago. I might have seen her give him a peck on the cheek after a football game. Is any of that a problem?” After the prep session, King calls the superintendent to provide an update. As King begins by saying some troubling things came up in the prep session with Leturno, the superintendent interrupts to say, “Oh, don’t worry about her. We haven’t needed two APs at the high school for a while; she’s going to be part of our reduction in force next month.” King, feeling like he’s received a stake to the heart, tries to determine his next steps.

2. The Questions

- **Can King convey to the district the new information from Leturno?**
- **Can he tell Leturno she may soon lose her job?**
- **Does King have any other obligations?**

3. The Framework

In simplest terms, a lawyer must not reveal information relating to the representation of a client, absent *informed consent*.²⁹ Rule 1.6, along with several other rules,³⁰ sets expectations for confidentiality that serve to reinforce the bond of trust that is the hallmark of the client-lawyer relationship.³¹ Remarkably, even if a school custodian tells King that he was with Leturno when they discovered the student and Al behind closed doors, partially disrobed, and in an embrace, King must hold this in confidence.³² The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. Disclosures are permitted when a client is about to commit a crime or fraud, but unless the misconduct is reasonably certain to result in substantial bodily harm, the client's conduct must involve the lawyer's services before disclosure is permitted. Even if the circumstances warrant withdrawal as counsel, the duty of confidentiality continues after the relationship ends.³³

4. The Reality

Assume Leturno also told King that the student once asked her if she thought Al was a good kisser; leaving Leturno in stunned silence, the student walked away saying, "I'd give him four stars." When King prepares the status update to AAPS RMF, can he explain how much worse the defense prospects have become? Can he advise Leturno that her failure to report suspected abuse may take her outside of defense coverage? King desperately wants to run this dilemma by someone; does he have any options?

5. The Analysis

King cannot communicate the prejudicial information from Leturno to the district. If Salem's Lot had not been so lucrative for King over the years, he would beat a hasty retreat from these horrors. For now, though, he's stuck. With regard to Leturno's disclosures, these are confidential unless something in Rule 1.6 allows disclosure. King can shop Rule 1.6's catalogue of exceptions to the rule of confidentiality, but none of them apply here. Neither Leturno's employment nor King's joint defense of Leturno and the district allows him to share what he learned in confidence. He certainly can confer with ethics counsel on his options under Rule 1.6(b)(4), and likely can do so with other lawyers in his firm.³⁴ Short of this, however, nothing in Rule 1.6 authorizes disclosure.

²⁹ MODEL RULES OF PROF. CONDUCT R. 1.6, cmt. [2].

³⁰ See MODEL RULES OF PROF. CONDUCT R. 1.6, cmt. [1] (citing Rule 1.18 for duties with respect to information provided by a prospective client, Rule 1.9(c)(2) for the duty not to reveal information relating to prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for duties concerning use of such information to the disadvantage of clients and former clients).

³¹ MODEL RULES OF PROF. CONDUCT R. 1.6, cmt. [2].

³² See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 08-450 (2008) (addressing confidentiality when a lawyer represents multiple clients in the same or related matters and the requirement of confidentiality upon receipt of non-privileged *information related to the representation*).

³³ MODEL RULES OF PROF. CONDUCT R. 1.6, cmt. [3], [6]-[8], [20]; see also Rules 1.9(c)(1)&(2) (prohibiting use of confidentiality information to the disadvantage of a former client).

³⁴ MODEL RULES OF PROF. CONDUCT R. 1.6, cmt. [5] (allowing lawyers in the same firm to make disclosures unless the client has instructed otherwise).

King cannot advise Leturno that she may be terminated. First, the superintendent is *not* King’s client; however, by virtue of his role as chief executive officer of the district, he is impliedly authorized to engage in confidential communications with King on behalf of the district.³⁵ Second, the superintendent likely would reasonably believe the conversation was confidential. Where a person holds an objectively reasonable belief that a lawyer is acting as his attorney, relies on that belief and relationship, and the lawyer does not refute that belief, the relationship typically will be viewed as one between attorney and client in bar disciplinary matters.³⁶ Moreover, this information does not directly relate to the assigned representation of Leturno, which, by the way, is likely to be short-lived.

