AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION

Professionalism, Discipline and Ethics
In Providing Defense in Removal Proceedings

Materials to Accompany Remarks of
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I. The Role of the Lawyer

A. Professional

1. “Since the mid-1980s, the concept of ‘professionalism’ has been the focal point for the organized bar’s debate whether the profession is adequately renewing its public purpose, core values, and ideals in each generation of lawyers.” Hamilton, Professionalism Clearly Defined, in 19 The Professional Lawyer No. 4 at p. 4 (2008).

B. Advocate in adversary proceedings and in proceeding for benefits

C. Counselor – Analysis and Advice

D. Negotiator – getting third parties to “yes”

1. Lawyers who affirmatively misrepresent or conceal material facts in negotiations risk professional discipline and judicial sanctions

2. The general rule that a lawyer has no duty to inform an opponent of relevant facts is subject to exceptions. Three principle exceptions are: a document does not reflect the parties’ agreement before execution; the client has died; and failure to disclose material nonconfidential facts where lawyer knows opponent has mistaken belief as to them which, if not corrected, deprives or materially lessens opponent’s benefit of the bargain

(a) See In re Becker 804 N.Y.S. 2d 4, 5-6 (AD 2005) (relying on N.Y. disciplinary rules as to dishonesty, conduct prejudicial to the administration of justice and conduct reflecting on a lawyer’s fitness to practice)

(b) See also, Nebraska Bar Ass’n v. Addison, 412 N.W. 2d 855 (Neb. 1987) (six month suspension sustained when lawyer concealed excess insurance available for settlement and effecting a settlement as if it did not exist; failure to disclose held to violate prohibition against lawyer “dishonesty, fraud, deceit, or misrepresentation”

E. Friend

F. If in-house or in-government – role as officer, employee, or subordinate, usually involved in organic policy and business, not just “legal advice”

G. Risks increase where lawyer blur

1. is director of the client’s business
2. is an investor in or business partner of the client or of entity that competes with client
3. has business dealings with client
4. has policy or operational business responsibilities
5. acts for more than one client with actual or potential conflicting interests

II. The Lawyer as a Regulated Professional

A. Licensed Professional


   (a) Mandated Codes of Professional Responsibility

      (i) Disciplinary rules affecting license

      (ii) Ethical precepts and exhortations

      (iii) Pro bono services

      (iv) Mandatory CLE

      (v) Mandated Registration – e.g., 204 P.A Code 219(a) (effective July 1, 2010)

      (vi) Individual court rules – e.g., the rules of the County Courts for Pennsylvania’s 60 judicial districts available from Jenkins Law Library. First Judicial District, Philadelphia.
B. Voluntary Codes of Professional Conduct


3. Codes adopted by clients and industry associations

4. Ethics opinions of bar associations

C. Rules of Practice of the Forum

1. Federal Courts – Local Rules incorporating state ethical rules
   Federal Courts – Rule 11; ABA Standards on Imposing Lawyer Sanctions

2. State Courts – Local Rules – Pa. R.C. P. 1023.1 (Sanctions); State Rule 11 analogs

3. Immigration Court Rules – see Rules Governing Practice before the Immigration Court (EOIR) and DHS under 8 C.F.R. § 1003.101 to § 1003.107

(a) A rule promulgated on June 27, 2000 governing the conduct of attorneys practicing before the INS/DHS and the Executive Office for Immigration Review (EOIR), which administers the Immigration Courts and the Board of Immigration Appeals (BIA), provides the EOIR with the authority to investigate complaints and to impose a wide range of disciplinary sanctions, ranging from private censure to expulsion from practice before the DHS or EOIR

(i) The EOIR can sanction attorneys who have been found guilty or who have pleaded guilty or nolo contendere to a serious crime or who have been disciplined in other jurisdictions. 8 C.F.R. § 1003.103

(1) If such a conviction or disciplinary action occurred on or after August 28, 2000, the rule also imposes a duty on the attorney to
notify the EOIR thereof voluntarily. 8 C.F.R. § 1003.103(c)

(ii) Also, the EOIR can sanction attorneys who have been the subject of a complaint filed with the Office of the General Counsel of the EOIR. 8 C.F.R. § 1003.104

(iii) The EOIR Rules were amended in 2009. 73 F.R. 44178


4. 8 C.F.R. § 292 (2003) (and other agency rules of practice). Lists 14 non-exclusive categories when an Immigration Judge, the BIA or the Attorney General may suspend or bar an attorney from further practice. (Does not cover government trial attorneys.)


D. The Limits of Law

1. Civil Law.

(a) Liability in contract

(b) Malpractice and tort liability rules

(c) 8 U.S.C. (Aliens and Nationality)

(d) Consumer agencies


(iii) *Macedo v. Dello Russo*, 178 N.J. 340, 840 A.2d 238 (2004) (insulating “advertisements by learned professionals in respect of the rendering of professional services” from New Jersey’s Consumer Fraud Act, given the state’s comprehensive regulation by the relevant regulatory bodies and applicable common-law remedies)


(a) 8 U.S.C. (Aliens and Nationality) crimes

(b) 18 U.S.C. (Crimes and Criminal Procedure), especially:

(i) § 1001 (False statement to agency)

(ii) § 2 (Aid and Abet) [“(assist”), (“counsel”), or (“encourage”)]

(iii) § 4 (Misprision of felony) (Active concealment)

(iv) §1503 et seq. (Obstruction of Justice)

(v) § 1341 (Mail and Wire Fraud)

E. Malpractice Insurance

1. Risk management assessments and peer reviews

2. Premium ratings

3. Availability at all

4. Claims made form

5. Limitations on scope of coverage and coverage limits

(a) prior acts

(b) exclusions – self dealing; intentional misconduct; fraud
F. The “Market” Discipline

1. Reputation and referrals
2. Client acceptance
3. “Media” coverage
4. Advertising

III. Federal Crimes and Civil Penalties


1. Understanding the elements of the immigration crimes is a prerequisite to effective client intake and case planning and analysis

2. Lawyers can be implicated in the associational crimes (e.g. aiding and abetting, conspiracy, harboring, false statement, record keeping failure) and misprison of felony in connection with the immigration and nationality law crimes. See DOJ, US Attorney Manual, 9-73.010-9-73.801 at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/73mcrm.htm (last viewed June, 2011)

(a) 8 U.S.C. § 1323 – Unlawful bringing of aliens into the United States

   (i) “It shall be unlawful for any person, including any transportation company, or the owner, master, commanding officer, agent, charterer, or consignee of any vessel or aircraft, to bring to the United States from any place outside thereof (other than from foreign contiguous territory) any alien who does not have a valid passport and an unexpired visa, if a visa was required under this Act or regulations issued thereunder”

   (ii) Authorizes civil penalties on carriers (ships, planes, etc.) who bring unauthorized aliens to the United States

absence of evidence to the contrary, that the owner of a carrier is a knowing participant when his vessel is used to transport unauthorized aliens to the United States)

(b) 8 U.S.C. § 1324 – Bringing in and harboring certain aliens

(i) Transporting

(1) Authorizes criminal penalties for any person who, “knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien” 8 U.S.C § 1324 (a)(1)(A)(i)

(2) Distilled into a legal test, the five elements of the crime of transporting illegal aliens are: (1) the defendant transported an alien within the United States; (2) the alien was in the United States in violation of law; (3) this was known to the defendant; (4) the defendant knew or had reasonable grounds to believe that the alien’s last entry into the United States was within the last three years; and (5) defendant acted willfully in furtherance of the alien’s violation of the law. United States v. Shaddix, 693 F.2d 1135 (5th Cir. 1982)

(ii) Harboring

(1) Authorizes criminal penalties for any person who, “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation” 8 USCS § 1324 (a)(1)(A)(iii)

(2) The term “harboring” means “to afford shelter to” and is not limited to clandestine sheltering, as in a smuggling operation. *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir. 1976)

(iii) Criminal prosecution of lawyers

(1) In a 23 count superseding indictment, the US charged Maqsood Hamid Mir, an immigration attorney practicing in Maryland, with racketeering, conspiring to harbor aliens, and submitting false labor certification applications for those harbored aliens which permitted the illegal aliens to enter and remain in the US as permanent resident aliens. Thomas M. DiBiagio, the United States Attorney said, “This indictment should send a message to those who take advantage of the immigration laws – particularly immigration attorneys and businessmen who exploit their small businesses and law practices to sponsor aliens illegally – that they will be prosecuted aggressively and to the full extent of the law.” See Press Release, US Department of Justice, United States Attorney, District of Maryland, *Immigration Lawyer and Others Charged In Racketeering Scheme*, (Mar. 2, 2004) available at http://www.usdoj.gov/usao/md/press_releases/press04/MirRacketIndict.pdf; see also Ruben Castaneda, *5 Charged in Work Visa Fraud*, Wash. Post, Mar. 3, 2004, at B02
8 U.S.C. § 1324a – Unlawful employment of aliens

(i) “It is unlawful for a person or other entity…to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien” 8 U.S.C. § 1324a(a)(1)

8 U.S.C. § 1324c – Penalties for document fraud

(i) “It is unlawful for any person or entity knowingly—

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act,
(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or to obtain a benefit under this Act” 8 U.S.C. § 1324c(a)

(ii) A civil penalty under this statute does not violate Double Jeopardy Clause when assessed after a criminal conviction for same conduct. Noriega-Perez v. United States, 179 F.3d 1166 (9th Cir. 1999)

(iii) Criminal prosecution of lawyers

(1) In July 2004, Manlin Chee, an immigration lawyer in Greensboro, NC, previously honored with the ABA’s coveted Pro Bono Award for her many cases, was indicted on federal charges of conspiring to provide false documentation as well harboring a fugitive. Arraignment Will Be Reset For Accused Chee Helpers, NEWS & RECORD (Greensboro, NC), July 7, 2004, at B2.
In November 2004, Ms. Chee pleaded guilty to conspiring to defraud the United States by submitting false paperwork on behalf of immigrant clients. Jim Schlosser, Chee’s Backers Buy Ad, NEWS & RECORD (Greensboro, NC), Jan. 17, 2005, at B1

8 U.S.C. § 1325 – Improper entry by alien; marriage fraud; immigration-related entrepreneurship fraud
“(i) “Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.” 8 U.S.C. § 1325 (a)

(ii) See Boyle v. People, No. 02PDJ067, 2004 Colo. Discipl. LEXIS 31 (Colo. Sup. Ct. May 12, 2004) — immigration attorney disbarred for improperly instructing his client to enter country on B-1 visitor’s visa, knowing client intended to obtain employment, thus ineligible for B-1 visa and falsifying labor certifications on behalf of clients was reinstated

(f) 8 U.S.C. § 1326 – unlawful reentry after deportation or removal

(i) “any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien’s reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act,

shall be fined under title 18, United States Code, or
imprisoned not more than 2 years or both”

(ii) To obtain a conviction under 8 U.S.C. § 1326 the government must show (1) that the defendant is an alien who was previously arrested and deported, (2) that he re-entered the United States voluntarily, and (3) that he failed to secure the express permission of the Attorney General to return. *United States v. Joya-Martinez*, 947 F.2d 1141 (4th Cir. 1991)

(g) 8 U.S.C. § 1327 – aiding entry of certain criminal or subversive aliens

(i) “Any person who knowingly aids or assists any alien inadmissible under section 212(a)(2) [8 USCS § 1182(a)(2)] (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 212(a)(3) [8 USCS § 1182(a)(3)] (other than subparagraph (E) thereof) to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, United States Code, or imprisoned not more than 10 years, or both.”

(h) 8 U.S.C. § 1328 – importation of aliens for immoral purpose; willful failure or refusal to depart

(i) “Whoever shall, directly or indirectly, import, or attempt to import into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation, shall be fined under title 18, United States Code, or imprisoned not more than 10 years, or both.”
B. Sample Cases and Penalties for Document Fraud (8 U.S.C. § 1324c)

1. Criminalizes the unlawful attempted use or the providing of any forged, counterfeit, altered or falsely made document to obtain a benefit under 8 U.S.C.

2. Criminalizes the unlawful preparing, filing or assisting another in preparing or filing any application for benefits under 8 U.S.C. or filing any document in connection with such application “with knowledge or in reckless disregard of the fact that such application or document was falsely made or . . . does not relate to the person on whose behalf it was . . . submitted . . .”

