

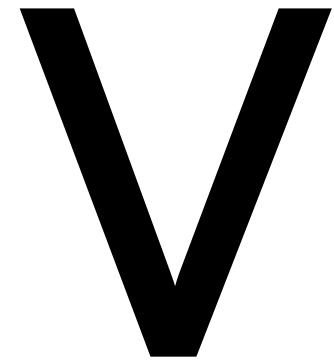
Environmental Ethics

Dalton Mott | Kansas City
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What Makes Being an Environmental Attorney Ethically Unique?

- Frequent interaction between government and private actors
- Corporations on both sides of the v.
- Historical cases



Comment to ABA Model Rule 1.3 - Diligence

“A lawyer should . . . **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.**”

Ethics v. Smart Practice



- Zealous advocacy is required, but extreme measures may not be in your client's interests
- Just because you can do something, does not mean you should or that it is the best course of action

HYPPO # 1

Hypo #1 – Rainmaker

You represent a large company related to a landfill where that company along with many other companies have been named as responsible parties because they shipped waste to the Site. Another small client of the firm asks if you can represent them too.

Questions for Hypo #3

- Is ethical to represent both clients?
- What are the key factors?
- Is a waiver needed?



ABA Model 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;

(2) there is a substantial 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.

ABA Model Rule 1.7 – Conflict of Interest – Current Clients

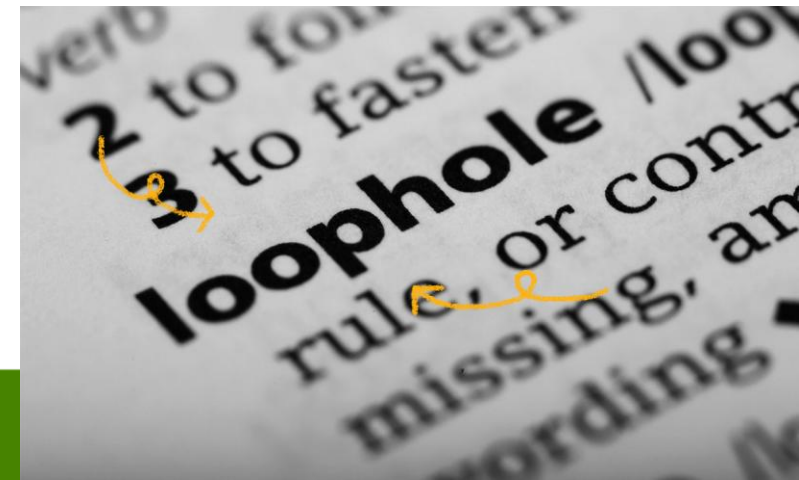
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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.



ABA Model Rule 1.7 – Conflict of Interest – Current Clients

“[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”

Am. Special Risk Ins. v. Centerline (E.D. Mich.)

- Attorneys represented some corporations at a superfund site and then later represented a group of cities at the same site after the corporations settled
- Government agency moved for disqualification in CERCLA action
- Court rejected disqualification because there was no conflict of interests



Different Branches?



TOUGHER QUESTION NO #1

HYP0 # 2

Hypo #2 – Former Employee

You represent a company that was recently sued by another company for remedial costs at a superfund site. You want to learn more about the operations at the Site, so you decide to contact a former employee of the company that sued you. You send a private investigator to talk to the former employee.

Questions for Hypo #3

- Does the attorney have to notify the agency of the disclosure?
- Does the attorney have to return the documents?
- Can the attorney use the documents in court?
- Does it matter that it an open records request rather than discovery?



ABA Model Rule 4.3 – Dealing with Unrepresented Persons

“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.”

ABA Model Rule 4.2 – Communication with a 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.