King’s real dilemma is continued representation. If the student’s question to Leturno about kissing is factored in, it has become apparent that Leturno has likely violated several district policies, perhaps a few reporting laws, and possibly perjured herself or interfered with a police investigation. King must examine Rule 1.7 on conflicts of interest involving current clients. Rule 1.7, set forth and discussed in detail at **Scenario 4** below, prohibits representation of multiple clients if the representation of one client will be directly adverse to another client, or 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. Although there are exceptions in Rule 1.7(b) that allow continued representation, none appear to permit this joint representation, even after notice and written consent. King simply cannot provide *competent and diligent representation* to each client.³⁷ King’s ability to effectively and zealously represent the district has been compromised because he cannot use information obtained from Leturno to support the district’s defense. Because of Rule 1.6, King probably cannot disclose sufficient information to the district in order to get its informed consent to the conflict.³⁸ A lawyer shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct.³⁹ King might be able to continue representing only Leturno,⁴⁰ but he may withdraw if he can do so without material adverse effect on her interests; he certainly can withdraw if Leturno insists on denying the additional knowledge in her deposition.⁴¹

With this additional information about the kissing question, could either of the crime-fraud exceptions apply to allow disclosures of confidential information? A lawyer may disclose confidential information under Rule 1.6(b)(1) to prevent reasonably certain death or substantial bodily harm or under Rule 1.6(b)(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

³⁵ MODEL RULES OF PROF. CONDUCT R. 1.13 (explaining that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents).

³⁶ *Matter of Pappas*, 159 Ariz. 516, 522, 768 P.2d 1161, 1167-68 (1988).

³⁷ MODEL RULES OF PROF. CONDUCT R. 1.7(b)(1).

³⁸ “Among a lawyer’s foremost professional responsibilities are fidelity to a client and preservation of the client’s confidence with respect to ‘information related to the representation’ as addressed by Rule 1.6. On the other hand, a lawyer is required by Rule 1.4(b) to provide information to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each.” ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 08-450 (2008).

³⁹ MODEL RULES OF PROF. CONDUCT R. 1.16(a)(1).

⁴⁰ See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 08-450 (2008) (concluding that withdrawal is required from representation of the client to whom the confidential information cannot be revealed).

⁴¹ MODEL RULES OF PROF. CONDUCT R. 1.16(b)(1)&(2).

another.⁴² There is no present threat of death or substantial bodily harm, so Rule 1.6(b)(1) does not apply. Likewise, Rule 1.6(b)(2) does not apply because Leturno has already engaged in the potentially criminal conduct. While Rule 1.6(b)(3) allows disclosure to correct or mitigate certain wrongs created by a client's conduct, the disclosure must relate to conduct in furtherance of which the client has used the lawyer's services; thus, Rule 1.6(b)(3) does not apply.⁴³

It would not be wise for King to advise Leturno concerning the effect of her conduct under the insurance coverage agreement that led to his engagement as her counsel. King has an inherent conflict in offering such advice given his relationship with the coverage provider. Under Rule 1.8(f), a lawyer can only accept compensation from someone other than the client when it does not interfere with the lawyer's independence. This rule also mandates that information relating to representation of a client remain protected under Rule 1.6; thus, King cannot report the "new facts" to AAPS RMF in his status report.⁴⁴ Typically, counsel informs an insurer in a timely manner on all matters relating to the action, except for privileged matters that might be relevant to coverage disputes.⁴⁵

TODAY EVERYTHING'S A CONFLICT OF INTEREST.
– SID VICIOUS

CONSIDER THE "NEW" WOMAN. SHE'S TRYING TO BE POLLYANNA BORGIA, CLEARLY A CONFLICT OF INTEREST. SHE'S SUPPOSED TO BE A RUTHLESS WINNER AT WORK AND A BUNDLE OF NURTURING SWEETNESS AT HOME.
– RITA MAE BROWN

D. 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;**

⁴² MODEL RULES OF PROF. CONDUCT R. 1.6(b)(1)&(2).

⁴³ MODEL RULES OF PROF. CONDUCT R. 1.6(b)(3).

⁴⁴ MODEL RULES OF PROF. CONDUCT R. 1.8(f)(3).

⁴⁵ *E.g., Employers Insurance of Wausau v. Seeno Construction Co.*, 692 F.Supp. 1150, 1158, n. 11, *aff'd* 945 F.2d 284 (9th Cir. 1991) (applying California 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.**

Numerous scenarios can arise where multi-party representation becomes ethically challenging. Sometimes the conflict is apparent even before representation begins. At other times, as in **Scenario 3** above, the conflict develops during the representation. The conflict can involve parties to the same litigation or transaction, or it may involve undertaking new representation that conflicts with an existing client's interests.

1. The Facts (Scenario 4a)

Connie Collaborator represents several school districts that pool their special education resources in order to affordably meet their obligations under the Individuals with Disabilities Education Act. One of Connie's clients has opted to withdraw from the cooperative arrangement and go it alone. The separation is going smoothly and according to the terms of the districts' shared services agreement (SSA), but then a dispute arises. The withdrawing client contends that it initially purchased the co-op's audiology equipment, although it was used by the co-op for many years. Another of Connie's clients is skeptical. That client serves as the fiscal agent, and all purchases are supposed to be made through its accounts.