3. Provides criminal penalties for the felony of “knowingly and willfully” failing to disclose or covering up the fact the person prepared or assisted another in preparing a falsely made application for benefits under 8 U.S.C.

4. The foregoing crimes are in addition to the penalties available under Title 18

5. An immigration lawyer who represented Nigerians and Ethiopians in proceedings before the INS was convicted as codefendant under 8 U.S.C. § 1324(a)(1)(A)(iv) for falsifying documents for the aliens’ citizenship applications. The lawyer and the other codefendant, one Oloyede, ran a scheme in which Oloyede would sell false documents to illegal aliens and would then refer the clients to the attorney, who would use the documents to prepare the INS applications. United States v. Oloyede, 982 F.2d 133 (4th Cir. 1992)

6. In a state ethics case, Boyle v. People, No. 02PDJ067, 2004 Colo. Discipl. LEXIS 31 (Colo. Sup. Ct. May 12, 2004), a lawyer falsified labor certification for two clients, whom he knew did not have the requisite experience or jobs

7. In re Chu, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977) (lawyer disbarred for conviction of making false and fraudulent submissions to the INS and arranging of marriages for immigrants to gain visas)

(attorney counseled client, a New York resident, to obtain California  
documents and file for asylum as a resident of California)

C. Immigration Lawyer Indictments

(discussing the principle of law that a party’s intentional destruction  
of evidence can, under certain circumstances, support an inference  
that the evidence would have been unfavorable to the party  
responsible for its destruction)

(holding that 18 U.S.C. § 1503, the general or “omnibus” obstruction  
of justice statute, reaches deliberate destruction of documents in civil  
litigation between private parties)

3. *United States of America vs. Raghubir Gupta*, 07 Crim. 177 –  
(U.S.D.C., S.D.N.Y.) Gupta was charged in March, 2007 with  
immigration fraud in violation of 18 U.S.C. §§ 1546(a) after he  
“charged clients thousands of dollars to prepare amnesty  
applications that contained false information and then submitted  
those applications to the United States Citizenship and Immigration  
Services, knowing the applications contained false information.”  
In rejecting a motion to dismiss, Court affirmed that a “penal statute is  
not void for vagueness if it defines the offense with sufficient  
definiteness that ordinary people can understand what conduct is  
prohibited.” Simply, “an ordinary person – and certainly an  
immigration attorney – would know that” Gupta’s actions are  
prohibited by the statute.

Maryland) (September 29, 2005).

D. Obstruction of Justice in the Course of Representation

1. Obstruction of justice provisions, equally applicable to attorneys, are  
found in 18 U.S.C. §§ 1503, 1505, 1512, and 1513. See Mary C.  
Spearing, *Obstruction Of Justice and Attorneys Who Work On Civil  
Fraud Cases, Qui Tam: Beyond Government Contracts*, 456  
PLI/LIT, 521 (1993); see also Kathleen F. Brickey, *Corporate  
Criminal Liability* §§ 12:01 - 29 (2d ed. 1992)
2. 18 U.S.C. § 1503 forbids corruptly influencing any grand or petit juror or officer of the court by threats or force, or by letter or communication. It also proscribes endeavoring to influence, obstruct, or impede “the due administration of justice.” (Omnibus Clause, 18 U.S.C. § 1503 et seq.)

(a) “[A]ny corrupt endeavor whatsoever, to ‘influence or impede any . . . witness . . . ’ whether successful or not, is proscribed by the obstruction of justice statute” United States v. Cintolo, 818 F.2d 980, 991 (1st Cir. 1987) (citations omitted)

(b) “[M]eans, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive, (ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct” Id. at 992

(c) The Supreme Court’s reading of § 1503 “makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way.” United States v. Aguilar, 515 U.S. 593, 601-602 (1995)

3. The U.S. Supreme Court set limits on the Omnibus Clause of §1503.

(a) In United States v. Aguilar, 515 U.S. 593 (1995) the court affirmed the reversal of the defendant judge’s conviction for endeavoring to obstruct justice in violation of § 1503 where the government failed to show that the agent to whom the judge lied was an arm of the grand jury. The Supreme Court held that it did “not believe that uttering false statements to an investigating agent . . . who might or might not testify before a grand jury is sufficient to make out a violation of the catch-all provision of §1503” Id. at 600

(b) The court further held that “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice . . . and a person lacking knowledge that his actions are likely to affect a pending proceeding necessarily lacks the requisite intent to obstruct” Id. at 594

E. Elements of a § 1503 Offense

1. A § 1503 offense requires:

(a) a nexus with a pending federal judicial proceeding;
that the defendant knew of or had notice about the proceeding; and

that the defendant acted corruptly with intent to obstruct or interfere with the proceeding or due administration of justice

2. Pending Federal Judicial Proceeding


Most Circuits hold that there must be an investigation in contemplation of or before the grand jury. *See United States v. Monus*, 128 F.3d 376, 389 (6th Cir. 1997) (a judicial proceeding is pending “where a subpoena is issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury’’) (quoting *United States v. Tackett*, 113 F.3d 603, 612 n.6 (6th Cir. 1997)); *United States v. Davis*, 183 F.3d 231, 240-41 (a wiretap order cannot be considered a judicial proceeding under §1503), amended by 197 F.3d 662 (3d Cir. 1999); *United States v. Cueto*, 151 F.3d 620, 634 (7th Cir. 1998) (“It is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute ‘the due administration of justice under §1503.’”) (quoting *United States v. Maloney*, 71 F.3d 645, 657 (7th Cir. 1995)); *United States v. Brady*, 168 F.3d 574, 577-78 (1st Cir. 1999) (purposely depriving the grand jury of information is sufficient to make out a conviction under § 1503); *United States v. Grubb*, 11 F.3d 426, 438 (4th Cir. 1993) (“Interrupting the grand jury in its pursuit of information” is punishable under § 1503); *United States v. Wood*, 6 F.3d 692, 696 (10th Cir. 1993) (holding that a grand jury investigation qualifies as “pending judicial proceeding” for the purpose of § 1503); *United States v. Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988) (declining to overturn a conviction under § 1503 where the defendant encouraged another to testify falsely after he had ample notice that a grand
jury proceeding was pending); *United States v. Vesich*, 724 F.2d 451, 455 (5th Cir. 1984) (a proceeding is pending for purpose of § 1503 where grand jury had been impaneled)

(ii) The Ninth Circuit holds that a proceeding is pending after an indictment is issued. *United States v. Wash. Water Power Co.*, 793 F.2d 1079, 1085 (9th Cir. 1986) (“It is clear that a federal proceeding is ‘pending’ for purposes of section 1503 once an indictment has been issued”)

(iii) The Eighth and Eleventh Circuits have found no need for a pending judicial proceeding for a conviction under § 1503. *See United States v. Novak*, 217 F.3d 566, 571 (8th Cir. 2000) (“There is nothing on the face of § 1503 requiring a pending judicial proceeding.”); *United States v. Veal*, 153 F.3d 1233, 1250 n.24 (11th Cir. 1998) (“In the second and third clauses of § 1503, the federal interest originates from the status of the targeted person, a federal juror, but no judicial proceeding is required”)

(b) The possibility of filing a post-trial motion can still be considered part of a “pending proceeding.” *See United States v. Baum*, 32 F. Supp. 2d 642, 649 (S.D.N.Y. 1999) (declining to dismiss the § 1503 obstruction of justice charge in the indictment of a criminal attorney, who allegedly devised a plan whereby his client would lure an alleged drug trafficker to the United States in an attempt to induce a federal prosecutor to file a post-sentence reduction motion for him). *See also United States v. Fleming*, 215 F.3d 930, 937 (9th Cir. 2000) (holding that there is sufficient evidence of a pending proceeding even if the defendant’s appeal had little chance of success); *United States v. Fernandez*, 837 F.2d 1031, 1034 (11th Cir. 1988) (rejecting defendant’s contention that proceeding was no longer pending at conclusion of sentencing hearing when obstruction occurred, since post-sentence appeal could still be filed and noting pending proceeding is not required under § 1503)

3. Knowledge or Notice Of Pending Proceeding.
(a) In circuits that require a pending proceeding, the defendant must have knowledge of a pending judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 205 (1893)

(i) “Knowledge” does not require that defendant know that proceeding was federal in nature. *United States v. Ardito*, 782 F.2d 358 (2d Cir. 1986). See also *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993)

(b) In *United States v. Aguilar*, 515 U.S. at 599, the Supreme Court stated that if the “defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct”

(c) In *United States v. Washington Water Power Co.*, 793 F.2d 1079 (9th Cir. 1986), the Ninth Circuit held likelihood that conversation included news of an indictment, based on one party’s likely status as a witness, was enough to prove knowledge of pending federal proceeding

(d) The Second Circuit has held that one who makes statements to a federal investigator not knowing that they would be repeated during the grand jury investigation cannot be convicted under § 1503. *United States v. Schwarz*, 283 F.3d 76, 109 (2d Cir. 2002)

4. Corrupt Intent to Obstruct or Interfere

(a) The Circuits differ in their interpretation of the intent requirement. The First Circuit aptly points out the source of the conflict: confusion over the “the scienter element in the obstruction statute . . . in part, results from the promiscuous use in the cases of the ambiguous word ‘intent,’ which can mean either knowledge (of consequences) or purpose (to achieve them).” *Brady*, 168 F.3d at 578

(i) In interpreting the corrupt intent requirement in 1893, the Supreme Court had held that “specific intent to violate the statute must exist to justify a conviction.” *Pettibone*, 148 U.S. at 207. Many years later, in *United States v. Neiswender*, the Fourth Circuit held that an attorney can be held guilty of obstructing justice without proving he had or could have had a direct involvement with the judicial proceedings. 590
F.2d 1269 (4th Cir. 1979). In that case, soon after the criminal trial of the former governor of Maryland, the defendant offered to guarantee an acquittal in exchange for the right price. *Id.* at 1270. The Court upheld his conviction under § 1503 stating, “In our view, the defendant need only have had knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one’s acts.” *Id.* at 1273. The Court continued: “The defendant's design is irrelevant; if the natural result of his plan is to interfere with judicial processes, justice will be obstructed whether he hopes it is or not.” *Id.* at 1274. The Second, Eleventh, Seventh, and Sixth Circuits adhere to this approach. *United States v. Buffalano*, 727 F.2d 50, 54 (2d Cir. 1984); *United States v. Silverman*, 745 F.2d 1386, 1393 (11th Cir. 1984); *United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *United States v. Atkin*, 107 F.3d 1213, 1219 (6th Cir. 1997).

(1) In the application of this foreseeability approach, Courts have convicted attorneys for acting in furtherance of schemes to defraud. *Atkin*, 107 F.3d at 1219; *United States v. Machi*, 811 F.2d 991, 998 (7th Cir. 1987); *Silverman*, 745 F.2d at 1396; *Buffalano*, 727 F.2d at 54. In fact, the conduct, in the language of the statute – an endeavor, sufficient for a conviction – is less than that required for a criminal attempt and can be simply solicitation. *Buffalano*, 727 F.2d at 53

(2) There is an argument that the Fourth Circuit misapplied the “natural and probable consequences” language in *Pettibone* to the intent requirement of the statute, thus lowering the necessary level of proof and creating a new and uncodified crime. See Joseph V. De Marco, *Note: A Funny Thing Happened On the Way to

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1 Due to similar reasoning, the defense of impossibility is rarely raised successfully by defendants charged with violating § 1503. See Keith Palfin & Sandhya Prabhu, *Obstruction of Justice*, 40 Am. Crim. L. Rev. 873, 888 (Spring 2003).
the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statue, 67 N.Y.U. L. Rev. 570, 588 (1992). On DeMarco’s view, the Neisweneder approach could be used to criminalize recklessness or negligence as in the case of an attorney who inadvertently destroys or fails to adequately safeguard documents that have been subpoenaed. Id. at 598-605. However, prosecutorial discretion, in practice, has minimized the likelihood of this occurring. Id. at 605-08

(3) Generally, the intent requirement is satisfied if the government shows that the defendant knowingly and intentionally undertook an action from which an obstruction of justice was a reasonably foreseeable result. See United States v. Cueto, 151 F.3d 620, 630–31 (7th Cir. 1998) (upheld lawyer’s conviction for conspiracy and obstruction of justice for using court processes to interfere with a federal investigation of the illegal gambling operations), cert. denied, 526 U.S. 1016 (1999); Silverman, 745 F.2d 1386, 1393 (attempt by attorney to solicit $25,000 from his client under pretext of using it as bribe to guarantee client would receive probation upon pleading guilty is “endeavor” to obstruct justice justifying attorney’s conviction for violating § 1503.)


