

Law and Ethics in the Construction Industry



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Supreme Court 2013-2020



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Capitol Renovation



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The Quadriga, 2014



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Capitol Courtroom (Before)



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Inside the Dome



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Capitol Courtroom (After)



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Attorney Discipline

- 25,000 active attorneys in Minnesota; 40-50 publicly disciplined per year.
- Discipline cases pursued by the Director of the OLPR, overseen by the Lawyers Professional Responsibility Board.
- First level: District Ethics Committees.
- Second level: Referee contested evidentiary hearings.
- Final level: Minnesota Supreme Court.

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Topic 1: Conflicts

- A frequent issue in the construction industry.
- A specialized bar, in which some represent GCs, subs, designers, and owners, and do ADR.

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The Nature of the Industry

- Actor roles shift from project to project, and even within projects; friends, enemies, or frenemies at the same time.
- Groups of actors sometimes portray themselves as a “team” made up of “partners” engaged in “partnering.”
- Joint ventures on big projects are usual.
- Subs may band together to pursue claims.

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Who's the Client?

- Minn. R. Prof. Cond. 1.7 - 1.13.
- All of the conflict rules revolve around the fundamental question: Who is the *client*, and who is the *attorney*?
- Make the answer clear to all actors – in writing and with consents, as needed.
- Advise others to seek advice of counsel. Never discourage it. Rules 4.3, 1.13(e).

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Avoiding Conflicts with Current/Former Clients

- Rule 1.7: covers not just current clients but includes “material” limitation based on responsibilities to former clients, third parties, or personal interests.
- Rule 1.9: may not be adverse to a former client “in the same or a substantially related matter” without informed written consent. See *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808 (Minn. 2014).

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Conflicts Within the Organization (Rule 1.13)

- Attorneys represent the Organization “acting through its duly authorized constituents.”
- Attorneys must act “in the best interest of the organization.”
- If a conflict between the organization and a constituent, consult Rule 1.13; go to the “highest authority” or resign.

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To Avoid Violations . . .

- Don't let loyalty to the Organization (including its cost concerns) prevent the required retainer of separate counsel.
- Be aware if you're a witness (Rule 3.7).
- Don't try to impede/control representation such as by improperly communicating with another counsel's client (Rule 4.2).
- Don't expect counsel to violate its obligation of confidentiality (Rule 1.6).

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Topic 2: Confidentiality

Rule 1.6: (a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information *relating to the representation* of a client.

(b) Exceptions: (1) informed consent; (2) not protected by privilege, confidentiality not requested, not embarrassing or detrimental; or (3) disclosure impliedly authorized.

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Interesting Case on Confidentiality

- *In re Charges of Unprofessional Conduct in Panel File No. 41310.*
- Attorney in negotiations with insurance adjuster. Client terminates representation.
- Attorney emails adjuster.

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The Email

“I was notified yesterday that [client] is terminating my representation and . . . not accepting the settlement offer. . . . I advised him that he already accepted it, there is no rescinding I’m assuming you will . . . bring a motion to enforce the settlement. He’s been advised of all of this. Sorry for the inconvenience, but he is a very difficult client.”

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Procedural Posture

- Director of OLPR issues a private admonition.
- Attorney requests Board Panel review.
- Panel concludes attorney violated Rule 1.9(c)(2) (confidentiality to a former client) but not Rule 1.6 (present client).
- Attorney contests Panel decision.

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In the Supreme Court

- Attorney concedes it was “information relating to the representation” but disclosure was harmless because it was “not that much of a revelation” and did not have “any conceivable effect on the claim.”
- Held: Nothing in Rule 1.9(c)(2) limits the prohibition to significant revelations or contains a requirement that the improper disclosure prejudices a client. Private admonition affirmed.

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When Confidentiality is Violated . . .

- May harm internal and external reputations, for people and brands.
- May open the attorney to outside pressure and even blackmail.
- Can affect the securities markets.
- May become a very expensive political/regulatory issue.

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Dangerous Times/Places

- Discussions with opposing or allied counsel, especially in negotiations.
- Trade association meetings, conventions.
- Parties, dinners with friends/relatives.
- Conversations with classmates.
- Restrooms, hotel lobbies, airplanes, trains.

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Danger with Devices

- Cell phones, wi-fi in public places.
- Inadvertent broadcast on Zoom or phone.
- Social media.
- Failing to keep track of keys, passcards.
- Failure to adhere to company device use policies, especially anti-phishing.
- Leaving devices in cars, restaurants.
- Failing to change/protect passwords.

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Topic 3: Attorney-Client Privilege

- Communications to/from client and attorney for legal advice are covered.
- Not covered: business advice. *Polaris* (Minn. 2021).
- Facts: Polaris investigated by the CPSC and sued in tort for defective RVs. Retained a big DC law firm to review and report on safety policies and practices.

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Polaris (cont.)

- 32-page report inadvertently produced in discovery; Polaris sought to “claw back.”
- Supreme Court (5-2): the report as a whole is not privileged.
- The test: whether the “predominant purpose” of the report was to solicit or render legal advice.
- Burden is on the party claiming the privilege. A privilege label is not enough.

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Polaris (cont.)

- The report contained both legal advice and business advice.
- The district court found that it was predominantly the latter. This finding is not clearly erroneous.
- This does not preclude individual portions of the report from being redacted as covered by the privilege.