More Facts (Scenario 4b)

Tommy Taxx represents Suspicion School District. Suspicion approached Tommy a few years ago concerning the local Tax Appraisal District's assessments impacting Suspicion's funding. Rumors were swirling that a new software package at the Appraisal District had multiple glitches that resulted in reduced appraisals and less income to Suspicion. They consulted with Tommy about a possible lawsuit, but the dust seemed to settle as appraisal values climbed steadily for a couple of years. Now the Appraisal District has been referred to Tommy to assist it with an appeal of a Public Information Act decision related to voluminous records containing proprietary vendor information.

2. The Questions

- **Can Connie represent both sides to the SSA dispute?**
- **Can Tommy take the Appraisal District's case?**

3. The Framework

To be sure, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."⁴⁶ Resolution of a conflict of interest requires the lawyer to:

- a) clearly identify the client or clients;

⁴⁶ MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. [1].

- b) determine whether a conflict of interest exists;
- c) decide whether the representation may be undertaken despite the existence of a conflict; and
- d) if so, consult with the clients affected by the conflict and obtain their informed consent, confirmed in writing.⁴⁷

So what is a *consentable* conflict? Ordinarily, clients may consent to representation notwithstanding a conflict, but some conflicts are non-consentable, in which case the lawyer involved cannot properly ask for such consent or provide representation.⁴⁸ A client may not effectively consent when the lawyer is unable to provide competent and diligent representation, when other law prohibits the representation, and when adverse interests limit vigorous development of each client's position because the clients are aligned directly against each other "in the same litigation or other proceeding before a tribunal."⁴⁹ Informed consent must be confirmed in writing in order to impress upon clients the seriousness of the decision the client is making. It also serves to avoid disputes that might occur in the absence of a writing. The requirement of a writing does not replace the need in most cases to talk with the client about all the aspects of the representation and the conflict.⁵⁰

4. The Reality

It seems unusual that most conflicts are consentable. The question is one of clarity. The law favors the ability of parties to enter legal arrangements of their choosing; it disfavors circumstances where one party is at a severe disadvantage or may not have full information upon which to base a decision. Thus, lawyers can enter into strange arrangements, but they generally require a signed writing that fully discloses the conflict and its possible ramifications, and reflects the client's understanding and informed consent. Sometimes a client simply doesn't want a lawyer to represent a rival, but when does a lawyer cross the threshold to a real conflict? What if Connie drafted the SSA that did not account for every piece of property? What if Tommy is asked to work on a breach of contract case for the Appraisal District against the vendor that supplied the very software package that Suspicion School District found problematic?

5. The Analysis

(4a) Presently, Connie can represent both sides to the dispute because the clients, who are directly adverse, are not yet in litigation or before a tribunal. She will need informed consent from both clients in writing, however. The pre-existing SSA likely provided a process for distribution of assets when a member withdraws, so it is unlikely that Connie's own malpractice interests are at stake for any failure to include a detailed inventory in the original agreement. In fact, Connie probably has the same consent form available that she used to create the cooperative in the first place. While she cannot rely on that earlier consent, she can revise the form, adding new details,

⁴⁷ *Id.* at cmt. [2]; *see also* Rule 1.0 (b), (c) (defining *confirmed in writing* and *informed consent*, respectively).

⁴⁸ *Id.* at cmt. [14]

⁴⁹ *Id.* at cmt. [15]-[17].

⁵⁰ *Id.* at cmt. [20].

to obtain the new consents.⁵¹ The original SSA may also contain a dispute resolution process that will guide the parties and their counsel until Connie can no longer represent both parties if litigation ensues. If litigation occurs, Rule 1.7(b)(3) bars dual representation.

(4b) Not only can Tommy represent the Appraisal District, he probably doesn't even need the existing client's consent. The Appraisal District needs representation in a Public Information Act lawsuit. Although Suspicion School District once considered litigating with the Appraisal District, it did not do so, and the two matters do not appear to be substantially related—a factor some jurisdictions add to the evaluation of conflicts.⁵² He would do well to check in with the school district to determine the current attitude related to the Appraisal District, but it is not required.⁵³ Even if the case related to the appraisal software package previously at issue, Tommy is not proposing to represent interests adverse to the school district's. The new representation could lead to disqualification from representing the school district if it were to sue the Appraisal District.

CORPORATE GOVERNANCE IS NOT A MATTER OF RIGHT OR WRONG—IT IS MORE NUANCED THAN THAT.