(a) Conviction under § 1503 can result from “subtle suggestions.” In United States v. Tranakos, 911 F.2d 1422 (10th Cir. 1990), the court affirmed the conviction of an attorney for obstructing a witness’ grand jury testimony for smiling and saying suggestively to the witness (in a case in which the ownership of trusts was at issue), “Well, you don’t own any trusts, do you?” followed by, “You don’t have any bank accounts in Montana, do you?” Id. at 1431. The court held that “One who proposes to another that the other lie in a judicial proceeding is guilty of obstructing justice . . . The
statute prohibits elliptical suggestions as much as it does
direct commands . . . A reasonable finder of fact could have
decided on this evidence that [defendant’s attorney] suggested
to [the witness] that [the witness] falsely tell the grand jury
that he had no Montana bank accounts” Id. at 1432

6. Evidence Must be Preserved, Not Destroyed, Concealed, or
Fabricated.

(a) In United States v. Vesich, 724 F.2d 451 (5th Cir. 1984), the
court held that §§ 1503 and 1505 apply to the destruction of
documents prior to issuance of a subpoena. The court said,
“We have long held that the issuance of a subpoena is not
necessary to trigger application of the obstruction of justice
statute.” Id. at 455. Similarly, the Sixth Circuit, in United
that distort the evidence to be presented or otherwise impede
the administration of justice are violations of 18 U.S.C. §
1503. The act of altering or fabricating documents used or to
be used in a judicial proceeding would fall within the
obstruction of justice statute if the intent is to deceive the
court.” Id. at 1128. The Eleventh Circuit had previously held,
“It is clear that the knowing destruction or concealment of
documentary evidence can constitute a violation of §1503.”
United States v. Banks, 942 F.2d 1576, 1578 (11th Cir. 1991)
(citations omitted), vacated by, remanded by 988 F.2d 1106
(11th Cir. 1993). See also United States v. Schwartz, SI 98
(holding that the protections of the Fifth Amendment,
attorney client privilege, and “professional judgment” are no
defense to intentionally withholding evidence duly
subpoenaed), aff’d, No. 00-1128 (CON), 2001 U.S. App.
LEXIS 519 (2d Cir. Jan. 12, 2001)

7. Statute Not Limited to Obstruction Through Force or Intimidation.

(a) In United States v. Schaffner, 715 F.2d 1099, 1103 (6th Cir.
1983), the Sixth Circuit stated that an attorney would violate
§ 1503 by knowingly hiding or advising a corporation to hide
an employee who gave written statements to the government
incriminating the corporation in order that the employee
would not be subpoenaed and would not testify at a trial
(b) In *United States v. Savoy*, 38 F. Supp. 2d 406, 417 (D. Md. 1998), the court held that the retraction of defendant’s perjurious affidavit was no defense to defendant’s violation of § 1503.

8. Certain Defenses.

(a) In *United States v. Cintolo*, 818 F.2d 980, 990 (1st Cir. 1987), the court affirmed the conviction of an attorney for conspiracy to obstruct justice where the attorney attempted to hinder the grand jury investigation of an organized crime operation by using his position as attorney for the grand jury witness to acquire information about the investigation and inhibit the witness from testifying or cooperating by urging the witness to take the Fifth Amendment.

(i) The court said, “An attorney who spurns the interests of his own client and conspires to subject him to a prison term for the benefit of a third party is not performing the traditional functions of defense counsel. Such an attorney is not, on any view of the matter, entitled to special perquisites and privileges.” *Id.* at 995.

(b) In *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974), the court affirmed a conviction for endeavoring to influence a grand jury witness to invoke the Fifth Amendment privilege rather than testify regarding an extortionate loan made by defendant’s associate, in violation of § 1503.

(c) The Second Circuit rejected the argument that advising a witness to do that which he possessed a constitutional right to do could not be criminalized. The court said, “while a witness violates no law by claiming the Fifth Amendment privilege against self-incrimination in a grand jury, one who bribes, threatens, coerces a witness to claim it or advises with corrupt motive a witness to take it, can and does obstruct the administration of justice.” *Id.* “The lawful behavior of the person invoking the [Fifth] Amendment cannot be used to protect the criminal behavior of the inducer” *Id.*
(d) Inducing or threatening a witness to testify falsely is proscribed (witness tampering is primarily enforced under § 1512)\(^2\)

9. Zealous Representation Doctrine Provides no Immunity to Obstruction of Justice Charge.

(a) In *United States v. Cueto*, 151 F.3d at 631, the court found that the defendant’s role as an attorney was no defense to prosecution under §1503. “As a lawyer, [Cueto] possessed a heightened awareness of the law and its scope and he cannot claim lack of fair notice as to what is proscribed by [section] 1503 .... More so than an ordinary individual, an attorney, in particular a criminal defense attorney has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law.” *Id.* at 631–32. The lawyer, in an effort to forestall investigation of his client’s business, had complained to State’s Attorney, filed motions attacking the FBI, sought the judge’s disqualification, and filed pleadings in a district court action as well as a subsequent appellate brief and petition for certiorari. “[T]he contours of the line between traditional lawyering and criminal conduct . . . must inevitably be drawn case-by-case. We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients’ interests and then avoid criminal prosecution by claiming that they were ‘just doing their job.’ As the First Circuit stated in *Cintolo*, ‘we refuse to chip some sort of special exception for lawyers into the brickwork of §1503.’” *Id.* at 634

(b) The court in *Cueto* cited with approval *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987). In *Cintolo*, the court

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\(^2\) See *United States v. Vesich*, 724 F.2d 451, reh’g denied, 726 F.2d 168 (5th Cir. 1984), superseded by statute on other grounds as stated in *United States v. Gonzalez*, 922 F.2d 1044, (2d Cir. 1991) (upholding conviction of an attorney for endeavoring to obstruct justice in violation of §1503, by urging a potential grand jury witness and former client to testify falsely before a grand jury investigating narcotics trafficking; attorney later perjured himself in denying that gave such advice in his own grand jury testimony.) The attorney advised the witness to lie by giving the grand jury phony names of his contacts in the narcotics business. *Id.* at 459. The court noted that the attorney “explained to [the witness] at length how [the witness] could successfully lie to the grand jury if he were called to testify. Upon listening to the recording of [the attorney’s] language and tone of voice during that conversation, the jury was plainly justified in concluding that [the attorney] was not merely a disinterested party explaining the workings of the grand jury system, but meant his words to encourage and advise [the witness] to lie to the grand jury.” *Id.*
stated, “We emphatically reject the notion that a law degree, like some sorcerer’s amulet, can ward off the rigors of the criminal law. . . . By our reckoning, attorneys cannot be relieved of obligations of lawfulness imposed on the citizenry at large. . . . As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct. To the exact contrary, they should be held to the highest standards in promoting the cause of justice.” Id. at 996. “The fact that [attorney’s] participation was clothed, at least in part, in the mantle of superficially ‘professional’ conduct does not exonerate the lawyer from culpability.” Id. at 990. The court went so far to say that “even were we inclined to credit the claim that [the witness] voluntarily acceded to actions by [the attorney] aimed at sending him to jail in order to protect [the third party], no effective defense avails to [the attorney] as a result.” Id.

F. Conspiracy

1. Elements of Conspiracy under Federal Law.

(a) Conspiracy is an agreement between two or more persons to commit an unlawful act by knowingly engaging in the conspiracy, intending to commit those offenses that were the objects of the conspiracy, and commission of an “overt act” by one or more members of the conspiracy. See 2 Kevin O’Malley, Jay Grenig & Hon. William Lee, Federal Jury Practice and Instructions: Criminal §31.02 (5th ed. 2000); Committee on Pattern Jury Instructions District Judges Association, Fifth Circuit Pattern Jury Instructions: Criminal (2001)

2. Supreme Court Revives Broad Definition of Conspiracy.

(a) In United States v. Recio, 537 U.S. 270 (2003), the issue was whether the government could charge suspects with conspiracy when the alleged crime had already been discovered and prevented from occurring. The Supreme Court held that a conspiracy does not automatically terminate simply because the Government defeated the conspiracy’s objective

(b) Writing for the majority, Justice Breyer emphasized that “[t]he Court has repeatedly said that the essence of a
conspiracy is ‘an agreement to commit an unlawful act.’ That agreement is ‘a distinct evil,’ which ‘may exist and be punished whether or not the substantive crime ensues.’ The conspiracy poses a ‘threat to the public’ over and above the threat of the commission of the relevant substantive crime – both because the ‘combination in crime makes more likely the commission of [other] crimes’ and because it ‘decreases the probability that the individuals involved will depart from their path of criminality.’” 537 U.S. at 275. (Internal citations omitted.)

(c) In light of Recio, an individual charged with conspiracy and linked to the conspiracy, such as Zacarias Moussaoui, will likely have difficulty arguing that it was factually impossible to carry out the conspiracy to hijack a plane on September 11 because he was jail at the time. See David G. Savage, A Trio of Cases Could Determine How the Government Probes Security Threats, ABA J. (Dec. 20, 2002)

3. Doctrine of Conscious Avoidance.

(a) “Conscious avoidance occurs when a person deliberately closes his eyes to avoid having knowledge of what would otherwise be obvious to him. But such deliberate ignorance . . . does not establish that person’s innocence.” United States v. Reyes, 302 F.3d 48 (2d Cir. 2002); see also United States v. Abreu, 342 F.3d 183, 188 (2d Cir. 2003). “[T]he doctrine may be invoked to prove defendant had knowledge of the unlawful conspiracy. But . . . [the doctrine may not] be used to prove intent to participate in a conspiracy. . . . Yet once defendant’s participation in a conspiracy has been proved, conscious avoidance may properly be used to prove his knowledge of its unlawful objectives.” Reyes, 302 F.3d at 54–55. See also United States v. Hollender, No. 02-1720(L); 03-1196, 2004 U.S. App. LEXIS 498, at *6-7 (2d Cir. Jan. 14, 2004). In reversing the decision of the lower court to set aside the guilty verdict, Judge Cardamone reinstated Reyes’ conviction of engaging in a stolen automobile air bag conspiracy, finding that Reyes demonstrated a conscious avoidance of guilt in the context of a conspiracy. Following Reyes’ arrest, an FBI agent had asked him whether he knew the business associate from whom he received checks for brokering the sale of airbags dealt in stolen airbags. Reyes
had responded, “with an analogy to drug use and when you see a friend using drugs you see what’s happening, but you turn the other way.” Reyes, 302 F.3d. at 52

4. Example of Conspiracy by Immigration Lawyer.

(a) In United States v. Jacques Dessange, Inc., an immigration lawyer was convicted as codefendant and co-conspirator under 18 U.S.C § 1546, which prohibits knowingly submitting visa applications containing material false statements. The attorney was charged with assisting his client in falsifying visa applications for workers at the client’s American subsidiary and its franchisees of a French hair salon company. Over the course of three years, the attorney and his partner obtained scores of L-1A visas by representing that the applicants were assuming managerial positions in the subsidiary headquarters, when in fact the majority of them were placed hairstylists at franchise locations, and therefore not qualified to obtain L-1A status. United States v. Jacques Dessange, Inc., 103 F. Supp. 2d 701 (S.D.N.Y. 2000). In United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003), cert. denied, 124 S.Ct. 2196 (2004), the Second Circuit further clarified the permissible use of the conscious avoidance doctrine. The defendant in that case was convicted of conspiracy to commit securities fraud, but claimed that he did not know that the person from whom he received insider information had obtained it illegally. Id. at 475. He challenged his conviction based on language in Reyes. The Court, however, rejected his argument, holding: “We do not permit the [conscious avoidance] doctrine to be used to prove intent in a conspiracy.” Id. at 478

(b) In a well-publicized case from the Southern District of New York, a jury convicted Lynne Stewart, Esq., of two counts of conspiring to provide material aid to terrorists, and three counts of perjury and defiance of federal prison rules, as a result of her actions on behalf of her client. Julie Preston, Lawyer of Terrorist Found Guilty, THE INTERNATIONAL HERALD TRIBUNE, Feb. 12, 2005, at 5

G. Wire and Mail Fraud

1. In United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003), cert. denied, 125 S.Ct. 32 (2004), the Second Circuit held that, in the
private sector, there are four elements to the crime of a § 1346 scheme or artifice to deprive another of the intangible right of honest services:

(a) a scheme or artifice to defraud;

(b) for the purpose of knowingingly and intentionally depriving another of the intangible right of honest services as thus defined;

(c) where the misrepresentations (or omissions) made by the defendants are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior; and

(d) use of the mails or wires in furtherance of the scheme

2. 18 U.S.C. §§ 1341 and 1343 respectively penalize the use of mail or wires to perpetrate a “scheme or artifice to defraud.” Section 1346 provides that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”

In Rybicki, the defendant lawyers were found guilty of violating each element of § 1346. Specializing in personal injury cases, the lawyers devised a scheme in which they would, “acting through intermediaries, arrange for payments to be made to claims adjustors employed by insurance companies that had insured against injuries sustained by the defendants’ clients.” The scheme was intended to induce the adjustors to settle the lawyers’ clients’ claims more expeditiously. Although each insurance company had a written policy forbidding adjustors from receiving any gifts or fees and to report any such offers, the adjustors did not report the payments.

