

The Regulator's Compass Guide to Ethical Regulations: Ethics in the Modern Era

(Time: 2 hours)

(Ethics Credits)

Moderators: Honorable Dewight Nodes – Chief Administrative Law Judge,
Arizona Corporation Commission

Honorable Eve Moran – Administrative Law Judge,
Illinois Commerce Commission (Retired)

Instruction: Caroline Klancke, Esq., Attorney, Florida Commission on Ethics

The Not-So-Excellent Ethical Adventures of JK Parrot

After spending many years with a prestigious law firm in Pirate Cove City, J. K. Parrot has taken a staff attorney position with the Nirvana Utilities Regulatory Commission. But, she has had little time to acquaint herself with this new area of practice. Almost immediately, J.K. is assigned to a “hot” water case pending before the Commission that will test both her skills and her courage to meet with a whole host of ethical challenges. The scenarios portrayed in this program will invite vigorous discussion of state ethics laws and the Model Rules of Profession Conduct.

Skit I - No Room For Bias (J.K. sees barriers to opportunity at her new workplace)

Skit II - Discovery Matters (a new competency requirement)

SKIT III - The Push for Civility (J.K. is bullied by opposing counsel at a motion hearing)

SKIT IV - Telling Truths (J.K wants her witness to correct misstatements in his pre-filed testimony at the evidentiary hearing)

SKIT V - Social Media Drag (J.K finds another staff attorney is emailing the ALJ during the hearing & blogging about the case)

SKIT VI - Writing it Right (In the course of legal briefing, JK is put to question “who is my client?”)

Program Materials (Amended)

National Conference of Regulatory Attorneys
June - 2016 (Tampa, Florida)
Presented by the NARUC Subcommittee on Administrative Law Judges

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After spending many years with a prestigious law firm in Pirate Cove City, J. K. Parrot has taken a staff attorney position with the Nirvana Utilities Regulatory Commission. But, she has had little time to acquaint herself with this new area of practice. Almost immediately, J.K. is assigned to a “hot” water case pending before the Commission that will test both her skills and her courage to meet with a whole host of ethical challenges. The scenarios portrayed in this program will invite vigorous discussion of state ethics laws and the Model Rules of Profession Conduct.

Moderators:

Dwight Nodes, Administrative Law Judge, Arizona Corporation Commission
Eve Moran, Retired ALJ (Illinois Commerce Commission)

Instruction:

Caroline Klancke, Attorney, Florida Commission on Ethics

Skits: Eve Moran

Materials: Caroline Klancke & Eve Moran

Skit I - No Room For Bias (*J.K. sees barriers to opportunity at her new workplace*)

Practice Tips:

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions and decision-making in an unconscious manner without awareness or intentional control. Everyone possesses them, even people with avowed commitments to impartiality such as judges. *Kirwan Institute*.

Check out “Project Implicit” research and testing for hidden bias <https://www.projectimplicit.net>

Racial Bias, Even When We Have Good Intentions - The New York Times (May 1, 2014)
http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html?_r=0

Daniel Kahneman, ***Thinking, Fast and Slow*** (Farrar, Straus & Giroux, 2011).

Supreme Court of Florida; [Administrative Order AOSC14-45](#) (July 8, 2014) re: Standing Committee on Fairness and Diversity.

Why This Matters - ABA Model Rules Proposal:

The Standing Committee on Ethics and Professional Responsibility voted to file a resolution with the ABA House of Delegates for consideration in *August 2016* recommending that Model Rule of Professional Conduct 8.4 be amended to create new paragraph (g). This new paragraph would bring into the “black letter” of the Model Rules an anti-discrimination and anti-harassment provision. The resolution would also include the creation of three new Comments.

Proposed new section to Rule 8.4 Language:

It is professional misconduct for a lawyer to:

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

Proposed three new *Comments* to Rule 8.4 would state that:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; *operating or managing a law firm or law practice*; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. *See* Rule 1.2(b).

Skit II - Discovery Matters (*JK excels in the new competency*)

Practice Tips:

It is essential to consider the professional rules in light of social media use. At bottom and in keeping with modern law practice, the model rules require technological competency.

Social media are web-based communication tools that enable people to interact with each other by both sharing and consuming information.