ABA Model Rule 4.2, Comment 7

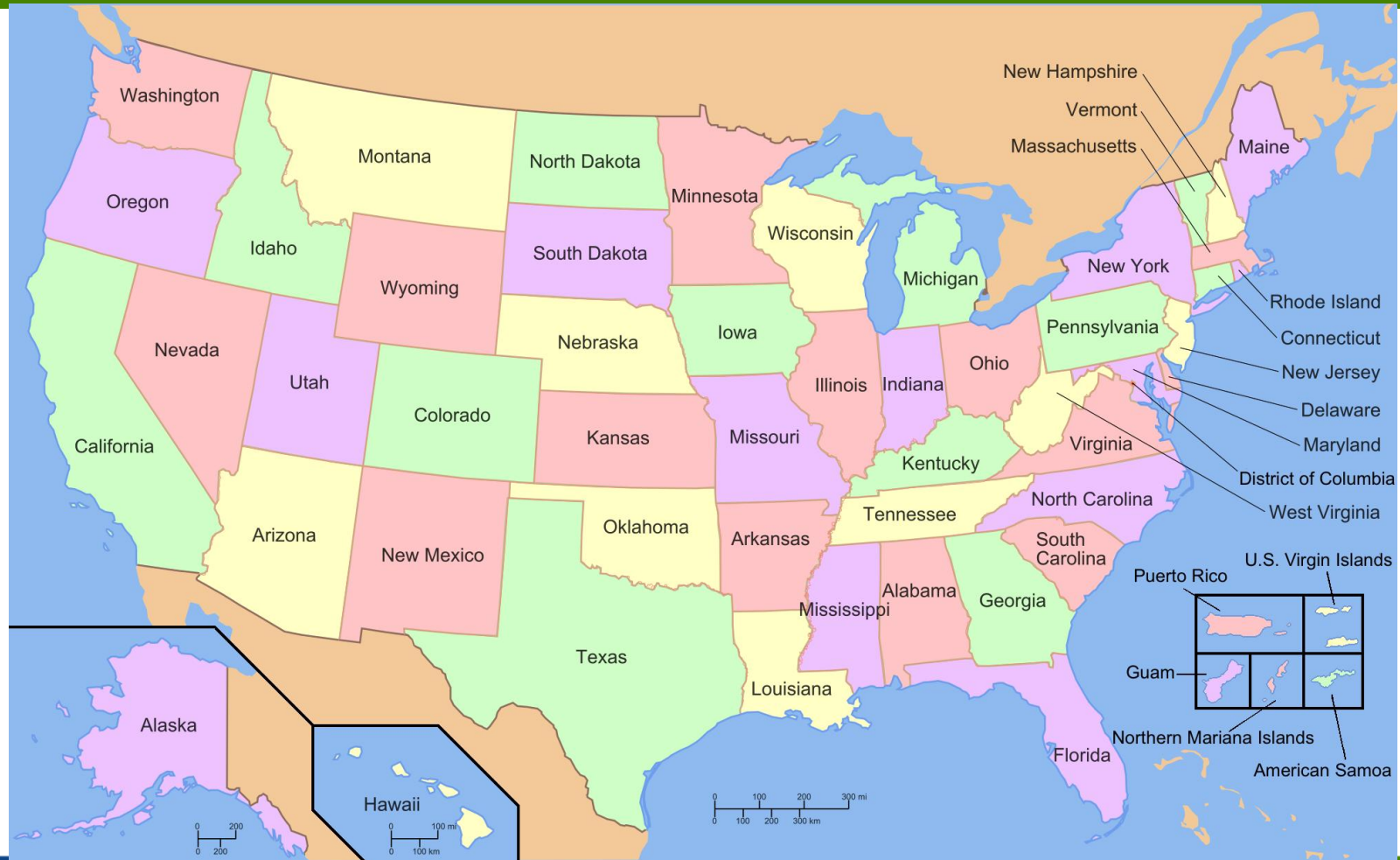
[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent.

ABA Model Rule 4.2, Comment 7, Cont.'d

[7] In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.



Does it matter why you live?