3. The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, attach criminal liability to a broad range of fraudulent conduct. The mail fraud statute, section 1341, “proscribes use of the mails in furtherance of ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’” Cleveland v. United States, 531 U.S. 12, 15 (2000). In fact, each use of the mail constitutes a separate offense and can constitute a separate count under the indictment. See Nirav Shah, Mail and Wire Fraud, 40 Am. Crim. L. Rev. 825, 829 (2003). The wire fraud statute requires interstate
communication, but has identical language and is interpreted in the same manner as the mail fraud statute. *See Fountain v. United States*, 357 F.3d 250, 253 (2d Cir. 2004). The broad language of the statute has allowed prosecutors to charge defendants for a broad range of conduct, including stock fraud, commodity frauds, blackmail, counterfeiting, election fraud, and bribery. *See* 40 Am. Crim. L. Rev. at 825.

4. The elements of mail fraud in the Second Circuit are: “(1) a scheme to defraud, (2) money or property [as the object to the scheme], (3) use of the mails... to further the scheme.” *Fountain*, 357 F.3d at 255 (quoting *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996)). To prove the first element of mail fraud, the government must establish beyond a reasonable doubt that a scheme existed in which use of the mails was reasonably foreseeable and that an actual mailing occurred in furtherance of that scheme. *See* 40 Am. Crim. L. Rev. at 830. Imbedded in this first element is a materiality requirement. *United States v. Neder*, 527 U.S. 1, 25 (1999) (holding that the common law understanding of fraudulent conduct included materiality and should be applied in the interpretation of this statute).

5. *Rybicki* particularizes the property requirement in the statutory language. Courts have disagreed over the definition of “property” in this statute, and specifically if it should include intangible property rights. *See* 40 Am. Crim. L. Rev. at 833. In February 2004, the Second Circuit upheld defendant John Fountain’s conviction under the mail and wire fraud statutes for his involvement in a scheme in which he transported cigarettes from Canada to a Native American Reservation and back to Canada where they were then sold on the black market. *Fountain*, 357 F.3d at 252. He challenged his conviction in light of the Supreme Court’s ruling in *Cleveland v. United States*. *See* id. at 256-57. In Cleveland, the Court held that unissued state video poker licenses did not qualify as "property" under mail and wire fraud statutes because there must be symmetry in the meaning of the term—the implement used in the alleged mail fraud scheme must be transferable in both the defendants’ and victims’ hands. *See Cleveland*, 531 U.S. at 15. The Second Circuit held that taxes still qualify as property after *Cleveland* and that, since the Canadian government had been defrauded of them, Fountain’s conviction would stand. *Fountain*, 357 F.3d at 260.

6. The property requirement was also analyzed in *United States v. Hausmann*, 345 F.3d 952 (7th Cir. 2003), *cert. denied*, 124 S. Ct.
2412 (2004), a case similar in many respects to Rybicki. Attorney Hausmann was convicted for his involvement in a kickback scheme with a chiropractor to whom he referred his clients who had been injured in car accidents. Id. at 958. Hausmann challenged his conviction claiming that the statute was overly vague and therefore unconstitutional and, moreover, it invited arbitrary policing of private business conduct. Id. The Seventh Circuit rejected these arguments, holding that prior case law put the defendant on notice of the fact that the misuse of one’s fiduciary duty for personal gain leads to criminal liability under the mail and wire fraud statutes under the intangible liability doctrine. Id.

7. Intent to Defraud.

(a) The government must also prove that the defendant had specific intent to defraud. However, since “direct proof of harm is often unavailable, courts have long permitted fact finders to rely of a variety of circumstantial evidence, including evidence of actual or contemplated harm, to infer such intent.” United States v. Welch, 327 F.3d 1081, 1105 (10th Cir. 2003). Further, a “defendant’s reckless indifference to the truth of a representation may [also] establish the intent to defraud under § 1341.” See id.

8. Mailing in the Furtherance of a Scheme to Defraud.

(a) Finally, the government must prove that the defendant used, or caused to be used, the United States Postal Service or a private interstate carrier. See 18 U.S.C. § 1341. However, the mailing need not be complete or integral to the scheme. See United States v. Segal, No. 02 CR 112, 2004 U.S. Dist. LEXIS 407, at *22 (N.D. Ill. Jan. 12, 2004). In a recent case, an indictment where the defendants were alleged to cause to be mailed blank license renewal forms “in furtherance of a fraudulent scheme” were sufficient for an indictment for mail fraud under section 1341. Id.


1. The Homeland Security Act of 2002 created the Bureau of Immigration and Customs Enforcement (ICE), bringing together the enforcement and investigative arms of the Customs Service, the former Immigration and Naturalization Service (INS), and the
Federal Protective Service (FPS) under the Department of Homeland Security

2. A May 13, 2003 Memorandum of Agreement between Homeland Security Secretary Ridge and Attorney General Ashcroft assigned the FBI the lead role in investigating terrorist financing

3. Title III of the USA PATRIOT Act, for the first time, imposed on securities brokers and dealers, insurance companies and money-transfer services obligations to detect money laundering

4. Immigration Lawyers.

(a) In May 2004, Mohamed Alamgir, a Washington D.C. immigration lawyer, pleaded guilty to money laundering (among other crimes) after filing more than 200 fraudulent visa applications. See *Immigration Attorney Guilty of Fraud and Conspiracy* (May 13, 2004) at http://www.visalaw.com/04may1/12may104.html (last viewed June, 2011)

(b) In March 2003, Samuel G. Kooritzky, a Virginia attorney, was sentenced to 10 years’ imprisonment and ordered to pay $2.3 million in restitution after being convicted in 2002 of one count of money laundering (among numerous other crimes). The charges stemmed from his efforts to file fraudulent applications for alien employment certification with the United States Department of Labor on behalf of Northern Virginia businesses and local immigrants. See *Immigration Lawyer in Virginia Sentenced in Immigration Fraud Case* (Mar. 12, 2003) at http://www.jjgvisalaw.com/March1_Labor_Certification_Fraud.html. (last viewed June, 2011)


*See generally* Abramowitz and Bohrer, New York Law Journal, March 5, 2002 (explaining that the destruction of documents may constitute obstruction of justice even before a proceeding is commenced where destruction is with intent to make documents unavailable). *See also* Ann Davis, *UBS Is Sanctioned for Withholding E-mails*, Wall St. J., July 21, 2004 (describing how a U.S. District Judge in the S.D.N.Y. adopted a then new standard of a lawyer’s “obligation” to promote the preservation of evidence, specifically, that company lawyers must warn employees not to
destroy evidence relevant to a lawsuit and actively supervise any destruction process).

J. OFAC Compliance- See Mario Mancuso et al., Lessons Learned from Recent OFAC Enforcement Cases, 3 Financial Fraud Law Report 640 (2011).

IV. Duties of Lawyer

A. To Client

1. Contractual – in engagement letter, by oral contract or implied in law


3. In tort – as a “fiduciary”

4. Under statutes

5. New York “Statement” of Client Rights. See Annex A-16

B. To Third Parties – who pay the bill or are affected by lawyer behavior, including counter-parties and adversaries of the client

1. In tort and contract

2. Under Code of Professional Responsibility

3. Under statutes

C. To Public – Pro Bono

1. “To what greater object, to what greater character, can we aspire as lawyers than to assist the helpless and friendless in a worthy cause? I say there is none. To devote your skill and energy to the plight of another, without the promise of a material reward for oneself, is what sets us apart as professionals.” -- John Adams, 1761


3. For members of the American Immigration Lawyers Association, see http://www.aila.org/content/default.aspx?docid=24828. (last viewed June, 2011)


5. See 204 Pa. Code Section 81.4 Rule 6.1

6. Law firms adopt a variety of pro bono programs. See www.probonoinst.org. (last viewed June, 2011)

7. EOIR has replaced its 1995 guidance on pro bono activities with a thoughtful instruction to the field on best practices. See Operating Policies and Procedures Memorandum 08-01; Guidelines for Facilitating Pro Bono Legal Services (Office of the Chief Immigration Judge, March 10, 2008) (“It is incumbent on every judge to facilitate pro bono representation.” At p. 6). http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf (last viewed June, 2011)

V. Sources of Enforcement

A. Lawyer or law firm self assessment and restraint

B. Angry client or affiliate of client (e.g., family members, parent corporation)

1. Bar referral

2. Agency Referral

3. Suit

4. Publicity

C. Angry adversary or counter-party

1. Bar referral

2. Agency Referral

3. Suit

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4. Publicity

D. An affected or interested unit of government or tribunals before which lawyer appears or is authorized to practice

E. Local, state and federal civil and criminal law prosecutors and regulators, generally

F. Consumer Affairs Agencies
   1. False Advertising
   2. Consumer Fraud
   3. Cease and Desist Orders
   4. Fines and Penalties

G. Bar Counsel and Licensure Authorities
   1. Inquiry
   2. Proceedings
   3. Discipline and Disbarment

H. Selected grounds for BIA suspensions or disbarments.
   1. Knowingly or with reckless disregard makes a false statement or willfully misleading, misinforming, threatening, or deceiving any person

   (a) In the Matter of Libby D. Salberg, 713 N.Y.S.2d 181- attorney disbarred following convictions of the Federal felonies of conspiracy to commit immigration fraud, immigration fraud and conspiracy to obstruct justice after attorney willfully and knowingly presented information to the Immigration and Naturalization Service of more than 25 visa applications that contained false statements of material fact.

   (b) Matter of Jon E. Purizhansky, 840 N.Y.S.2d 846- attorney suspended after filing a letter containing false statements in support of an application for a temporary work visa.

   2. Engaging in frivolous behavior or engaging in conduct that constitutes ineffective assistance of counsel
(a) In the Matter of Baird Cuber, 796 N.Y.S.2d 4- attorney suspended for neglecting to pursue immigration matters and displaying professional incompetence including utilizing the services of a nonlawyer illegal immigration service.

(b) In the Matter of Mitchel O. Bechet, 693 N.Y.S.2d 40- attorney suspended (later disbarred for failure to comply with disciplinary committee) for failing to obtain the necessary papers for client and concealing from client the fact that two submissions of their asylum applications had been returned by the Immigration and Naturalization Service as incomplete.

3. Forging or falsifying documents

(a) In the matter of Elizabeth Cohen, 831 N.Y.S.2d 141- attorney suspended for backdating an immigration related document submitted to two government agencies, falsely suggesting that the backdated documents had been filed timely.

(b) In the matter of Toritsefe Nanna, 778 N.Y.S.2d 681- attorney submitted affidavit of resignation from the practice of law (which was accepted) after creating false documents for her client files including completed visa applications that she signed and backdated to make them look as if they had been filed, supporting letters from employers which she signed and backdated, and a Department of Labor certification that she altered to fit four other client matters.

4. Failing to file or failing to appear

(a) See In the Matter of Kemakolam Comas, 787 N.Y.S.2d 40- attorney suspended for failing to file a petition for permanent residency for one client and failing to appear with another client at an interview with the Immigration and Naturalization Service.