Research: While it is important to evaluation information (e.g. check accuracy, objectivity, timeliness, etc.) that is published in any format, such an evaluation is especially important for information found on the web. See *Evaluating Websites and Other Information Resources* www.law.siu.edu/lawlib/guides/eval.htm

Create a “glossary of terms” for the case.

(You, the ALJ and other counsel want to be clear & consistent on definitions of technical terms)

Establish a written “social media” policy for the office (or a checklist for yourself).

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.

Comment No. 8 (Maintaining Competence)

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to **ensure that the person's conduct is compatible with the professional obligations of the lawyer**; and

(c) a lawyer shall be 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 the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 4.4 - Respect For Rights Of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) 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. (emphasis added).

Note:

- Pretexting & misrepresentation - Rule 4.1(truthfulness in statements to others); Rule 4.2 (communications with represented persons); Rule 4.3 (dealing with unrepresented persons); and 8.4 (c) (prohibits conduct involving dishonesty, fraud, deceit and misrepresentation).
- Gift ban laws - state government employee ethics rules & statutes.

Other Resources:

*25-21.050, Florida Administrative Code
(Re: The Acceptance of Gifts by FPSC Employees).*

*Section 350.041, Florida Statutes
(Re: Additional Ethics Standards of Conduct for FPSC Commissioners).*

*Section 350.042, Florida Statutes
(Re: Ex Parte Communications Between FPSC Commissioners and Parties to FPSC Proceedings)*

*Rule 25-22.033, Florida Administrative Code
(Governing Communications Between Commission Employees and Parties)*

New York State Bar Association Opinion No. 843
(*Re: access to public pages of another party's social networking site*)

Association of the Bar of the City of New York. Formal Opinion No. 2010-2
(*Re: no gaining access to social networking site under false pretenses either directly or through an agent*)

Massachusetts Bar Association Ethics Opinion No. 2014-5
(*Re: when "friending" an unrepresented adversary to gain information from nonpublic website*)

Florida Bar Proposed Advisory Opinion No. 14-1 (January 23, 2015)
(*Re: advising clients to "clean up" their social media pages before litigation*)
<https://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/f7e19a378eccb67685257ddc00500a4e!OpenDocument>

Oregon State Bar Association, Formal Opinion No. 2013-189
(*Re: Accessing Information about Third Parties through a Social Networking Website*)

New Hampshire Bar Association, Advisory Opinion 2012-13/05
(*Re: Social Media Contact with Witnesses in the Course of Litigation*)

*Lackey, Michael E. Jr. and Minta, Joseph P. (2012) "[Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging.](#)" *Touro Law Review*: Vol. 28: No. 1, Article 7.*

SKIT III - The Push for Civility (*JK is bullied by opposing counsel at a motion hearing & encounters a non-responsive judge*).

Practice Tips:

In a hostile situation, there is power in becoming silent.
Never respond in kind. This will only fuel the conflict.

Opinions:

Principe v. Assay Partners, 586 N.Y.S.2d 182 (N.Y. Sup. Ct. 1992) (male attorney's name-calling directed at opposing counsel, a female, during the course of a deposition, warranted a sanction).

Logan v. Scwab, No. 2015-C-1508 (La. May 27, 2016) (finding trial judge's action resulted in a miscarriage of justice and required a new trial. A concurring opinion indicates that the judge roamed about looking out the windows, greeted one party's expert with a hug, ate candy and otherwise failed to pay attention to the proceeding).

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(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;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Other Resources:

Taking the High Road: How to Deal Ethically with Bullies Who Don't Play by the Rules
Materials: 2012 ABA Section of Litigation Corporate Counsel, CLE Seminar Hollywood,
(Florida February 14-17, 2013)

SKIT IV - Telling Truths (*J.K wants her witness to correct misstatements in his pre-filed testimony at the evidentiary hearing*)

Practice Tips:

Check for consistency in a witness' testimony (both internally & with respect to any external matters). Point out deficiencies to your witness.

Be honest with the judge when asking for a continuance.

Correct any earlier misstatements.

Disclose and distinguish any opposing authority,

Be well prepared - and not afraid - to challenge precedent.

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.

Other Resources:

- *Iowa Supreme Court Attorney Disciplinary Board v. Jeffrey K. McGinness*, No. 13-1213 (March 21, 2014). (attorney disciplined for falsifying certificates of service).