– JOHAN MYBURGH

SELF-GOVERNANCE DOES NOT MEAN NO ONE IS RESPONSIBLE. IT MEANS EVERYONE IS.

– HEATHER MARSH

E. Rule 1.13: Organization as Client

(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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

...

⁵¹ When a client has signed a general, open-ended consent, the consent will ordinarily be ineffective when new circumstances arise that the client would not have understood to be material risks involved in the original consent. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 05-436 (2005).

⁵² Tex. Disciplinary Rule Prof. Conduct 1.06(b)(1).

⁵³ Cf. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 97-405 (1997) (explaining the importance of disclosure to a government client when engaging in potentially conflicting representation).

- (f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.**
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.**

The organizational client, like a multi-headed hydra, presents unique challenges for the lawyer. What are the limits in representing such entities when competing interests exist within the organizational leadership? When do special obligations arise to certain officers, and when are uncomfortable discussions absolutely required? As with the confidentiality requirements, a great deal turns upon the relative certainty of substantial injury. The need to change course with a constituent of an organization may depend upon the degree of conflict perceived by the attorney.

1. The Facts (Scenario 5)

Sally Savvy is the lawyer for Angel Falls School District, providing day-to-day legal advice to board members and district administrators. Sally is extremely active on all social media platforms. Although she makes it a practice not to be friends on social media with clients, she made an exception for Cherie Chapman, an AFSD board member, because they go to the same health club and were acquaintances before Cherie was elected to the board. Cherie’s daughter is a cheerleader. Recently, Sally noticed that Cherie has been posting disparaging and taunting comments on the Facebook page of the high school student who beat Cherie’s daughter for head cheerleader. She has also posted on her own page statements about how she is going to “get rid of that slutty head cheerleader.” The student’s mother, who happens to be the middle school principal, has gotten involved by posting requests that Cherie leave her child alone. The middle school principal, who calls Sally occasionally for guidance in school matters related to her campus, such as student discipline, has called Sally and asked for advice on how to handle Cherie’s behavior toward her daughter.

2. The Questions

- **Does Sally have an obligation to do anything with regard to Cherie’s behavior?**
- **Can Sally advise the middle school principal on this matter?**

3. The Framework

A school district, as an organizational client, is a legal entity, but it cannot act except through its constituents, which include its officers, directors, and employees. This does not mean that the constituents are the clients of the lawyer. The lawyer may only disclose to such constituents information relating to the representation that is explicitly or impliedly authorized

by the organizational client in order to carry out the representation. A lawyer's obligation under Rule 1.13(b) to proceed as is *reasonably necessary* in the *best interest* of a school district client arises when the lawyer knows that the district is likely to be *substantially injured* by an action of an officer or other constituent that violates a legal obligation to the district or is in violation of a law that might be imputed to the district.⁵⁴ Knowledge can be inferred from the circumstances, and a lawyer cannot ignore the obvious.⁵⁵ In determining whether and how to proceed under Rule 1.13(b), the lawyer should consider the seriousness of the violation and the consequences, the responsibility of the district, the motivation of the person, the district's applicable policies, and any other relevant information. In some cases, it may be appropriate for the lawyer to ask the constituent to reconsider the behavior; if a constituent merely misunderstands the law and subsequently accepts the lawyer's advice, the lawyer may reasonably decide not to refer the matter to a higher authority (e.g. the board of trustees). If a constituent persists in conduct contrary to the lawyer's advice, the lawyer must take steps to have the board review the matter. If the matter is sufficiently serious and important or urgent, referral to the board may be necessary without communication with the constituent. Even if the lawyer is not *obligated* to communicate the matter to the board, the lawyer *may* do so if he or she believes it is of sufficient importance to warrant communication in the best interest of the district.⁵⁶

Comment 9 to Rule 1.13 specifically addresses governmental organizations and points out that precisely defining the identity of the client and prescribing the resulting obligations may be more difficult in the government context and constitutes a matter beyond the scope of the Rules.⁵⁷ Notably, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than he or she might when representing a private organization in similar circumstances; the public interest may permit a different balance to be struck between maintaining confidentiality and assuring that the wrongful act is prevented or rectified.⁵⁸

Finally, while each situation is highly fact-specific, there are times when the organization's interest may become adverse to that of one of its constituents. The lawyer should advise any such constituent that the lawyer does not and cannot represent the constituent, that he or she may wish to obtain independent representation, and that discussions with the lawyer may not be privileged.⁵⁹

4. The Reality

Fireworks may fly within the leadership of any organizational client. Fortunately, the ethical obligations set a very high threshold before a lawyer is required to take additional steps concerning a controversy. It is critical that a lawyer remain focused on the interests of the district rather than on the interests and opinions of individual officers or employees. What if Cherie is posting from her public "Cherie Chapman, Angel Falls SD Board Member" page? What if Cherie's daughter starts

⁵⁴ MODEL RULES OF PROF. CONDUCT R. 1.13, cmt. [1]-[3].