(b) In the Matter of Gaetanella Molinini-Rivera, 802 N.Y.S.2d- attorney suspended after lying about having submitted an INS application and acted deceitfully when submitting a falsified Immigration and Naturalization Service receipt as evidence of the claimed filing.
I. The Media

J. Insurers – denial of, or substandard rating for, coverage under policy of insurance

1. Have you explained the rules of confidence and attorney client privilege and their different limitations? How privilege or confidences can be lost?

2. Was there a conflict check and a record made of it? Of the basis for judgments in resolving potential conflicts?

3. Have you done a “full” background interview that would give sufficient information to analyze alternatives to assess or counsel to achieve client objectives?

4. Have you made disclosure of relevant facts about referral and any referral fees?

5. Have you done due diligence on the client – prior lawyers, a government informant, litigation history, capacity to pay fees?

K. Maintaining Competence

1. CLE

2. Bar association membership and participation in committee work

3. Adequate library or library access

4. Outsourcing

(a) General- See Steven Bennett, The Ethics of Legal Outsourcing, 36 N. Ky. L. Rev. 479 (2009)

(b) Supervision

(i) A lawyer must supervise paralegals and others in assisting the lawyer in the representation. See Phila. Eth. Op. 94-7 (1994) (firm must make reasonable efforts to ensure that paralegal who recently joined the firm from an opposing firm in litigation preserves the confidences relating to representation of clients); Phila. Eth. Op. 92-21 (1992) (although permissible to advertise about and employ non-lawyer translators and other employees, adequate supervision must be given
to non-lawyers to ensure compliance with ethical rules); Phila. Eth. Op. 90-5 (1990) (while it is permissible for paralegal to send a demand letter, attorney must supervise and review the paralegal's work product for accuracy and completeness). See also Phila. Eth. Op. 92-22 (undated) (lawyer who handled legal matter for client and supervised a social worker in connection therewith, must make reasonable efforts to insure that social worker maintains the client's confidences, despite social worker's statutory duty to report an allegation of the client's misconduct).

(ii) A lawyer is vicariously responsible for the ethical transgressions of his assistants. See Phila. Eth. Op. 90-24 (1990) (violation of Rule 5.3(c) occurs when non-lawyer employee of an insurance holding company uses a form demand letter bearing the letterhead and facsimile signature of in-house counsel). Cf. In re Fleet (E.D. Pa. 1989), where the court articulates its concern that attorneys involved in litigation may have ratified fraudulent conduct of nonlawyers by accepting referrals and participating in a fee-splitting arrangement.

VI. Specific Issues

A. Is there a, and who is, the “client”?

1. Who is the client?

(a) Formation of the lawyer-client relationship is not defined in the Codes or Rules

(1) Generally, relationship is formed when a person manifests intent that a lawyer will provide legal services and the lawyer either (a) manifests consent or (b) fails to manifest consent and knows or reasonably should know the person sought legal services. Restatement (Third), Law Governing Lawyers, Section 14; New York City Bar Association Committee on Professional and Judicial Ethics, 2006-3 (August 2006)
(b) Once created, even an inadvertent client relationship triggers all duties under the Code

(c) The client relationship is imputed to the Firm as a whole. ABA Model Rules of Prof’l Conduct R. 1.10 (1983)

(d) Usually a matter of fact evaluated under principles of agency and contract law


(ii) Usually implied from the circumstances and the “client’s” reasonable reliance on the existence of the engagement. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978)

(1) Preliminary consultations with an attorney usually trigger the fiduciary duties of the lawyer, especially as to confidentiality.

(2) Actual employment need not be undertaken

(3) Absence of fee payment or agreement is not controlling

(e) See Togstad v. Vesley, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (awarding over $600,000 in damages where the firm believed that it had declined representation but the client was not advised that the claim was becoming time barred)

B. Special Problems of Social Networking E-mail and the Internet

1. Ethical issues are featured on www.abanet.org/cpr/, the site of the ABA Center for Professional Responsibility (last viewed June, 2011), and www.visalaw.com/memphis/, the site of Gregory Siskind (last viewed June, 2011)

(a) A thoughtful and well researched, current survey is Levitt, Rosch & Goldfarb, Navigating the Social Network: Applying Ethics Rules to Blogs, Facebook, Twitter and other Social Media, American Immigration Lawyers Association, AILA Immigration Practice Pointers, 2011-2012 Ed. (reprinted in this volume).
(b) Sample policies, and a check list to compile policies, of Social Media use can be found at http://socialmedia.policytool.net and http://socialmediagovernance.com/policies.php.


(d) As with the other ethics rules for print media, Social Media restrictions on lawyer communication implicate First Amendment considerations. See Hade, Not All Lawyers Are AntiSocial: Social Media Regulation and the First Amendment, 2011 Journal of the Professional Lawyer, published by the ABA Center for Professional Responsibility. Similarly, what is and what constitutes permissible advertising on the Social Media prompted much bar opinion comment in 2010. See Constitutional Developments in Lawyer Advertising in 2010 at http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-lawyer-advertising.html (last viewed August 16, 2011).


(f) Lawyer use of social media should consider circumstances under which the lawyer may become exposed to discipline or damage claims for defamation. Generally, see Electronic Frontier Foundation, http://www.eff.org/issues/bloggers/legal/liability/defamation (last viewed August 17, 2011).

(g) Blogging by lawyers presents the same risks as sending an unsolicited letter to the world. In Re Peshek, Hearing Board of Illinois Attorney Registration and Disciplinary Commission, Commission No. 09-CH89, August 25, 2009,
available at http://www.iardc.org, last viewed August 14, 2011, illustrates a public defender making “personal diary entries” in a blog which was found to reveal the identify and confidences of her clients and evidence her complicity in covering up her client’s false statements to a sentencing tribunal. The lawyer was fired and ultimately disciplined.

2. In setting up or participating in Internet chats, do lawyers develop a “client” relationship? Are they giving “legal advice”? Do disclaimers work?

(a) State bar ethics committees are currently groping with the adaptation of traditional rules to new technologies

(b) Virginia State Bar’s ethics committee advised that “electronic communication, without in-person meetings, [can be] sufficient to fulfill an attorney’s duties of communication and competence.” Virginia State Bar Standing Comm. On Legal Ethics, Op. 1791, 12/22/03

(c) The New York State Bar Association Committee on Professional Ethics has concluded that the use of the Internet to “take orders for trademark searches, conduct trademark searches, render legal opinions and file trademark applications is analogous to conducting a law practice by telephone or facsimile machine and is likewise permissible.” New York State Bar Ass’n Comm. On Professional Ethics, Op. 709, 9/16/98

3. Unencrypted Internet E-mail

(a) Does it violate Rule 1.6(a) because it fails adequately to protect client confidences? Or evidences an intent that there be no confidence?

(i) See ABA Standing Comm. on Ethics and Prof. Responsibility, Formal Op. 99-413 (3/10/99). Argues for treating unencrypted e-mail with the same expectation of privacy as telephone calls

(1) See Micalyn Harris, E-mail Ethics for Attorney-Client Communications: Comments on ABA Opinion Regarding Unencrypted Internet E-mail, The Professional Lawyer (Vol. 10, No. 3,
Spring 1999) (analyzing and critiquing the ABA Opinion, calling for review of local Codes, and suggesting that it is appropriate for the lawyer to discuss with the client *in advance* the risks of using e-mail for communications and obtaining the client's informed consent)

(ii) See New York State Bar Ass’n Comm. On Prof’l Ethics, Op. 709, 9/16/98 (concluding that lawyers may utilize unencrypted e-mail without violating their duties of confidentiality)

4. Unthinking choice and use of Social Media in practice currently presents a serious trap for the unwary given the absence of clarifying standards and opinions as to ethics and discipline in most jurisdictions and ambiguity in guidance in many. Worse, where there is comment, there is inconsistency in state opinions. As a result, many with multijurisdictional practices or whose communications flow in the universe outside of the lawyer’s state of licensure, risk of ad hoc and post hoc criticism or discipline. For the cautious, this leads to conforming Social media use in law practice to the most restrictive guidance or not go undertake Social Media use at all.

(a) The flux of guidance and quick-paced evolution of privacy and confidentiality capacities of software and hardware, not to mention cloud computing, may leave a lawyer virtually defenseless to a charge of negligence, recklessness, indifference or worse well after the fact unless the lawyer can demonstrate having an objectively reasonable basis to believe that the Social media use conformed to all applicable rules of professional conduct.

(b) What hardware and software is presently “in trend” has been surveyed annually by the International Legal Technology Association. See [www.olta.org](http://www.olta.org). The 2010 survey, issued in September 2010, covered firms from under 50 lawyers to firms with more than 700. ILTA received and analyzed some 460 law firm responses covering over 80,000 lawyers on the following subjects:

Usage of operating systems, virtualization, laptop, netbook and pc hardware, scanning, word processing, digital dictation, internet access, remote access to Firm server, records
management, time and billing, business intelligence, litigation and docket control, cost recovery, knowledge management, human resources, enterprise searches, messaging, e mail and email storage and retrieval, electronic records management, mobile devices, VOIP, extranets, back up, security, clouds, and Ranking technology issues reported by users.

All of these functions challenge a lawyer’s duty of competence in preserving a client’s privacy, confidences and proprietary information.

(c) Given the costs and complexity of IT products, including their capacities and limitations, reliance on internal IT staff and outside consultants alone for integrating, deploying and maintaining office systems alone will not likely suffice as a defense to discipline charges and civil claims unless the lawyer has a demonstrably reasonable basis for such reliance.

C. Taping Conversations with Clients, Adversaries and the Court

1. Check federal, state, and local law for criminal law violations. See United States v. Wuliger, 981 F.2d 1497 (6th Cir. 1997) (finding no impeachment exception to the exclusionary rule of § 2515 in civil proceedings despite other circuit decisions to the contrary); see, e.g., 18 U.S.C. § 2515 (prohibiting intentional interception of wire communications and the introduction into evidence of any information obtained from a wiretap).

2. Traditionally, failure to gain the express consent of all on a call constitutes a violation of ethical/disciplinary rules based on the proscription against “dishonesty, fraud, deceit or misrepresentation.” See ABA Model Rules of Prof’l Conduct R. 8.4(c) (1983).

3. The prior “majority” bar association views were called unreasoned and without foundation in the Codes. See Maine Bd. of Overseers of the Bar Op. 168 (3/9/99) (concluding it is “not nice” but not proscribed)

4. One June 24, 2001, the American Bar Association issued Formal Op. 01-422 on “Electronic Recordings by Lawyers Without the Knowledge of all Participants.” It withdrew a 1974 ABA opinion (Formal Op. 337), and determined that such a recording “does not necessarily violate the Model Rules”

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5. While “the better practice may be . . . to obtain consent prior to recording,” the conclusion of an increasing number of commentators and bar committees is that “attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation.” Alaska Ethics Op. 2003-1, Nat’l Rep. Legal Ethics (Univ. Pub. Am.) (Dec. 6, 2001, Approved, Jan. 24, 2003, Adopted)

6. The Association of the Bar of the City of New York has concluded that “a lawyer may . . . engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would [not] impair pursuit of a generally accepted societal good.” Digest, Formal Op. 2003-02

(a) The opinion reflects the Ethics’ Committee strong distaste for taping and its implications of trickery

(b) Taping as a “routine practice” remains “unethical” in the Committee’s opinion

(c) The opinion particularizes circumstances where undisclosed taping is more likely to be generally acceptable

D. Legal Fees – 204 Pa. Code Section 81.4 Rule 1.5- Rules of Professional Conduct (Effective September 20, 2008) provides:

“(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of a fee include the following:

(1) whether the fee is fixed or contingent;

(2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount involved and the results obtained;
(6) the time limitations imposed by the client or by the circumstances;

(7) the nature and length of the professional relationship with the client; and

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.”
E. Retainers and Lump Sum; Duties on Termination

1. Ambiguity in meaning and usage of the term “retainer”

(a) A "retainer" may refer to a payment that the lawyer (1) will hold and credit against legal costs that are incurred; (2) considers a "minimum fee" to be credited against legal services that are provided, but will also not be refunded if legal services are not rendered; and (3) expects to be an engagement fee that is "non-refundable" regardless of whether the lawyer performs legal services.

(b) Absent a written statement satisfying PA-R 1.5(b) or a written agreement stating that the minimum fee is non-refundable, a minimum fee is treated as an advance payment retainer fee with respect to payment and deposit. Pa. Eth. Op. 95-100 (1995).