Different Rules For Different Courts

D. Va. – *Armsey v. Medshares* – No interviews with former employees who can bind the corporation

D. Kan. – *Chancellor v. Boeing Company* – No interviewing employees who were the subject matter of the lawsuit

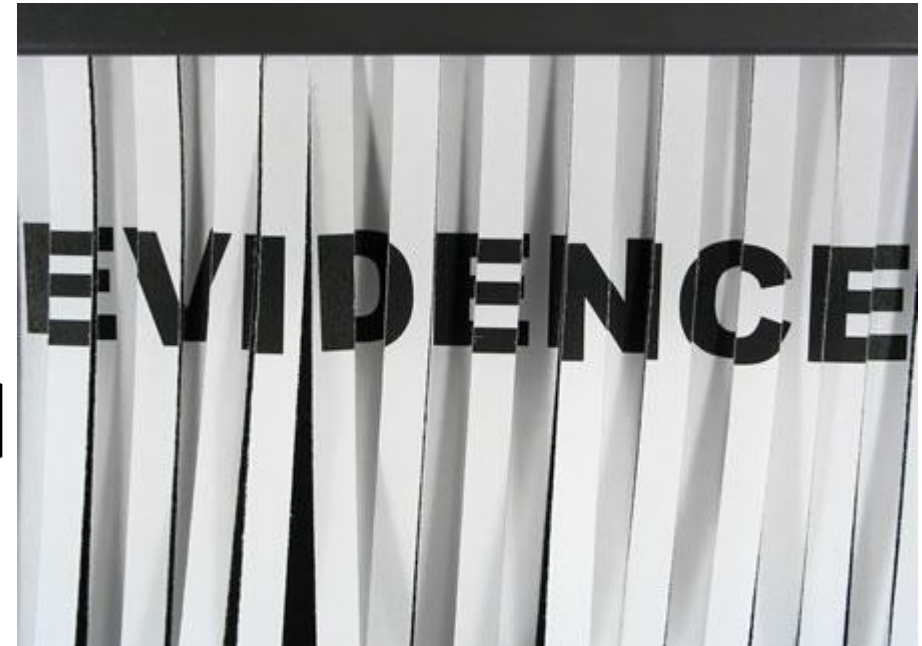
D. Md. – *Rentclub v. Transamerica Rental* – No interviewing employees with attorney-client knowledge

TOUGHER QUESTION NO #2

TOUGHER QUESTION NO #3

ABA Model Rule 3.4(a) – Fairness to Opposing Party & Counsel

“(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act”



HYP0 # 3

Hypo #3 – Inadvertent “Production”

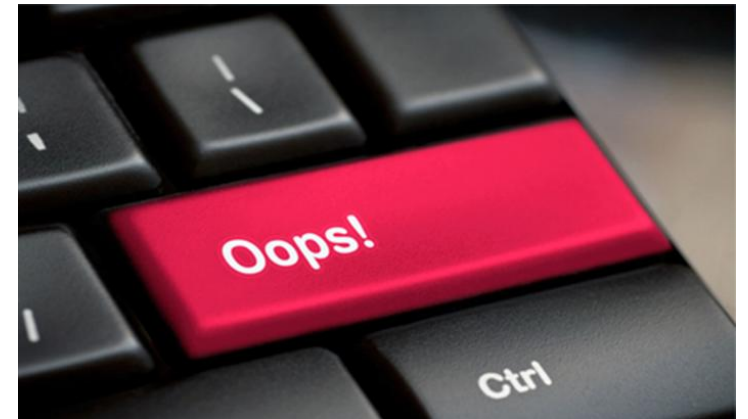
You represent a small company that was recently sued with a large group of PRPs by a state agency to remediate a contaminated site. Lacking information about the site, you decide to send an open records request to the agency in charge of the site. The agency provides their entire file including, some materials that are arguably attorney-client privilege, in response.

Questions for Hypo #3

- Does the attorney have to notify the agency of the disclosure?
- Does the attorney have to return the documents?
- Can the attorney use the documents in court?
- Does it matter that it an open records request rather than discovery?