⁵⁵ *Id.* at cmt. [3] (citing Rule 1.0(f) for the definition of *knowingly*, *known*, and *knows*).

⁵⁶ *Id.* at cmt. [4].

⁵⁷ *Id.* at cmt. [9]; *see also* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 97-405 (1997) (discussing conflicts in representing government entities).

⁵⁸ MODEL RULES OF PROF. CONDUCT R. 1.13, cmt. [9].

⁵⁹ *Id.* at cmt. [10].

taunting the other girl at school and on Facebook? What if the other student is a male student and instead of posting disparaging and taunting comments, Cherie is posting positive and flirtatious comments along with sending him texts and bringing him snacks and other small gifts at cheer practice? What if the other student is the child of the board president?

5. The Analysis

Sally probably does not currently have an obligation to act on the information she has about Cherie’s behavior. Although Cherie’s behavior may support a private cause of action, it does not currently rise to the level of violating a legal obligation to the district or violating a law that might be imputed to the district, as long as Sally is confident that the language “get rid of . . .” is not any sort of viable threat. The actions are being taken by Cherie as a parent and an individual. That said, however, Sally might consider talking to Cherie about her behavior and the fact that it might reflect negatively on the district because observers (e.g., her followers, the public, etc.) may be unable to distinguish her behavior as an individual and as a board member. This becomes a closer question if Cherie is engaging in this behavior in her role as a board member, such as through her “official” Facebook page. The possibility that her behavior will be perceived as attributable to the board as a whole increases. Even so, Sally only has a duty to proceed as is *reasonably necessary* in the *best interest* of the district when she knows the district is likely to be *substantially injured* by Cherie’s behavior that violates a legal obligation to the district or a law that might be imputed to the district. If the facts were changed to include flirtatious behavior and other inappropriate conduct with a student, behavior that might expose the district to litigation, Sally should take steps to refer the matter to the board.

Sally may not advise the middle school principal in this instance because this is solely an individual issue, and the principal is not acting as a constituent seeking advice on behalf of the district. Sally must clearly inform the principal that she does not and cannot represent her, that she may wish to consult her own counsel, and that their conversations may not be confidential. If the scenario were to involve the behavior of other students, such as Cherie’s daughter, then Sally could advise the principal as to specific issues of student discipline and *solely* in her role as principal, a constituent for the district under Rule 1.13. It might be advisable in this instance for the principal to delegate the responsibility for handling the discipline matter, if possible, to an appropriate and disinterested school official in order to keep the boundaries of representation clear.

III. Counselor

I CONSIDERED GOING INTO BUSINESS OR BECOMING A LAWYER – NOT FOR THE MONEY, BUT FOR THE THRILL OF PROBLEM-SOLVING.

– LISA RANDALL

NO CLIENT EVER HAD MONEY ENOUGH TO BRIBE MY CONSCIENCE OR TO STOP ITS UTTERANCE AGAINST WRONG, AND OPPRESSION. MY CONSCIENCE IS MY OWN – MY CREATOR’S – NOT MAN’S. I SHALL NEVER SINK THE RIGHTS OF MANKIND TO THE MALICE, WRONG, OR AVARICE OF ANOTHER’S WISHES, THOUGH THOSE WISHES COME TO ME IN THE RELATION OF CLIENT AND ATTORNEY.

– ABRAHAM LINCOLN

A. Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations[,] such as moral, economic, social and political factors, that may be relevant to the client’s situation.

What does a lawyer do when social mores, community expectations, and changes in the legal landscape converge? Cultural changes can occur at the pace of a glacier or the speed of a bullet train. How much of a lawyer’s representation can be driven by his or her own perspective on such changes? The public schools are increasingly on the front line of societal shifts. They have, in recent years, become the focus for issues related to gun control, bullying, transgender students, and racial inequality in discipline, just to name a few. As school boards struggle to adapt, while facing increasing scrutiny, how does a school attorney best counsel the client?