(c) Is it an advance against future services? If so, it remains client property until earned. See Baranowski v. CA State Bar, 593 P.2d 615, 618 n. 4 (1979)

   (i) A lawyer should hold property of others with care. ABA Model Rules of Prof’l Conduct R. 1.15, cmt [1] (2001)

   (ii) Lawyers should hold client’s money with a fiduciary duty to safeguard and account for every penny of it until all disbursed

(d) Is it securing availability apart from other fees to be earned for future services? If so, the lawyer owns it.

   (i) In New York, “a lawyer [may] ethically accept an advance payment retainer and place such funds in the lawyer’s own account while retaining any interest earned from such amount . . . . The lawyer may request an advance payment retainer for final fees that accrue at the very end of the relationship”. NYSB Formal Opinion 816 (10/26/07) (distinguishing this from a general retainer and requiring that they must be “fair, reasonable, and fully known and understood by the client”). See Jacobson v. Sassower, 499 N.Y.S. 2d 381, 382 (1985)).
2. The lawyer must take reasonable steps to protect client interests, including “refunding any advance payment of fee that has not been earned.” N.Y. Rules of Prof’l Conduct R. 1.16 (2001).

(a) Duty under Rule 1.16(d) to account for even a “nonrefundable” retainer

(b) Because fee disputes are so prevalent, states have increasingly required written letters of engagement and labeled “nonrefundable” retainers as per se unethical. See In re Cooperman, 187 A.D.2d 56 (2d Dep’t 1993), aff’d, 83 N.Y.2d 465 (1994). In Matter of Cooperman, 83 N.Y.2d 465, 471 (1994), the New York Court of Appeals held that an agreement that “compromise[s] the client's absolute right to terminate the unique fiduciary attorney-client relationship” is void as against public policy and violative of the then Code of Professional Responsibility, especially DR 2-110(A)(3) (requiring withdrawing attorneys to “refund promptly any part of a fee paid in advance that has not been earned”), DR 2-110(B)(4) (requiring withdrawal if an attorney is discharged by the client), and DR 2-106(A) (prohibiting a lawyer from entering into an agreement for, charging or collecting an illegal or excessive fee).

3. PA-R 1.5 does not contain an express prohibition of a "non-refundable" retainer. Such a retainer, however, may not be "illegal or clearly excessive" under PA-R 1.5(a). See Pa. Eth. Op. 95-100 (1995) (suggesting that, under certain circumstances, portion of non-refundable retainer must be returned to client to prevent retainer from being considered "clearly excessive" under PA-R 1.5(a)); see also Pa. Eth. Op. 93-201 (1994) (non-refundable retainer may be considered unreasonable fee if client terminates relationship before services are fully rendered).

(a) Case outcomes are influenced by the sophistication of the client, whether the jurisdiction has an anti-commingling rule against client deposits, and whether the client was advised by independent counsel about the fee arrangements

(b) The "appropriate inquiry should be the expectations of the parties" when determining whether the lawyer should have placed the advance fee in escrow instead.
F. Confidentiality – characteristics

1. Belongs to the client

2. Have limited protections. ABA Model Rules 1.6 and 1.13.
   (a) Broader than communications protected by attorney client privilege

3. May not be disclosed to third parties by a lawyer without client consent or on certain public policy grounds
   (a) Implied consent
   (b) If would aid or further crimes and frauds
   (c) If not intended as or kept confidential by client
   (d) To benefit lawyer (in fee dispute or in defense of lawyer conduct)
   (e) When lawyer is obliged otherwise to comply with law
      (i) Code would permit disclosure
      (ii) Rules do not provide for this ground of disclosure
   (f) ABA Model Rules adopted in 2003 broadened the permissible scope of disclosure; Rule 1.6(b) now provides:
      “(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; or

(6) to comply with other law or a court order”

(g) In addition, ABA Model Rule 1.13 provides:

(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.

4.  *Azriliant v. Oppenheim*, 91 A.D.2d 586, 457 N.Y.S.2d 80 (1st Dep’t 1982) (former partners in law firm not disqualified because partners did not owe duty of confidentiality to each other)

5.  *People v. DePallo*, 96 N.Y.2d 437, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001) (attorney did not violate duty of confidentiality when he disclosed client's perjury because intent to commit a crime is not protected by privilege and client has right to testify, but not to perjure)


G.  Lawyer’s Advice to “Shut-Up” as Basis for Suspending License


   (a)  Facts: Lawyer suggested that his client add a word during a grand jury investigation before a subpoena was issued to
client to be given to a potential witness to clarify meaning

Witness testified: “[The lawyer] indicated if . . . our records were subpoenaed . . . we should keep our mouths shut” and, in the likely event authorities would question them, that they should be uncooperative and say as little as possible

Holding: Court concluded that both the alteration of the document and the urging of the potential witnesses to cooperate as little as possible constituted “a violation of the ethical standards governing the conduct of attorneys.” The attempt to deny evidence to law enforcement authorities constituted “conduct prejudicial to the administration of justice in violation of DR 1-102(5).”

Result: Attorney suspended

(b) See former DR 2-110(B)(2): “A lawyer . . . shall withdraw from employment, if . . . it is obvious that . . . continued employment will result in violation of a Disciplinary Rule.” DR 2-110(B)(2). In re Hopkins, 687 A.2d 938 (D.C. 1996)

(c) See 42 U.S.C. § 1985(2): Provides a private cause of action against those who conspire to deter a party or witness from attending or testifying in a court of the United States. See, e.g., Brever v. Rockwell Int’l Corp., 40 F.3d 1119 (10th Cir. 1994) (target of conspiracy has standing to bring civil damage action under § 1985)

H. Conflict of Interest and Disqualification

1. ABA Model Rule 1.7; Model Code 5-105(A), Pa R. 1.7

2. Conflicts may arise from:
   (a) lawyer interests adverse to client
   (b) lawyer business transactions with client
   (c) lawyer gifts from client
   (d) lawyer financial assistance to client
   (e) lawyer fees paid by third party
(f) representation adverse to interests of existing client
(g) representation adverse to interest of former client
(h) lawyer possession of confidential information
(i) multiple representations
   (i) immigration lawyers often represent both alien beneficiaries and employer-petitioners
(j) fee arrangements – e.g. literary or media rights

3. Possible consequences:
   (a) bar discipline
   (b) disqualification by tribunal
   (c) malpractice and other civil liability to damaged client
   (d) possible inability to act for any of the conflicted interests

4. In Pennsylvania:
   (a) Dual representation rule (Rule 1.7 from Pennsylvania Disciplinary Rules of Professional Conduct)
      (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

         (1) the representation of one client will be directly adverse to another client; or

         (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

(b) “A law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications and advantages, and risks, so that the client can make an informed decision whether to consent and a disinterested lawyer would believe that the law firm can competently represent the interests of the clients.” New York City Bar Association Committee on Professional and Judicial Ethics, Formal Opinion 2006-1 (2/17/06)

5. Waiver of future conflicts. New York professional responsibility law recognizes that a law firm may ethically request a waiver of future conflicts when undertaking to represent a client (including being adverse in litigation on behalf of another current client) “if (a) the law firm appropriately discloses the implications, advantages, and risks involved and if the client can make an informed decision after full disclosure of the relevant implications, advantages and risks as to whether to consent; and (b) a disinterested lawyer would believe that the lawyer can competently represent the interests of all affected clients”. ABCNY Formal Op. 2006-1 (2/17/06)

(a) For sophisticated clients, Op. 2006-1 would also support blanket advance waivers and advance waivers that include substantially related matters where client confidences and secrets are adequately protected

6. ABCNY Formal Op. 2006-1 suggested sample forms of waivers of conflicts to be tailored to each engagement:
(a) **Conflicts Waiver: (Blanket Advance Waiver Not Including Substantially Related Matters)**

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters.

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliates in any matters (whether involving the same substantive area(s) of law or for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at [www.XXX.com](http://www.XXX.com).) You acknowledge that you have had the opportunity to consult with your company’s counsel [if client does not have in-house counsel, substitute: “with other counsel”] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

(b) **Conflicts Waiver: (Same Type of Advance Waiver as (a))**

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation] the client’s or its affiliates’ debtors, creditors, and
direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.

Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent, other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related to (a) the legal services that [this firm] has rendered, is rendering, or in the future will render to [the client] under the engagement and (b) other legal services that this firm has rendered, is rendering, or in the future will render to [the client] or any affiliates (an “Allowed Adverse Representation”)

[The client] also agrees that it will not, for itself or any other entity or person, assert that either (a) this firm’s representation of [the client] or any affiliate in any past, present, or future matter or (b) this firm’s actual, or possible, possession of confidential information belonging to [the client] or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. [The client] further agrees that any Allowed Adverse Representation does not breach any duty that this firm owes to [the client] or any affiliate.

(c) Conflicts Waiver: (Advance Waiver Including Substantially Related Matters)

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as “other bidders for the same asset” or “the lenders or parties providing financing to the eventual buyer of the asset”]

This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are
satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

7. Absence of Conflict and Unforeseeable Concurrent Conflicts.

(a) Lawyers are cautioned to decline a representation when conflicts are likely for the lawyer or the firm at the outset of an engagement. DR 5-105(A); DR 5-105(D)

(b) When confronted with an unforeseen conflict arising after the lawyer or the firm has accepted multiple representations, and it arises through no fault of the lawyer or law firm affected, the lawyer may not continue the multiple engagement “if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer’s representation of another client, or if it would be likely to involve the lawyer in representing different interests” (DR 5-105B). Unless:

(i) “a disinterested lawyer would believe that the lawyer can competently represent the interest of each” AND

(ii) each client “consents to the representation after full disclosure of the simultaneous representation and the advantages and risks involved”. DR 5-105C

8. Generally, the lawyer and the law firm will have to withdraw where there is a consentable conflict between concurrent clients or one or both client will not consent to continued multiple representation

9. The Code does not expressly address unforeseen concurrent conflicts during a multiple representation or provide guidance from which representation an attorney should withdraw to cure the conflict with withdrawal from one (or more) representation(s) is sufficient
10. Selected materials on conflicts in immigration law:


(b) Maggio, Ethical Questions Relevant to Everyone’s Practice, 23 Immigration Law Today 38 (September/October 2004).

(c) Pinnix, Risk Management for the Immigration Practitioner. Brave New World.


11. Conflicts arising from possession of confidential information of another client. The Association of the Bar Committee on Professional and Judicial Ethics reached the following conclusion in Formal Opinion 2005-02 (3/05): In the course of representing clients, lawyers frequently come into possession of information that would be of use to other clients but that they cannot use for the latter clients’ benefit. The possession of that information does not, without more, create a conflict of interest under the Code. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer’s independent professional judgment in the representation of that client. Whether that is the case will often depend on the materiality of the information to the second representation and the extent to which the information can be effectively segregated from the work on the second representation. Even if the lawyer has a conflict, it may be possible in certain circumstances for the clients to waive the conflict without revealing the information in question. If the
lawyer must withdraw, the lawyer should not reveal the embargoed information

I. Lawyer Obligations to Third Parties

1. ABA Model Rule 4.4; PA Rule 4.4; Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.4

2. Legal Opinions prepared for release to third parties

3. Limitation on communications with persons represented by counsel

4. Threatening “adversary” with criminal prosecution

5. Lawyer compliance with fair debt collection practice acts and fines and penalties for lack of compliance

6. Limitation on communications with unrepresented persons

7. Obligation to be truthful in statements to others

8. Common law and statutory tort liability

J. Lawyer Obligations to the Tribunal

1. Frivolity


   (b) ABA Model Rule 3.1; PA Rule 3.1; Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.1

2. Failure to make reasonable efforts to expedite litigation consistent with interests of client

   (a) ABA Model Rule 3.2 (expediting litigation)

   (b) PA R. 3.2; Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.2

3. Client Perjury

   (a) ABA Model Rules 3.3, 1.6 and 1.16 (requires actual knowledge to disclose)
(b) PA R. 3.3, 1.6 and 1.16 Rules of Professional Conduct (22 NYCRR 1200.0) rules 3.3, 1.6 and 1.16