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Polaris (cont.)

- The dissent reads the report as “positively dripping with legal advice.”
- The lead attorney relied on her experience as former general counsel of the CPSC.
- The dissent predicts that the decision will cause businesses to forego seeking legal advice and that lawyers will be forced to “drape” their advice in the “fabric” of law.

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Topic 4: The Truth

Rule 3.3: (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
(3) offer evidence that the lawyer knows to be false . . . [and] shall take reasonable remedial measures

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Rule 3.4: “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”

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Rule 3.4: A lawyer shall not: (b) falsify evidence, counsel or assist a **witness** to testify falsely, or offer an inducement to a witness that is prohibited by law

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Rule 3.4: A lawyer shall not: (d) in pretrial procedure, make a frivolous **discovery** request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party

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Rule 4.1: In the course of representing a client a lawyer shall not knowingly make a **false statement** of fact or law.

Comment: Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

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Rule 8.4: It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or **misrepresentation**
(Need not be in the course of law practice)

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Examples

- *In re Walsh*, 872 N.W.2d 741 (Minn. 2015). Attorney lied to opposing counsel.
- *In re Karlsen*, 778 N.W.2d 307 (Minn. 2010). Attorney lied to client.
- *In re Pierce*, 706 N.W.2d 749 (Minn. 2005). Attorney lied to Director of OLPR.

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Danger Spots

- Claims for \$ to governments (FCA, MFCA)
- Any communication with government entities, especially law enforcers.
- Negotiated settlements. Even no-reliance and integration clauses may not bar a claim of fraudulent inducement. *Great Plains Ed. Fdn. v. Student Loan Fin. Corp.* (Minn. App. 2020).

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Topic 5: Interstate Practice

- An issue because so many contractors (and attorneys) work across state lines.
- *In re Panel File No. 39302* (Minn. 2016).
- Private admonition to a Colorado attorney for practicing law in Minnesota.
- The practice? Representing his in-laws, a Minnesota couple, with respect to a Minnesota judgment, and attempting to negotiate a settlement via email.

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Interstate Practice (cont.)

- Attorney admitted he practiced law but asserted not *in* Minnesota because he was never physically presented and only sent emails to clients and opposing counsel.
- Supreme Court concluded that the attorney had violated Rule 5.5 by the unauthorized practice of law in Minnesota.

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Interstate Practice (cont.)

- Rationale: attorney “had a clear, ongoing attorney-client relationship with Minnesota clients;” contacts not “fortuitous or attenuated.”
- Didn’t fit Rule 5.5(c) “temporary basis” exceptions. No local counsel, not reasonably related to proceeding or practice in another state.
- Rule now amended re relatives.

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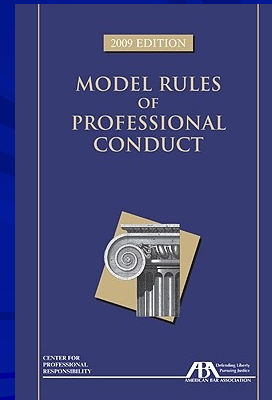
Topic 6: Pro Bono



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Minn. R. Prof. Conduct -- Preamble

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.



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Voluntary Pro Bono

Rule 6.1: Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.

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How to Do It Per Rule 6.1

- Serve persons of limited means.
- Charitable, religious, civic, community, governmental, and educational organizations in matters regarding persons of limited means (and generally).
- Legal work for organizations seeking to secure or protect civil rights, civil liberties, or public rights.

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How to Do It (cont.)

- Writing a check is not enough: **In addition**, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.



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Why Do Pro Bono?

- Because it's your professional obligation.
- Because it's the right thing to do.
- Because it's smart and fun!

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"Melanie, find me a little pro-bono case to cleanse my palate."

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Ethical Tips on Pro Bono

- Pro bono clients are *clients*.
- Follow firm/corporation procedures.
- Run conflict checks.
- Be cautious of multiple representations.
- Be aware of positional conflicts with existing clients.
- Always use retainer letters.

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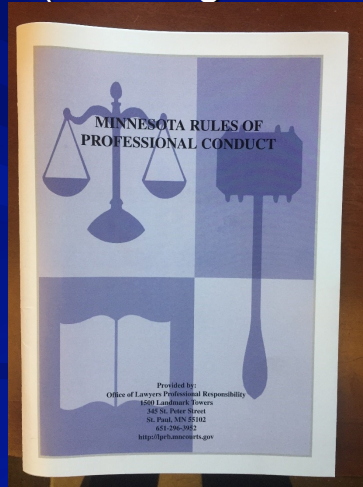
Pro Bono Tips (cont.)

- Familiarize yourself with new subjects and consult with experienced lawyers.
- Communicate regularly and document.
- Know how to handle client money.
- Consult counsel when ethical questions arise – or potential claims.
- Know the law of withdrawal.

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Ethical Hygiene

- Read the Rules (including Comments) once a year.



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Ethical Hygiene (cont.)

- Ask yourself: Is it legal, professional, and moral?
- Don't keep ethical issues to yourself, or delay confronting them.
- Have a privileged consultation with designated ethics counsel.
- Use the OLPR help line.

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**Thanks for Your Time
and Attention!**



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