1. The Facts (Scenario 6).

Let’s revisit Trinity School District. In the face of threatened litigation, Board President Fallwell has gone to the place best-suited to invoke the wrath of God—Facebook. When he learned of Board Secretary Modern’s narrow views on the separation of church and state, he sought protection for Jesus from his many fans on Facebook. Soon the town of Trinity was abuzz with posts, tweets, snaps, pins—some people were so eager to talk about the assault on Christian values that they even discussed it in line at the grocery store. Not so surprisingly, the provocative posts Fallwell is making on social media, have resulted in unprecedented sign-ups for public comment at board meetings by citizens decrying the demise of Western civilization through proposed gun control legislation, transgender accommodations, and illegal immigration. O’Hare has been hired to attempt to resolve the FFRF concerns related to board prayer, with an engagement letter that limits her role to pre-suit negotiations and, if agreed, mediation. She ponders whether she should intervene in some way.

2. The Question

- **Should O’Hare address the social media firestorm?**

3. The Framework

A client is entitled to straightforward advice reflecting a lawyer’s honest assessment. As Comment 1 to Rule 2.1 notes, “Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain a client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”⁶⁰ Under some circumstances, purely technical legal advice may be inadequate, and it is proper for a lawyer to refer to relevant moral and ethical considerations that could influence how the law is applied. If a client experienced in legal matters requests purely technical advice, the lawyer can accept this at face value. If the request is made by an

⁶⁰ MODEL RULES OF PROF. CONDUCT R. 2.1, cmt. [1].

inexperienced client, however, the lawyer's responsibility may include communicating that more may be involved than strictly legal considerations. Generally, a lawyer is not expected to give advice until requested by a client; however, a lawyer may have a duty to offer advice under Rule 1.4 if the lawyer knows the client proposes a course of action that is likely to result in *substantial adverse legal consequences* to the client and the proposed course of action is related to the representation. Ordinarily, a lawyer has no duty to initiate an investigation or offer advice the client has indicated is unwanted, but a lawyer may offer advice if it appears to be in the client's interest to do so.⁶¹

4 The Reality

It is not uncommon for a client to be unhappy with the advice of the client's lawyer. There may be a perception that lawyers make things unnecessarily difficult and costly. Advice may be perceived as unreasonably conservative or risk-averse. It may be perceived as unrealistic or out of touch with the client's circumstances. What if Fallwell has specifically asked O'Hare for purely technical legal advice limited to the prayer issue? What if Modern has specifically asked O'Hare for advice on the possible implications of Fallwell's social media campaign? What if, during a closed board meeting at which O'Hare is present, Modern, a transactional lawyer, begins opining about the legal ramifications of Fallwell's behavior and O'Hare disagrees with his opinions on Constitutional law? What if Fallwell and Modern argue about the prayer issue in closed session?

5. The Analysis

Whether O'Hare should address the social media situation and its impact on her ability to resolve the dispute involving prayer at board meetings depends on additional facts. She should probably refrain from offering unsolicited advice if Fallwell is a fairly sophisticated representative of the board, particularly if he sought only technical legal advice. If, however, O'Hare has knowledge that FFRF has successfully used social media information in prior litigation to show proselytizing intent or to demonstrate excessive entanglement with religion, she may conclude that Fallwell's posts are likely to result in *substantial adverse legal consequences*.

The resulting politically-charged public comment is a bit of a red herring. To the extent the added attention may increase the likelihood of substantial adverse legal consequences, it may influence the answer, but often this is the nature of public comment. If Fallwell and Modern argue in closed session, O'Hare may need to manage the discussion so that it does not stray into a violation of open government laws.⁶² This may create the opportunity to advise the board more broadly and candidly in a manner that reflects her independent *professional* judgment as informed by the societal context.

⁶¹ *Id.* at cmt. [2], [3], [5].

⁶² For example, Texas law allows a governmental body to conduct a private consultation with its attorney only 1) when the governmental body seeks the advice of its attorney about pending or contemplated litigation or a settlement offer; or 2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct clearly conflicts with the Open Meetings Act. Tex. Gov't Code § 551.071.

IV. Transactions with Persons Other Than Clients

THE GOOD LAWYER IS THE GREAT SALESMAN.

– JANET RENO

GOD WORKS WONDERS NOW AND THEN; BEHOLD A LAWYER, AN HONEST MAN.

– BENJAMIN FRANKLIN

A. Rule 4.1: Truthfulness In Statements To Others

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

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

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

The legal profession is one of few professions where an affirmative obligation exists to be truthful to someone who is not a client or the government. But where is the line between mere salesmanship or “puffing,” and misrepresentation? Is a *material fact* merely one that is important, or is it a fact upon which the other party is known to rely?

1. The Facts (Scenario 7)

Charles Shrewd represents Independence School District in two lawsuits in which the defense is being provided pursuant to insurance coverage. One case arises from an auto accident involving a district maintenance employee who was driving a district van to the hardware store when he rear-ended a vehicle at a stop sign. The roads were damp, and the plaintiff’s injuries were minor. The school board has authorized Shrewd to settle the claim “for anything under the district’s deductible.”