(c) Lawyer obligation to discourage if prospective or recant if completed

(d) Civil cases
   (i) Withdrawal
   (ii) A few jurisdictions require disclosure
   (iii) Under New York rules, when a lawyer receives information “clearly establishing” that a client’s submission to the court is fraudulent, the lawyer is required to call upon the client to undo the fraud. If the client refuses, the onus is upon the lawyer to withdraw the document. New York State Bar Ass’n Comm. On Professional Ethics, Op. 781, 12/8/04. The lawyer is required to withdraw the document because he or she is deemed to have certified the accuracy of its contents and the tribunal relies upon it. When determining if the client has committed a fraud, all “reasonable doubts” regarding the client’s state of mind are to be resolved in favor of the client. Id

(e) Criminal cases
   (i) Withdrawal (see Nix v. Whiteside, 475 U.S. 157 (1986))
   (ii) If withdrawal prevented by tribunal, alternative requirements in different jurisdictions:
      (1) Disclose
      (2) use narrative for eliciting client testimony and make no reference in closing
      (3) ignore and zealously advocate

(f) The lawyer obligation arises when the lawyer “knows” of the past or anticipated perjury

4. Candor to Tribunal

(a) ABA Model Rule 3.3

(i) PA R. 3.3; Rules of Professional Conduct (22 NYCRR 1200.0) Rule 3.3

(ii) Duty to disclose adverse legal authority not disclosed by opposing counsel and material facts

(iii) Duty not knowingly to make false statements of material facts or offer false evidence

5. Lawyer as Witness

(a) ABA Model Rule 3.7

(b) PA R. 3.7; Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7

6. Communications with Jurors or Judge

(a) ABA Model Rule 3.5

(b) PA R. 3.5; Rules of Professional Conduct (22 NYCRR 1200.0) Rule 3.5

7. Fairness to Opposing Party

(a) ABA Model Rule 3.4 (destruction of evidence, falsifying evidence)

(b) PA R. 3.4; Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4

8. Courtroom Conduct
9. Special Obligations of Prosecutors

(a) ABA Model Rule 3.8

(b) PA R. 3.8; Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8

10. Trial Publicity

(a) ABA Model Rule 3.6

(b) PA R. 3.6; Rules of Professional Conduct (22 NYCRR 1200.0) Rule 3.8

11. Fashioning Witness Testimony

(a) Role of Lawyer

(b) “Implanted or Supplied Recollection”

(c) Suggesting Actual Language of Testimony

(d) Opinion 79 (District of Columbia Bar - Legal Ethics Committee) December 18, 1979 (“[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading.”)

(i) New York and ABA Model Rules jurisdictions require “actual knowledge of the fact in question” before a lawyer can conclude there is sufficient information that evidence is false. “Actual knowledge” can be inferred. Conscious avoidance of falsity does not prevent a finding of actual knowledge. Charles W. Wolfram, Modern Legal Ethics, 12.5.3 at 655 (1986); Restatement (Third) of The Law Governing Lawyers; United States v. Hanlon, 548 F.2d 1096 (2d Cir. 1977) (false statement conviction sustained under conscious avoidance doctrine)

(e) Former New York DR 7-102(A) (4), (6) and 7; EC 7-26
(f) *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) (noting distinction between discussing testimony and seeking improperly to influence it)

(g) *United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1998) (sustaining sentence enhancement for obstruction of justice following perjury conviction based on exculpatory categorical answers to questions with a partially mistaken premise; distinguishes non-responsive or partially responsive answers from categorically complete questions)


(j) *In re Geoghan*, 253 A.D.2d 205, 686 N.Y.S. 2d 839 (2d Dep’t 1999) (lawyer offered to have client testify falsely in criminal matter in exchange for settlement of civil matter); *Goodsell v. Mississippi Bar*, 667 So. 2d 7 (Miss. 1996) (lawyer knowingly allowed witness to testify untruthfully); *In re Storment*, 873 S.W.2d 227 (Mo. 1994) (lawyer counseled and assisted client to testify untruthfully); *In re Edson*, 108 N.J. 464, 530 A.2d 1246 (1987) (same)

(k) *Cf. In re Deutsch*, 286 A.D.2d 91, 730 N.Y.S.2d 503 (1st Dep’t 2001) (disbarring a former senior partner in an immigration law firm who was found guilty in federal court of, among other things, witness tampering in violation of 18 U.S.C. §§ 1512(b)(1) and (b)(3) for removing certain physical evidence from, and inserting fabricated exculpatory evidence into, the files of a client then the subject of an INS criminal investigation)

12. Spoliation of Evidence and E-mail Discovery Failures

E-mail Discovery Failures


(ii) In *Zubulake v. UBS Warburg LLC*, 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004), Judge Shira Sheindlin found that UBS failed to preserve and produce relevant e-mails, and produced certain other e-mails two years late.

(1) In discussing counsel’s obligations, the court said: “Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents” and that to do this, “counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.” *Id.* at *32-33. The court concluded, “It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Id.* at *35
There were four previous opinions by the District Court in this case relating to the discovery of electronic documents. See Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 312 (S.D.N.Y. 2003) (addressing the legal standards for determining the cost allocation for producing e-mails contained on backup tapes); No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7940, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) (denying plaintiff’s motion to release the transcript of a certain deposition to securities regulators); 216 F.R.D. 280 (S.D.N.Y. 2003) (allocating costs for backup tape restoration between plaintiff and defendant); 220 F.R.D. 212 (S.D.N.Y. 2003) (ordering sanctions against defendant for violating its duty to preserve evidence).

In United States v. Philip Morris, No. CIV. A. 99-2496GK, 2004 WL 1627252 (D.D.C. July 21, 2004), the court imposed sanctions of $2.75 million on Philip Morris for the willful destruction of e-mails by 11 high-ranking Philip Morris officers and supervisors in violation of the company’s document retention policy and a court order. Id. at *4. The court also precluded the testimony of the 11 individuals at trial. Id. In explaining the large monetary sanction, the court stated, “it is essential that such conduct be deterred, that the corporate and legal community understand that such conduct will not be tolerated, and that the amount of the monetary sanction fully reflect the reckless disregard and gross indifference display by [the defendants] toward their discover and document preservation obligations” Id. at *3.

SEC proceedings

Lucent agreed to pay a $25 million civil penalty as part of its settlement of securities fraud charges brought by the SEC. According to an SEC press release, Lucent was penalized for, among other things, “incomplete document production, producing key documents after the
testimony of relevant witnesses, and fail[ure] to ensure that a relevant document was preserved and produced pursuant to a subpoena” See Lucent Settles SEC Enforcement Action Charging the Company with $1.1 Billion Accounting Fraud, at http://www.sec.gov/news/press/2004-67.htm (last viewed June, 2011)


VII. Selected Issues of Law Office Management and Risk

A. The Intake Process

1. Do you want this client?
2. Can you competently and lawfully assist the client?
3. Have you delegated intake to non-lawyers?
4. Is there full disclosure about, and agreement on, fee arrangements and scope of services?
5. Does the client understand any limitations on your services and have reasonable expectations about your role and the certainty or uncertainty of outcome?
6. Have you explained the rules of confidence and attorney client privilege and their different limitations? How privilege or confidences can be lost?
7. Was there a conflict check and a record made of it? Of the basis for judgments in resolving potential conflicts?
8. Have you done a “full” background interview that would give sufficient information to analyze alternatives to achieve client objectives?

9. Have you made disclosure of relevant facts about referral and any referral fees?

10. Have you done due diligence on the client – prior lawyers, a government informant, litigation history?

B. The Engagement Letter (See sample in Annex)

1. Mandatory in many jurisdictions and now required for New York.

2. Not a selling document – you and the client already have determined to have the engagement.

3. Ambiguities will be construed against the lawyer.

4. Evidences aspects of “the contract”; currently, in New York, lawyers cannot negate professional duties or have client indemnify the lawyer.

C. Files and Records/Attorneys’ Liens

1. The Pennsylvania Bar Association has addressed the nature of rights to a client file and concluded: "A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have a potential utility to the client." Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp. Formal Op. 2007-100.

   It is therefore not determinative whether such material resides in a hardcopy "client file" or a "digital file" or elsewhere. Nor are "property" rights determinative (but the opinion states that the client has an "ownership interest" -- a phrase without precise meaning -- in the client file.)

2. The opinion goes on: "Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests, and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (s) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence ... (Including e mail) ... (6) all original documents with legal significance ... (7) all documents and other
things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client.

3. The opinion does not directly discuss "sticky notes," marginalia, attorney work product or metadata.


5. Client documents in your custody do not become your documents.

6. Do you have a protocol for advising the client and dealing with a subpoena or CID for your client files?

7. When can you dispose of client files?

   (a) Most jurisdictions have a five year Code-mandated retention period. Pennsylvania's Rule 1.15 (a) states that complete records of client funds and other property, which includes client files, must be held for five years after termination of the representation. The Pennsylvania State Bar interprets this as a "flexible guideline" not establishing a five-year holding period, only that a record of the property's whereabouts and disposition be kept for five years. Law firms were advised in the opinion to adopt a strict policy on record retention and destruction, with decisions made by lawyers, not staff persons, and that the policy be communicated to clients with the initial engagement letter. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp. Formal Op. 2007-100.

8. As to the lawyer’s documents, retain long enough to meet, (i) statutory record keeping requirements, (ii) statute of limitations periods, (iii) needs for office precedent, and (iv) defense against potential claims

9. Meet Code obligations to return. Look at state attorneys’ lien laws about withholding “client” files and “client records.”

   (a) Cannot prejudice former client

   (b) Factual and characterization issues
D. The Nonengagement Letter (see sample in Annex)

1. Increasingly recommended by insurers to put potential client on notice that lawyer regards contact as not resulting in engagement (and any client belief there was an engagement is in error).

2. Generally, ends tolling of malpractice limitations period.

3. Lawyer should have proof of delivery.

4. Should be sent even if potential engagement not accepted after initial interview.


   (b) Absence of fee does not control whether relationship came into existence or ended. See *In re McGlothlen*, 99 Wash. 2d 515, 663 F.2d 1330 (1983)

E. The Disengagement or Termination Letter (see sample in Annex). Withdrawal or ending of engagement triggers duties.

1. Return of unearned fees.

2. Return of client properties and papers.

3. Cooperation with successor counsel.

4. Protect client interests for reasonable period to permit locating new counsel and transitioning work.

   (a) give client reasonable notice of withdrawal

   (b) see Restatement of the Law Governing Lawyers § 45(2)(c)

5. Secure any required court or tribunal permissions to be relieved of appearance.

   (a) nonpayment of fees may not be sufficient

(a) Ethical rules neither endorse nor condemn

(b) Arise at common law. Do not exist under federal common law

(c) But Supremacy Clause may trump state lien. See Resolution Trust Corp. v. Elman, 949 F.2d 624 (2d Cir. 1991)

(d) Lien overcome by client’s inability to pay. See, e.g., D.C. Code of Professional Responsibility Rule 1.8(i)

(e) In most jurisdictions, lien never applies or deemed lapsed where withdrawal was triggered by fee dispute. See, e.g., Acad. of Cal. Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (Cal. Ct. App. 1975)

F. Maintaining Competence

1. CLE.

2. Bar association membership and participation in committee work.

3. Adequate library or library access.


(a) Outsourcing – permissible if “the lawyer rigorously supervises the non-lawyer…; preserves the client’s confidences and secrets when outsourcing; …avoids conflicts of interest when outsourcing; bills…appropriately; and obtains the client’s informed advance consent to outsourcing.” New York City Bar Association Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August, 2006).

G. Staff and Partner Intake Procedures

1. Scrutinize prior employment for potential conflicts.

2. Review restrictions on practice of former government employees.
H. Staff and Partner Exits
1. Have an exit procedure.
2. Ensure transition of client work.
3. Screen client documents and other firm records so confidences remain in the firm.
4. Review firm agreements to avoid disputes over post departure “competition” and unlawful forfeiture of earned benefits.
5. Establish ground rules for notice to and other communications with existing clients.
6. Preserve confidentiality and anticipate conflicts and their resolution when departing lawyer practices elsewhere.

I. “Sale” of Practices
1. Many jurisdictions still prohibit the “sale” of a legal practice.
2. In these jurisdictions, cases can be transferred with client consent after full disclosure and fees are apportioned based on contribution to the case.