SKIT V - Social Media Drag (*J.K is the subject of another staff attorney's emails and postings about the case*)

Practice Tips:

Some claim that email is the first and the largest digital social network. Others would draw a distinction classifying email as a distribution mechanism and social media as a collective mechanism. Regardless, a good deal of our daily office communication is via email and email retention policies mean that email messages remain forever in cyberspace.

- Think before you type
- Never write when angry.
- Carefully review an email chain before forwarding.
- Watch your tone.
- Check to whom you are actually sending.
- Be especially careful when sending personal emails on a work computer.
- Never respond to a decision-maker (ALJ/ Commissioner) if asked about the merits of a case.

Be extremely vigilant when using email and also when posting on blogs and other social media. Know that others can copy your postings and forward to a larger and unintended audience.

Know that “friending” judges raises the risk of ex parte communications.

Rule 3.5 Impartiality And Decorum Of The Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate **ex parte** with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

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, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (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.

Other Resources:

ABA Formal Opinion 462: *Judge's Use of Electronic Social Networking Media* (Feb. 21, 2013).

Opinions:

- *The Florida Bar v. Sean William Conway* (Case No. SC08-326) 2008 WL 4748577 (Fla. Oct. 29, 2008). (Public Reprimand).
<http://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/DisActFS?OpenFrameSet&Frame=DisActToC&Src=%2FDIVADM%2FME%2FMPDisAct.nsf%2FdaToc!OpenForm%26AutoFramed%26MFL%3DSean%2520William%2520Conway%26ICN%3D200751308%26DAD%3DPublic%2520Reprimand>
- *In the Matter of Peshek*, IL ARDC, 09 CH 89 (Aug. 25, 2009) Ill S Ct MR 23794 (May 8, 2010). (www.iardc.org)

- *United States v. Bowen*, No. 13-31078, U.S. Court of Appeals (5th Cir.) August 18, 2015. (New trial order for defendants upheld where federal prosecutors posted online, anonymous comments to newspaper articles about the case and throughout its duration).
- *Fieger v. Michigan Supreme Court*, 553 F.3d 955 (6th Cir. 2009). (Lawyer and popular radio show host who stipulated to a disciplinary reprimand (for lambasting state appellate justices in connection with a civil case) fails in challenging the Michigan Rules of Professional Conduct on First Amendment grounds).

John Schwartz, A Legal Battle: Online Attitude vs. Rules of the Bar. *The New York Times*. (September 13, 2009). <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

Florida Judicial Ethics Advisory Opinion 2009-20
(*Re: Florida Bar members should not make a "friend" request to a judge to avoid assisting a judge in violating the Code of Judicial Conduct*)

Section 350.041, Florida Statutes
(*Re: Additional Ethics Standards of Conduct for FPSC Commissioners*).

Section 350.042, Florida Statutes
(*Re: Ex Parte Communications Between FPSC Commissioners and Parties to FPSC Proceedings*).

Rule 25-22.033, Florida Administrative Code
(*Governing Communications Between Commission Employees and Parties*).

SKIT VI - Writing it Right (*In writing the brief, JK is put to question "who is my client?"*)

Practice Tips:

The purpose of the brief is to make the judge's job easier (Scalia).

Tell a story to keep the reader's attention

Organize your thoughts with headings and sub-headings.

Test the logic and understandability of your arguments

Be persuasive by showing your authority.

Build and maintain your credibility

Understand the power of likability - it's a continual process.

Write ethically - be scrupulously fair and accurate with respect to other parties.

Edit - and edit some more.

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.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(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.

(Comment)

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

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.

Other Resources:

Ethical Issues For Government Attorneys

<http://www.heylroyster.com/news2/details.cfm?pageID=49&newsID=41>

William Josephson and Russel G. Pearce, To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict, 29 Howard L.J. 539 (1986).

James R. Harvey III, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 Wm. & Mary L. Rev. 1569 (1996).

Steven K. Berenson, Public Lawyer, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 B.C.L. Rev. 789 (2000).

Maureen A. Sanders, Government Attorneys and the Ethical Rules: Good Souls in Limbo, Vol. 7 B.Y.U. Journal of Public Law 39.