The second case involves defense of an employment discrimination lawsuit in which a cafeteria employee complains that she was subjected to a hostile environment because her co-workers kept repeatedly referring to her by a derogatory term. The co-workers claimed they were joking. The cafeteria supervisor investigated the complaint, found it baseless, and terminated the complaining employee. In considering settlement of this case, a claims adjuster tells Shrewd she has to obtain district consent to settle, but ultimately she is willing to pay twice the deductible.

2. The Questions

- **In the first case, can Shrewd tell Plaintiff’s counsel that he only has half the authority he actually has?**
- **In the second case, can Shrewd tell opposing counsel that he only has half the authority the adjuster has said she will pay?**

3. The Framework

Misrepresentations covered by Rule 4.1(a) can occur if the lawyer affirms another person's statement that the lawyer knows is false. They can also happen when making partially true but misleading statements or omissions that are the equivalent of affirmative false statements.⁶³ While a lawyer may not make a false statement of material fact to a third person, he can make statements regarding a party's negotiating goals or its willingness to compromise, as well as other statements that can fairly be characterized as negotiation "puffing."⁶⁴ According to Comment 2 to Rule 4.1, "[u]nder generally accepted conventions in negotiation certain types of statements ordinarily are not taken as statements of material fact." A party's intentions as to an acceptable settlement are in this category.⁶⁵

4. The Reality

Settlement negotiations can involve significant posturing as each lawyer seeks the best deal for his or her client. What if the lawyer has sufficient information to know where a case will settle, but has no specific authority to attempt settlement? What if the case involved a bus accident with a potential claimant class of dozens; can the lawyer say the case won't settle unless opposing counsel agrees not to represent any more clients from the same wreck?

5. The Analysis

Shrewd cannot make either representation because each one involves making false representations. The first question involves a clearly false representation that is prohibited. The exact amount of authority to settle is known, and the lawyer cannot claim he has been limited to a lower amount. He would be better off saying, "If you can give me a specific demand, I'll see what I can do with it." He can also make a specific offer less than the current authority unless he already has a demand within the authority. In that case, he can accept the demand or visit with the client about making a lower offer.

At first glance, it seems that the second question should be answered in the affirmative because the lawyer does not yet have a precise amount of authority, so he is unconstrained by an amount. The scenario, however, says he intends to convey that he **has** less than half of what he expects the ultimate authority may be. The fact is that he has **no** actual authority because the board has not approved the adjuster's amount. **The lawyer cannot ethically say what he "has" when in truth, he has nothing.** He could represent a legitimate belief about an amount the board will approve. In both scenarios, the presence or lack of specific authority determines the answer.

With regard to the bus accident with a huge class of potential claimants, a lawyer may not ethically agree, in connection with settling a claim on behalf of a client, not to represent certain

⁶³ MODEL RULES OF PROF. CONDUCT R. 4.1, cmt. [1].

⁶⁴ ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 06-439 (2006) (discussing lawyer's obligation of truthfulness when representing a client in negotiation, including mediation).

⁶⁵ MODEL RULES OF PROF. CONDUCT R. 4.1, cmt. [2].

other persons.⁶⁶ Therefore, the demand should not be made that the case will settle only with such a commitment.

ENEMIES ARE SO STIMULATING.

– KATHERINE HEPBURN

KNOW YOUR LINES AND DON'T BUMP INTO THE FURNITURE.

– SPENCER TRACY

B. Rule 4.2: Communication with Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3: Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Cautionary tales abound when it comes to dealing with represented and unrepresented parties who are not the client. These rules highlight the critical role lawyers play in both serving as insulation for their clients from contentious adversaries and in dealing fairly with those who do not enjoy such protection. The lawyer must strive to avoid even the appearance of impropriety.

1. The Facts (Scenario 8)

Solomon Landrover loves working with the Division School District. There is never a dull moment at their board meetings. There have been racial tensions, financial woes, and academic performance issues for years. Finger-pointing between board members has become commonplace. The current Board Secretary, Ms. Frances Gruntled, sued the district for discrimination a few years ago when she was serving as a teacher and did not get a job as a principal. She informs Solomon in a board meeting, "My personal lawyer has been advising me about this district's 'historically discriminatory practices.' I am looking forward to your briefing us in closed session about the Title VII lawsuit he brought on behalf of our maintenance employee."

⁶⁶ MODEL RULES OF PROF. CONDUCT R. 5.6(b).

At the same meeting, Ms. Cloven Hoof, a middle school teacher, approaches Solomon to discuss a disciplinary appeal before the board for her son who wore a pentagram earring to school in violation of the district’s dress code. Solomon knows Ms. Hoof because he is currently handling the nonrenewal of her contract by the district, a matter in which she is represented by counsel.