ABA Model Rule 4.4(b) - Respect for Rights of Third Persons

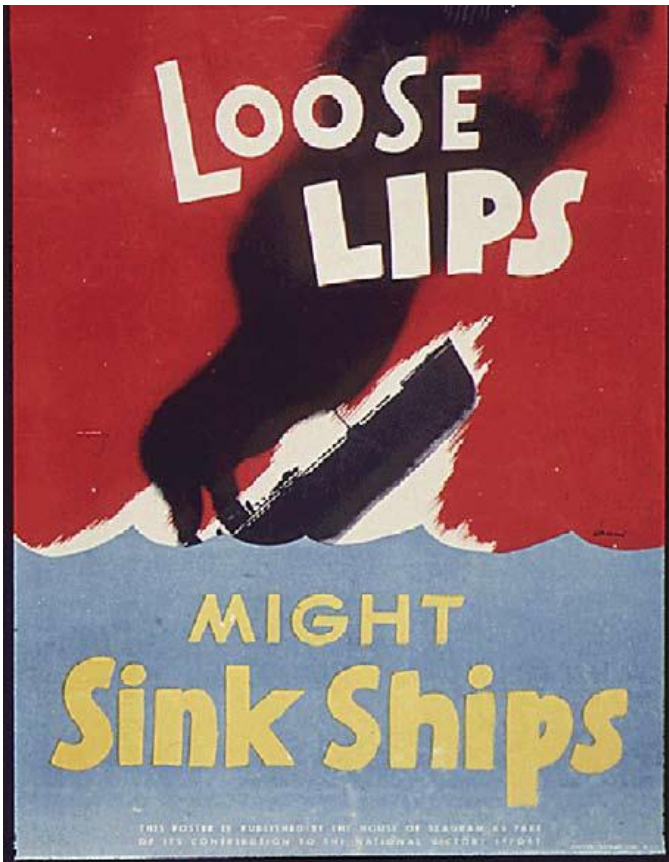
“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”



Comment to ABA Model Rule 4.4(b) - Respect for Rights of Third Persons

“Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law **beyond the scope of these Rules**, as is the question of whether the privileged status of a document or electronically stored information has been waived.”

Missouri Informal Advisory Opinion 2014-02



“According to Comment [3] to Rule 4-4.4, where applicable law does not require Attorney to return a document inadvertently sent, the decision as to whether to do so is governed by Attorney’s independent professional judgment.”

DC Bar Association Ethics Opinion 256 (1995)

“Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents **before the inadvertence of the disclosure is brought to that lawyer’s attention**, the receiving lawyer engages in no ethical violation by retaining and using those documents. Where, on the other hand, the receiving lawyer **knows of the inadvertence** of the disclosure before the documents are examined, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material.”

Ecological Rights Found. v. FEMA

- Plaintiff sends FOIA to FEMA and FEMA inadvertently discloses three documents
- FEMA seeks court order that documents are exempted
- Court rules it has the power to return the documents
- No exemption
- Waiver of attorney client privilege

Kadri v. Gorton Board of Education

- Plaintiff is suing for wrongful termination and does an open records request to board to get attorney opinion on firing
- Attorney opinion is leaked to the press and Plaintiff argues that it was not usable
- School Board argues that it was accidentally and it took steps to protect it

North Carolina Bar Association 2011 Formal Opinion 15: Communication with Adverse Party to Request Public Records

“Opinion rules that, pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, **whose lawyer does not consent to the communication.**”

HYPPO # 4

Hypo #4 – Litigating Through Media

You represent a large company that has been named as a responsible party at a superfund site. The site is currently in litigation but your client is unhappy that it has been named as a responsible. Your client wants you to coordinate a full out press attack against the regulatory agency and its decision to name your client as a responsible party.

Questions for Hypo #4

- Is it ethical for the attorney to talk to the media about these issues while the case is in litigation
- Would it matter if a third party did the press coordination?
- Does it matter that the government is the other party?



ABA Model Rule 3.6(a) – Trial Publicity

“A lawyer who is participating or has participated in the investigation or litigation of a matter **shall not make an extrajudicial statement** that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

ABA Model Rule 3.6(a) – cont'd

“(b) Notwithstanding paragraph (a), a lawyer may state . . .

(2) information contained in a public record;”



ABA Model Rule 3.6(d)



"Your Honor, we feel the trial failed to deliver on its pretrial publicity."

“No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)”

Comment to ABA Model Rule 3.6



“There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil **matter triable to a jury**, a criminal matter, or any other proceeding that could result in incarceration.”

Comment to ABA Model Rule 3.6

“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. . . . The public has a right to know about threats to its safety and measures aimed at assuring its security. . . . Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”

North Carolina Bar Association 98 Formal Opinion 4: Publicity in a Civil Trial (2011)

“Revised Rule 3.6 does not impinge upon the constitutional right of clients to make extrajudicial statements concerning their case. The rule, however, does place restrictions on attorneys' extrajudicial speech and that of their agents. If the above press release had a reasonable likelihood of materially prejudicing an adjudicative proceeding, and **the Board was merely used as conduit by the attorney to make prejudicial statements the attorney could not, then the attorney violated Revised Rule 3.6.**”

TOUGHER QUESTION NO #4

QUESTIONS?

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