Environmental Issues in the Cannabis Arena: Regulatory and Litigation Concerns

Christopher D. Strunk

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Environmental Challenges for the Cannabis Industry

- Environmental risks are significant and underappreciated
- Frequently “lost in the shuffle” of myriad local and state compliance
- Costly to ignore

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Regulatory Concerns

- Compliance
- Water
- Pesticides
- Energy use
- Air – odors/emissions
- Labelling
Litigation risks

- Toxic tort claims
- Product liability (failure to warn, improper packaging)
- Nuisance actions
- Civil RICO
- California causes of action (Prop 65)

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Environmental Risks & Issues

• Illegal water diversion

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Environmental Risks & Issues

• Improper discharge directly into rivers, streams and lakes

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Environmental Risks & Issues

• Improper disposal

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Environmental Risks & Issues

• Sedimentation & erosion

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Environmental Risks & Issues

- Human waste near water

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Environmental Risks & Issues

• Unpermitted timber conversion
Toxic Tort Risks & Issues

• Legalization for medical and recreational use provides recoverable economic value for damage to cannabis crops.

• Legalized use allows individual consumers to complain of injuries sustained by use, leading back to manufacturers/suppliers of products, including edibles.

• Contamination

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Toxic Tort Risks & Issues

- **Strict liability** for defective products, whether a *manufacturer* or even a distributor in the chain of distribution

- **Property damage** and nuisance/trespass cases – “NIMBY.”

- **Disposal & releases of pollutants into lakes, streams & rivers.**

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Recent litigation trends

- Prop 65
- Civil RICO
- Enforcement actions by various state and local agencies (water boards, counties, etc.) seeking administrative penalties.

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The future

• With mainstream use comes mainstream headaches including:
  – Potential Lawsuits based on Products Liability and Personal Injury Laws
  – Regulation of Products
  – Requirements that users of products comply with regulations

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The takeaways

• The cannabis industry is growing and will become even more massive than it is today.

• Legalization at the Federal level is viewed as inevitable.

• Environmental and toxic tort risks will become a primary risk for the industry as it matures, and those risks exist now.

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NAVIGATING MARIJUANA CONTRACTS AND AGREEMENTS

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SENIOR LEGAL COUNSEL | STEM HOLDINGS INC.
Introduction

• Stem Holdings, Inc., is a publicly traded company directly listed on the OTCQB with the ticker symbol STMH and on the CSE as STEM.

• The company filed a Form 10 and a 15c2-11 application and started trading in July 2018.

• Stem stock is currently trading in the $2.40.

• Stem focuses on acquiring and improving real estate assets and building state-of-the-art facilities for its cannabis operational partners located in OR, NV, OK and FL.
About Stem Holdings, Inc.

• Since cannabis is federally illegal, traditional institutional lenders have not directly participated in the financing of marijuana businesses and the related real estate assets resulting in a shortage of available capital and improvement capital.
• Stem’s initial focus was to provide a solution to a real need by acquiring real estate assets, building state of the art facilities and leasing them to vetted and sophisticated, vertically integrated cannabis operators.
• Stem is in the process of rolling up these operators.
Stem’s Business

• Stem’s operators are fully vertically integrated in Oregon and include TJ’s Gardens and Yerba Buena and various brands such as Cannavore, Supernatural Honey and has a joint venture with Incredibles out of Colorado.

• Nevada - cultivation and production license and applied for 3 retail dispensary licenses in the recent closed application process.

• Oklahoma - Stem was awarded 17 licenses; 5 cultivation, 5 production, and 7 dispensary licenses.

• Florida - Stem’s partner East Coast Packers, LLC (ECP) filed a Motion to Intervene in lawsuits against the Department of Health with the intent to preserve the citrus preference that it qualifies for.

• New Jersey – applied.

• In active negations with licensees in MA, PA and RI.
Today’s Presentation

A discussion of legal issues and potential pitfalls to consider when a marijuana company is entering into certain contracts and agreements, including operational based contracts, service provider contacts and expansion driven agreements with either other marijuana companies or ancillary related businesses with a focus on the general legality/enforceability of and risks associated with such contracts and agreements under Florida law, regulatory compliance, dispute resolution options, issues specific to intellectual property, commercial real estate and other general contract law considerations.
Purchase and Sale Agreements

Real estate is the name of the game in this green rush. Can’t have marijuana operations without a facility – but significant liability exposure and essential for valuations.