J. Trust Account Review (see Arizona checklist in Annex).

VIII. Civil Liability - Causes of Action for Damages
A. Breach of Contract
1. Written or oral
2. Consider carefully making “promises” in engagement letters
3. Cannot limit liability

1. Negligence – i.e. failure to exercise that degree of skill, care and diligence commonly possessed by a lawyer
2. Proximate cause (see N.Y. Pattern Jury Instructions PJI 2:70 (2004))
3. Actual damages

C. Malpractice

1. There are three essential elements which must be established in order to bring an action for legal malpractice: 1) the employment of the attorney or other basis for duty; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff. Storm v. Golden, 371 Pa. Superior Ct. 368, 375 (PA 1988). Additionally, the plaintiff must be able to establish by a preponderance of the evidence that he or she would have prevailed in the underlying litigation. Ibn-Sadiika v. Riester, 380 Pa. Superior Ct. 397, 403 (1988). See Basic Theories of Attorney Liability in Furman, Source of Legal Malpractice Claims: Theories of Liability and Defenses, in NYS Bar Assn. 2011 CLE Handbook: Legal Malpractice 2011.

2. A prima facie case of legal malpractice is made out by alleging that the attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages.” Rudolph v. Shayne, Dachs etc., 8 NY3d 438, 442 (2007) (internal quotation marks omitted).

3. Plaintiff must show there would have been favorable outcome “but for” the attorney’s negligence to meet proximate cause test in a malpractice case. Carmel v. Lunney, 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987) (“but for” test under pressure from expansion of liability for breach of fiduciary duty and negligent misrepresentation); Am-Base Corp. v. Davis, Polk & Wardwell P.C., 8 N.Y.3d 428, 434, 834 N.Y.S.2d 705 (2007); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep’t 2004) (reinstating a legal malpractice claim and noting that under New York law, there is only one standard of causation for both a legal malpractice claim and a claim for breach of fiduciary duty: the client must demonstrate that “but for” the attorney’s conduct, “the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages”) (citation omitted). But see Smartex Intern. Corp. v.

5. N.Y. malpractice cases do not adopt a “locality” standard of care – they reference the “legal community” as a whole


7. No reported malpractice cases in NY have turned on a lawyers’ claim to “specialization” or “specialty practice”. See DR 2-105 (restrictions on use of “specialization”). In other jurisdictions however a lawyer hired as such has been held to standard of performance of the average specialist of that type. See Restatement (Third), The Law Governing Lawyers, Section 52, cmt. d; *Walker v. Bangs*, 92 Wash. 2d 854, 601 P.2d 1279 (1979)


10. “Overbilling” or “excessive fee” claims are not malpractice


12. Prejudgment interest is available in New York for attorney malpractice claims. N.Y. C.P.L.R. § 5001
IX. Selected Malpractice and Disciplinary Pleadings and Cases

A. “Rude” and “Frivolous” Behavior to Clients and Adversaries

1. A twelve-lawyer immigration law firm became the first to be subject to public censure, a discipline sanction usually applied only to individuals. Its conduct from 1998 to 2002 was held to reflect a “pattern . . . involving rude and discourteous behavior to clients – conduct that strikes at the very heart of a lawyer’s or law-firm’s relation to the public.” Matter of Wilens and Baker, 9 A.D.3d 213, 777 N.Y.S. 2d 116 (1st Dep’t 2004)

Conduct included:

(a) Refusal to discuss cases unless additional fees paid

(b) Treating clients in a rude and demeaning manner, including yelling at them and ordering them to leave the office

2. An attorney was sanctioned for “frivolous” conduct ranging from attempts to harass opponents and barking like a dog at a witness (after the witness, in answer to a deposition question, described the lawyer’s threatening letter as a “mad dog” letter). The opposition counsel calmly said “Mr. Fink, please refrain from barking”. The offending lawyer, who claimed he was just clearing his throat, was fined $8,500. See N.Y.L.J. May 14, 2004

3. Lawyer who, while questioning witness in a deposition, allegedly flew into “a total rage” and flung his fist in order to punch his way past the witness to attack adversary, was the subject of an application for an arrest warrant. See Keith Griffin, Lawyer Faces Possible Arrest After Deposition Turns Ugly (May 18, 2004), available at http://www.law.com/jsp/article.jsp?id=1084316053680


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3 Reference is made to court-filed complaints to illustrate allegations actually made and the circumstances out of which claims may be asserted. The allegations are just that – not facts – and this section does not undertake to analyze or reference responsive pleadings, counterclaims, motions or dispositions of the cases on the merits or otherwise.

(b) Alleged failure to use reasonable care as shown by:

(i) conflicting representation of plaintiffs, defendants and third party purchaser of business

(ii) failure to disclose conflicts

(iii) incompetence in that transaction did not qualify for E-2 visa for plaintiff

(iv) failure to advise plaintiff that transaction was going to fail if plaintiff did not pay overdue sums

(c) Essential facts alleged:

(i) Beginning in September 2002 and until December 2003, Plaintiff Kim, a Los Angeles resident, was told orally by his uncle KS Lee that, by working with Lee’s business partners and some of his attorneys, Lee could obtain an E-2 visa for Kim and his family by investing in or buying businesses and real estate. Shortly after Lee made those representations, Kim gave Lee and Lee’s partner the total sum of about $580,000, which they used to purchase several properties and business under the disguise of investing for Kim

(ii) On or about October 2002, Kim had retained the defendant lawyers Thomas Lee and Theodore Lee to represent him in obtaining an E-2 visa and in structuring his purchase of a video store. These lawyers were also the lawyers for KS Lee, his partners and the third-party purchaser of the video store

(iii) After giving the money, Kim was told by Lee that Kim had purchased a video store and as a result would surely receive his E-2 visa. Unbeknownst to Kim, Lee and his partners cancelled the escrow on the video store on their own and concealed from Kim that in August 2003, the INS conclusively had rejected Kim’s E-2 visa application, on the grounds that the purchase
price was outside of the escrow, and that proof of purchase was therefore inadequate. The video store was eventually sold to a third-party, which transaction was effected using an escrow, and the third-party was accordingly granted an E-2 visa.

6. Breach of contract, intentional inflection of emotional distress, conspiracy and negligent malpractice claims filed by employee allegedly wrongfully terminated against employer and law firm. Employer had paid for employee to consult as to immigration matters. See Robson v. Hewlett-Packard Co., 103 CVO 05526 (Santa Clara California Superior Court filed Sept. 22, 2003). Law firm allegedly:

(a) failed to advise employee of applicable regulations

(b) refused to provide employee with INS-issued document as to him preventing travel

(c) misrepresented employee’s status to INS

(d) inflicted emotion distress by allegedly wrongfully advising employee he was accumulating “unlawful presence” time

Damages were sought for front and back pay, loss of career earnings and reputation, emotional distress, defamation, and multiple and punitive damages.

7. Malpractice allegedly led to imprisonment. Complaint alleging claims for damages due to incarceration, personal injury (fright and mental anguish) and for attorneys’ fees based on negligence, breach of contract and misrepresentation was filed February 19, 2004 in Galdamez v. Kraeger, Superior Court of Maricopa County, Arizona, Docket CV 2004-003304

(a) Plaintiffs alien husband and US citizen wife allegedly retained the services of defendant attorney Kraeger and his firm to represent them in obtaining permanent residence for husband through an adjustment of status based upon his marriage to wife. They allegedly informed the attorney of husband’s prior immigration proceedings, including his rejected residence application based on a request for political asylum and an ensuing alternative order of voluntary departure with which he did not comply.
(b) Kraeger informed them of an INS rule or regulation that permitted husband to remain in the country pending the application for adjustment of status but not of consequences of the VD order (as to which Kraeger presumably will claim that he had no information). Kraeger then filed the requisite documents. An I-130 interview was held at which the husband told the INS that he had not left the country. The interviewer told husband that because he failed to comply with the order of voluntary deportation, the order was still in effect. Thus, he would need to file a motion to reopen the deportation proceedings before any adjustment could occur. Promptly, husband was jailed pending INS executing the prior deportation order.

(c) Wife eventually convinced the INS under Lozado not to deport her husband based on an ineffective assistance of counsel claim.

(d) Plaintiffs now sue the attorney for damages claiming that, as a result of his malpractice, husband was imprisoned for nearly two months.

B. Causation Required for Malpractice Claim Damages

1. Defendant immigration attorneys moved for summary judgment on plaintiff alien’s claims alleging legal malpractice and breach of contract for counsel’s failure to properly handle plaintiff’s petition for permanent residency. Specifically, plaintiff alleges that the lawyers failed to 1) submit employment contracts with the H-1B application, 2) process an application for extension of plaintiff’s H-1B visa, and 3) take the necessary steps to obtain working status for plaintiff so he could begin work on time. The court dismissed the breach of contract claim as duplicative and granted the attorneys’ motion for summary judgment on the malpractice claim because the plaintiff could not “establish a causal connection between defendants’ actions or inactions and the damages plaintiff claims he has suffered.” Borsuk v. Jeffries, No. 98 Civ. 4088, 2000 U.S. Dist. LEXIS 9795 (S.D.N.Y. July 13, 2000)
X. SELECTED REFERENCES ON ETHICS

A. New York Rules of Professional Conduct (effective April 1, 2009)/Lawyer’s Code of Professional Responsibility (prior to April 1, 2009)
   1. 204 Pa. Code Section 81.4 (Effective September 20, 2008)

B. Sample Letters of Engagement are on the American Bar Association Website- (http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/sampleengageletters.html) New York examples are in the Annex

C. Formal and Informal Ethics Opinions
   1. American Bar Association (“ABA”)
   2. Pennsylvania Bar Association
   3. Philadelphia Bar Association
   4. New York State Bar Association
   5. New York City Bar Association
   6. ABA/BNA Manual

D. Other Resources and Periodicals
   1. ABA Standards on Imposing Lawyer Sanctions
   2. Restatement (Third) of The Law Governing Lawyers, American Law Institute-American Bar Association (January 2001)
   3. Legal Ethics: The Lawyers Deskbook on Professional Responsibility, Ronald D. Rotunda, American Bar Association Center on Professional Responsibility (Thomson West 2008)

E. Telephone Hotlines
   1. Philadelphia Bar Association 1-215-238-6300

**EOIR Implements Regulation To Enhance Attorney Discipline Program**

*New Regulation Will Enhance the Fairness and Integrity of Immigration Proceedings*

FALLS CHURCH, Va. – The Executive Office for Immigration Review (EOIR) has announced changes to the rules and procedures concerning professional conduct for
attorneys and other representatives (practitioners) who practice before the Board of
Immigration Appeals (BIA) and the immigration courts. The new rules and procedures
published on December 18, 2008, in the Federal Register, take effect on January 20,
2009.

The improvements to the Attorney Discipline Program will enhance the fairness
and integrity of immigration proceedings by providing additional categories of behavior
that constitute misconduct by practitioners and clarifying who is authorized to represent
individuals in proceedings before the BIA and immigration judges. These changes will
also increase the level of protection given to aliens in immigration proceedings.

The key change to the EOIR Attorney Discipline Program is the additional types
of behavior that constitute misconduct by practitioners that may subject them to
sanctions, such as:

- Conduct prejudicial to the administration of justice;
- Failure to abide by a client’s instructions;
- Failure to act with reasonable diligence, competence, and promptness;
- Not staying in contact with the client;
- Lack of candor toward EOIR tribunals;
- Not properly submitting forms, including Notice of Entry of Appearance as
  Attorney or Representative.

As a result of these additions, the EOIR professional conduct requirements will be more
consistent with the ethical standards applicable in most states and the American Bar
Association’s Model Rules of Professional Conduct.

EOIR Implements Regulation To Enhance Attorney
Discipline Program

The new rule will enhance EOIR’s current Attorney Discipline Program, which
has disciplined 449 attorneys since July 2000. The regulation can be found in the Federal
Register.

– EOIR –

The Executive Office for Immigration Review (EOIR) is an agency within the
Department of Justice. Under delegated authority from the Attorney General,
immigration judges and the Board of Immigration Appeals interpret and adjudicate
immigration cases according to United States immigration laws. EOIR’s immigration
judges conduct administrative court proceedings in immigration courts located
throughout the nation. They determine whether foreign-born individuals—who are
charged by the Department of Homeland Security with violating immigration law—should be ordered removed from the United States or should be granted relief from removal and be permitted to remain in this country. The Board of Immigration Appeals primarily reviews appeals of decisions by immigration judges. EOIR’s Office of the Chief Administrative Hearing Officer adjudicates immigration-related employment cases. EOIR is committed to ensuring fairness in all of the cases it adjudicates.