2. The Questions

- **Does Ms. Gruntled get to stay for the briefing on the defense of the suit her own lawyer has brought against the district?**
- **Can Solomon talk to Ms. Hoof about the disciplinary issue?**

3. The Framework

Rule 4.2 protects a person who has chosen to be represented by a lawyer from possible overreaching by other lawyers who are participating in the matter. The rule applies even if the represented person initiates or consents to the communication. The rule does not prevent communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.⁶⁷

An unrepresented person may assume that a lawyer serves as a “disinterested authority on the law” even when the lawyer represents a client. To avoid such a misunderstanding, a lawyer typically needs to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. When the interests of an unrepresented person may be adverse to those of a lawyer’s client, the rule prohibits giving any advice, other than the advice to obtain counsel.⁶⁸

4. The Reality

What if Ms. Gruntled has invited members of the ACLU to the meeting? What if her attorney is present for any action taken after the closed session on the Title VII claim?

What if Ms. Hoof just wants to cut a deal for less time in in-school suspension for her son, and Solomon knows the board would do this readily to avoid holding the grievance hearing, particularly in front of the ACLU and Ms. Gruntled’s lawyer? What if she wants to talk about the propriety of her appeal because she is worried the board may hold it against her during her nonrenewal hearing?

5. The Analysis

Ms. Gruntled can stay in the closed session, but Solomon will need to be guarded in his remarks and should avoid discussing confidential information related to the defense of the Title VII claim. In truth, this is an ethical question for Ms. Gruntled and a governance question for the board. Although he must be careful, Solomon can probably discuss the discrimination issues with

⁶⁷ MODEL RULES OF PROF. CONDUCT R. 4.2, cmt. [1], [3]-[4].

⁶⁸ MODEL RULES OF PROF. CONDUCT R. 4.3, cmt. [1]-[2].

Ms. Gruntled because, to his knowledge, she is not currently represented in any active matter involving the district. This might include a discussion of whether her involvement with the Title VII plaintiff's lawyer makes this an appropriate occasion for her to recuse herself from discussion, deliberation, consultation, and action on the matter. While not required, Solomon might also consider asking the opposing lawyer to talk with Ms. Gruntled and dissuade her from active participation in any board decisions on the Title VII matter.

Ms. Hoof is a horse of a slightly different color. She is represented by counsel for the limited purposes of her nonrenewal—a matter where she is a party directly adverse to the district. Solomon cannot talk to her about that matter. **She does not have representation on the disciplinary question, however, so he can talk with her about that.**⁶⁹ Even so, to avoid confusion or misunderstanding, Solomon must clarify his role,⁷⁰ and he probably should reach out to Ms. Hoof's nonrenewal counsel to explain the nature of any discussion they have. If possible, he should document this via email. He must understand that Ms. Hoof's future account of what they discussed could differ greatly from his own recollection, so he will want to document clearly the subject matter addressed. He cannot advise Ms. Hoof on the propriety of her discipline grievance as it relates to her employment dispute, but he can provide her a copy of the relevant district anti-retaliation policies.

V. Postscript

YOU GAIN STRENGTH, COURAGE AND CONFIDENCE BY EVERY EXPERIENCE IN WHICH YOU REALLY STOP TO LOOK FEAR IN THE FACE. YOU ARE ABLE TO SAY TO YOURSELF, "I HAVE LIVED THROUGH THIS HORROR. I CAN TAKE THE NEXT THING THAT COMES ALONG." **YOU MUST DO THE THING YOU THINK YOU CANNOT DO.**

— ELEANOR ROOSEVELT

... EXCEPT WHEN IT VIOLATES RULE 1.1

— TODD AND KRISTI CLARK

Kristi and Todd met in law school, and the fireworks (of every kind) have never stopped. The crucible of twenty-six years of refining marriage yielded grown twin daughters, with whom Kristi and Todd enjoy mutual respect and admiration. These young women are employed college graduates who do not live in their parents' home. Neither has ambitions to go to law school. Thus, their girls defy the quote mentioned above from *Adam's Rib*. They learned at a very early age to share, dance, study, laugh, and treat others as they would like to be treated.

⁶⁹ *Id.* (stating "This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person."); *see also* Rule 4.2. cmt. [4] (stating that Rule 4.2 does not prohibit communication with a represented person about matters outside the representation).

⁷⁰ ABA Comm. on Ethics and Prof. Responsibility, Formal Op 15-472, (2015) (addressing communication with person receiving limited-scope legal services, "limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3").