Legal issues and pitfalls:

• DO YOUR HOMEWORK!

• Make sure you check title
  • i.e. - easement issues (power upgrades); setback requirements; SUPs

• Separate real estate company and financing
  • Exit strategy “if the world is falling provision”

• When does closing occur?
  • Extended due diligence period for confirmation of a license or SUP

• Broker Agreements
Lease Agreements

Legal issues and pitfalls:

- Term, commencement and options
- Definition of use – no illegal activities
- Leasehold interest necessary
- Landlord has not participation – hidden ownership
- Right to inspect – no access/entry w/o “badged employee”
  - No access to restricted area
- Financing concerns and other tenants (shopping centers)
- TI and FF&E
- Force Majeure
Lease Agreements cont’d

Legal issues and pitfalls:
• Nuisance
• ADA
• GL and Risk Insurance
• Assignment and sublease
• Exit strategy and events of default
• Waive of illegality
• Environmental/Hazardous waste and storage
• Security
• Brokers
Employment Agreements

Legal issues and pitfalls:

• Duties and responsibilities
• At will and termination for cause
• Dispute resolution
• Compliance with rules and regs
• Proprietary and confidential information and NDA’s
  • Inadvertent disclosures – social media
• Ownership of work product (work made for hire)
• Pre-employment conditions and obligations
• Post-employment restrictions and obligations
  • Non-competes, non-solicitation, non-interference
Employment Cont’d

Legal issues and pitfalls:

• Workplace safety and vicarious liability – safety sensitive jobs (Coto NJ case and disability discrimination and drug test requirements)

• Employee Handbook – define Reasonable Accommodations and drug policy (on-site and intoxication)

• State by state analysis
  • Not regulated by the ADA
  • Difference btw medication and intoxication
    • Coats v Dish Network – CO 2015 lawful activities statute, discrimination or unfair employment practice to terminate due to employee’s engaging in any lawful activity off the premises; CO Sup Ct held “lawful activity” was not confined just to what was lawful under state law
    • Barbuto v ASM – MA 2017 use MJ and disclosed, drug test came back + and terminated; MA Sup Ct held use was lawful and not facially unreasonable as an accommodation and the company did not face an undue hardship
Intellectual Property

Legal issues and pitfalls - trademarks

• What is your brand?
• Who owns the IP?
• Assignment of IP assets
• Registration of trademarks
  • State vs USPTO
    • Ie CA, OR, CO and WA – lawful use
    • CA – specification must match class of goods or services
• Objections
  • Infringement – Gluten Free Intolerance Group, Gorilla Glue, Disney, Enterprise
• Office Actions at USPTO
Intellectual Property

Legal issues and pitfalls:

• FL Stat Sect 381.986(8)(e) – MMTC may not contract for services directly related to the cultivation, processing and dispensing of MJ or MJ delivery devices except MMTC legacy licenses (low-THC)

• License Agreements not to trigger Franchise rules
  • Too much control and power
  • MLD and ancillary agreements
  • Term, IP grant and assets
  • Royalty fee, commercially reasonable and hidden ownership
  • Breach and termination
Misc. Agreements

• Consulting Agreements
  • Payment from revenues generated from the sale of MJ – NO

• Banking contracts
  • NDA
  • P&Ls
  • Compliance

• Service contracts
  • Soil and ingredients
  • Processor agreements
  • Law firms and outside counsel
  • Marketing and PR – payment upon delivery of services
THANK YOU!

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| JESSICA M. FEINGOLD |
BUILDING AND GROWING A CANNABIS BUSINESS

JESSICA M. FEINGOLD
SENIOR LEGAL COUNSEL  I  STEM HOLDINGS INC.
Recent Trends in Cannabis M&A
Major deals

• Constellation Brands acquired 104.5 million shares of Canopy Growth for $3.8 billion – more than 50% premium to Canopy’s closing price on August 14, 2018.
• Canopy Growth bought Ebbu for $325 million.
• MedMen acquired PharmaCann in an all-stock deal for $682 million.
• Aurora Cannabis purchased CanniMed Therapeutics for $852 million and MedReleaf for $2.5 billion in an all-stock deal.
• Altria purchased a 45% stake in Cronos for approximately $1.8 billion with an option for majority interest.
• Cresco Labs acquires Origin House in an all stock deal valued at $823 million.
EVALUATION AND VALUATION

THE FORMULA

01
- X times Gross? X times Net?
- X times EBITDA
- Cash Flow or liquidity?
  - What is the metric to measure Profitability?

SUBJECTIVITY

02
- No two cannabis businesses are the same
- EBITDA analysis becomes difficult
- Capital expenditures are incorporated in cash flow analysis but no in EBITDA

OTHER FACTORS

03
- Human Capital
- Intellectual Property Assets
- Brand Market Share
- Scale
HOW TO PREPARE FOR A DEAL

SELLER’S SIDE:

• Know what you want.
• Prepare your books and get clean financials.
• Hire a broker.
• Compliance check.
• Prepare for on-site visit.
• Inform senior management and designate who is going to assist in providing the due diligence materials.

BUYER’S SIDE:

• Know what you want.
• Prepare offer – LOI or Term Sheet.
• Raise the capital needed.
• Designate necessary financial advisors and lawyers to run the deal.
• On-site visit.
• Prepare due diligence checklist and begin to request initial information – organization of company, company’s business and operations.
The Deal Structure – what is your goal?

- Brand expansion vs acquisition
- M&A vs Licensing Deals?
- What is permissible under the state and local laws and marijuana rules?
- LLC vs Corporation
- Licensing Agreements and commercially reasonable royalty rates?
- Red Flags?
- Divorce/Exit provisions
  - Pre-determination of company’s purchase price/appraisers?
  - Drag-along, tag-along, shotgun provisions, first right of refusal, non-competes, penalties.
- End – game plan and the exit strategy.
INTEGRATION OF TWO CANNABIS BUSINESSES

• The plan for integration of business operations and culture
  • The goal is to take the strongest components of each business and merge in to one.
    • Back of the house (accounting and legal), HR, IT, SOP’s, Compliance.
  • How to keep morale up when major transition is happening?
    • Retaining talent and timing for layoffs.
    • Create new and define new roles for key employees.

• Top-down management
  • Communication
QUESTIONS AND ANSWERS
THANK YOU!

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Civility Matters: Managing and Resisting the Temptation Toward Aggressive and Bad Behavior in Practice

Presented By:
Gary L. Gassman, Moderator
Joshua Lee, Moderator
Hon. Shahabuddeen Ally
Hon. Ramon Reyes
Twanda Turner-Hawkins
Kaylin Whittingham
I. DEFINITION OF CIVILITY
What is Civility?

• “Civility” is not specifically defined by legal statutes or model rules.

• Webster’s defines the term “civility” as civilized conduct or a polite act or expression.

• Oxford dictionary defines the term as “formal politeness and courtesy in behaviour or speech” or “polite remarks used in formal conversation.”
What is Civility?

• Voluntary guidelines regarding civility have been adopted by multiple State Bars.

• Examples:
  – California has “Attorney Guidelines of Civility and Professionalism”
  – New York has “Standards of Civility” within their published Rules of Professional Conduct.
What is Civility?

• Common themes among a majority of civility codes within different states include:

(1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;

(2) be respectfulful and act in a courteous, cordial, and civil manner;
What is Civility?

(3) be prompt, punctual, and prepared;

(4) maintain honesty and personal integrity;

(5) communicate with opposing counsel;

(6) avoid actions taken merely to delay or harass;

(7) ensure proper conduct before the court;
What is Civility?

(8) act with dignity and cooperation in pre-trial proceedings;

(9) act as a role model to the client and public and as a mentor to young lawyers; and

(10) utilize the court system in an efficient and fair manner.
What is Civility?

• State Bars recognize that civility plays an important role within the legal profession.

• Reflected in their codes/rules of professional conduct – similar to or adopting the ABA Model Rules.
What is not Civility?

Just doing these things alone does not constitute civil behavior…

• Possessing good manners
• Liking or favoring someone
• The absence of criticism against another
• Agreeing with others
II. HOW CIVILITY APPLIES TO THE LEGAL PROFESSION
Model Rules of Professional Conduct

Rule 3.3: Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (confidentiality of information).

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Model Rules of Professional Conduct

Rule 3.4: Fairness to Opposing Party & Counsel:

A lawyer shall not:

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

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

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

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

Rule 3.4: Fairness to Opposing Party & Counsel:

A lawyer shall not:

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

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

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

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

Rule 3.5: Impartiality & Decorum of the Tribunal:

A lawyer shall not:

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

Rule 4.1: Truthfulness in Statement Towards Others:

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
Rule 4.2: Communication with Person Represented by Counsel:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
Rule 4.3: Dealing with an Unrepresented Person:

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

Rule 4.4: Respect for the Rights of Third Persons:

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

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
Model Rules of Professional Conduct

Rule 5.1: Responsibilities of Partner or Supervisory Lawyer:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
Model Rules of Professional Conduct

Rule 5.1: Responsibilities of Partner or Supervisory Lawyer:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Zealous Advocacy v. Acting Without Civility

• Model Rules Comment
  – Pursue matters for clients with tenancy
  – Not bound to get every single advantage

• Strike balance between tenacious representation and acting with respect and professionalism
III. CONSEQUENCES FOR ACTING WITHOUT CIVILITY
Model Rule 8.4

• Rule 8.4: Misconduct by Attorneys:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

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Examples in Case Law

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  – The court affirmed the referee’s order to disbar an attorney that continuously violated multiple rules of professional conduct and performed egregious acts of misconduct over a four-year period.
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All of these case exemplify the analysis that courts use to administer the most appropriate sanctions or disciplinary actions for practicing attorneys.
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• NY: Inappropriate litigation behavior brought about 4-month suspension and required counseling

• FL: Supreme Court ordered a two-year suspension for an attorney’s rude and antagonistic behavior throughout a civil case
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• CA: Magistrate judge in that imposed a monetary sanction against an attorney for spilling coffee in the direction of opposing counsel

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We’ll now turn to the panelist for insight into what they’ve experienced and observed, both good and bad, in the profession...
General Tips/Advice

So, do the panelists have any tips or advice for the audience with respect to civility, what to do about incivility and how we can all make the practice better for everyone?
Questions?
Civility Matters: Managing and Resisting the Temptation Toward Aggressive and Bad Behavior in Practice

Presented By:

Gary L. Gassman, Moderator
Joshua Lee, Moderator
Hon. Shahabuddeen Ally
Hon. Ramon Reyes
Twanda Turner-Hawkins
Kaylin Whittingham
I. DEFINITION OF CIVILITY
What is Civility?

• “Civility” is not specifically defined by legal statutes or model rules.

• Webster’s defines the term “civility” as civilized conduct or a polite act or expression.

• Oxford dictionary defines the term as “formal politeness and courtesy in behaviour or speech” or “polite remarks used in formal conversation.”
What is Civility?

• Voluntary guidelines regarding civility have been adopted by multiple State Bars.

• Examples:
  
  – California has “Attorney Guidelines of Civility and Professionalism”
  
  – New York has “Standards of Civility” within their published Rules of Professional Conduct.
What is Civility?

• Common themes among a majority of civility codes within different states include:

  (1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions;

  (2) be respectful and act in a courteous, cordial, and civil manner;
What is Civility?

(3) be prompt, punctual, and prepared;

(4) maintain honesty and personal integrity;

(5) communicate with opposing counsel;

(6) avoid actions taken merely to delay or harass;

(7) ensure proper conduct before the court;
What is Civility?

(8) act with dignity and cooperation in pre-trial proceedings;

(9) act as a role model to the client and public and as a mentor to young lawyers; and

(10) utilize the court system in an efficient and fair manner.
What is Civility?

- State Bars recognize that civility plays an important role within the legal profession.

- Reflected in their codes/rules of professional conduct – similar to or adopting the ABA Model Rules.
What is not Civility?

Just doing these things alone does not constitute civil behavior…

• Possessing good manners

• Liking or favoring someone

• The absence of criticism against another

• Agreeing with others
II. HOW CIVILITY APPLIES TO THE LEGAL PROFESSION
Model Rules of Professional Conduct

Rule 3.3: Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
Rule 3.3: Candor Toward the Tribunal:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (confidentiality of information).

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Model Rules of Professional Conduct

Rule 3.4: Fairness to Opposing Party & Counsel:

A lawyer shall not:

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

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

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

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

Rule 3.4: Fairness to Opposing Party & Counsel:

A lawyer shall not:

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

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

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

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

Rule 3.5: Impartiality & Decorum of the Tribunal:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.
Rule 4.1: Truthfulness in Statement Towards Others:

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
Rule 4.2: Communication with Person Represented by Counsel:

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

Rule 4.3: Dealing with an Unrepresented Person:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
Rule 4.4: Respect for the Rights of Third Persons:

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

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
Model Rules of Professional Conduct

Rule 5.1: Responsibilities of Partner or Supervisory Lawyer:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
Rule 5.1: Responsibilities of Partner or Supervisory Lawyer:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Zealous Advocacy v. Acting Without Civility

• Model Rules Comment
  – Pursue matters for clients with tenancy
  – Not bound to get every single advantage

• Strike balance between tenacious representation and acting with respect and professionalism
III. CONSEQUENCES FOR ACTING WITHOUT CIVILITY
Model Rule 8.4

• Rule 8.4: Misconduct by Attorneys:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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Personal Insight/Stories

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ANATOMY OF AN EMERGENCY RESPONSE

By Land, Sea, and Air: In-House Counsel, Government and Insurance in the Golden Hour

ABA TIPS Section Conference
The Westin New York
May 3, 2019
Panel Members

Lili Beneda Rubenstein
Assistant Vice President
AIG Aerospace Insurance Services Inc. New York, NY

Sarah G. Passeri
Holland & Knight
New York, NY

Bill Donahue
Assistant Vice President, Global Marine Claims
RLI Insurance Co.
New York, NY

Eric Probst
Porzio Bromberg & Newman
Morristown, NJ

Sherry J. Ortiz
Senior Vice President, Claims Division Manager
US Aircraft Insurance Group
New York, NY

Pamela A. Palmer
Member
Clark Hill LLP
Los Angeles, CA
Risk Management/Emergency Planning

- Create Major Casualty/Disaster Plan prior to Event
- Client, Broker, Carrier Communication

- Mitigation Strategy (people, property, assets)
- Evidence Preservation
Emergency Response – Generally

- Identify all (1) potential impacted Insured’s and their exposure types according to event; (2) all suitable surveyors/salvage/experts/attorneys in the area able to respond, if needed

- Communication – (1) contact available surveyors, etc. to arrange for their standby; (2) contact impacted brokers and insureds to ascertain their action plans and advise of Insurer’s standby and assistance capabilities

- Monitor with adequate staffing for immediate response
What Next?
Rapid Response...

- Assemble the Rapid Response Team
  - Establish “The Privilege”
  - Lawyers, claims investigator, and experts
- Secure the scene and meet with the driver
- Preserve evidence
  - Develop case strategy, but no assumptions!
- Collaborate with law enforcement
Data Collection
Data Collection

RECEIPTS
Data Collection

RECEIPTS

ROUTES
Data Collection

RECEIPTS

MAINTENANCE

ROUTES
Don’t Forget Your Driver!

- Photos
- Mental health
Dealing with the Government

National Transportation Safety Board

- For incidents or accidents in the U.S. or involving U.S. parties
- Independent federal agency
- Stated goal: transportation safety
- Methods:
  - Official disseminator of accident information
  - Established accident investigation process
  - Safety recommendations
Dealing with the Government

Key Features of the NTSB Model

- Independence from other organizations
- Priority over other investigations
- Authority to obtain evidence
- Control of testing
- Party process/system
- Publicly visible processes/evidence
Dealing with the Government

Stages of NTSB Major Investigations

- Launch/initial organization
- On-scene investigation
- Public hearing
- Follow-on investigation/component tests
- Technical review
- Party submissions
- Sunshine Act board meeting and final report
QUESTIONS