

MAYER • BROWN

Key Ethical Duties of Lawyers

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Cary Malkin currently serves as the firm's Professional Responsibility Partner and concentrates his practice on legal ethics, business intake and engagements, and conflicts. He also has extensive experience in leasing and project transactions, and corporate and finance matters.

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ABA Model Rules: Key Provisions

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- Basic conflicts rule
- Organization as the Client
- Keeping Confidences, Even of Former Clients
- Communication to Others
- Role as Advisor
- No Frivolous Claims
- Candor and Fairness to Opposing Party and Counsel
- Responsibilities of a Partner/Supervisory Lawyer

ABA Model Rules

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- Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; 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.

- Identify who is your client and who is not

ABA Model Rules

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- Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that it 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.

ABA Model Rule 1.13, cont'd

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(b cont'd) 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.

* * *

(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.

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- Rule 1.6 Confidentiality

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)...

- paragraph (b) exceptions authorize a lawyer to reveal information to the extent necessary to prevent a client from committing a crime, or to protect the lawyer in a controversy between the lawyer and the client
- Confidentiality differs from attorney-client privilege rules, discussed later

ABA Model Rules

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- Rule 1.9 Duties to Former Clients:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Attorney-Client Privilege

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- Rules regarding what information is protected under the attorney-client privilege differ from ethical rules on confidentiality
- If information is NOT protected under the attorney-client privilege:
 - Disclosure of otherwise confidential information may be compelled in litigation
 - Ethical rules permit such disclosure without consent (Rule 1.6(b)(6))

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- Rule 4.2 Communication with Person Represented by Counsel
 - A lawyer shall not communicate about the subject of the representation with a represented party, unless lawyer has prior consent or is authorized by law.
 - A lawyer may cause a client to communicate with the represented party provided that the lawyer gives ‘reasonable advance notice’ to represented party’s counsel

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- Rule 4.3 Dealing with Unrepresented Persons
 - Cannot imply lawyer disinterested
 - Correct misunderstandings as to the lawyer's role
 - No legal advice to an unrepresented person if there is a possible conflict (except advice to secure own counsel).

Other ABA Model Rules

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- Rule 2.1 Advisor – independent professional judgment and candid advice

- Rule 3.1 Meritorious Claims

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.

- Rule 3.2 Expediting Litigation

- Rule 3.3 Candor Toward the Tribunal

No false evidence

- Rule 3.4 Fairness to Opposing Party and Counsel

Other ABA Model Rules

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- Rule 5.1 Duty to Supervise other Lawyers
- Rule 5.3 Responsibilities regarding Nonlawyer Assistants
 - Outside the rule itself is authority that lawyers are permitted to specifically delegate substantive legal work for which the lawyer is responsible. There are limitations. The crucial ones are (1) paralegals cannot apply a lawyer's professional judgment; and (2) generally only lawyers may appear in court.
 - The lawyer must make reasonable efforts to ensure conduct is compatible with the lawyer's professional obligations

Other ABA Model Rules

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- The lawyer is responsible for the conduct of the paralegal if
 - The conduct is ratified by the lawyer
 - The lawyer has direct supervisory authority and knows of the conduct when the consequences can be avoided or mitigated but the lawyer fails to take remedial action
- Key:
 - A. Lawyer must give appropriate instruction and supervise conduct
 - B. Lawyers are responsible to ensure:
 - Maintenance of confidentiality
 - Quality of work product

Identifying Ethical Conflicts

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- Representing both sides in an intra-corporate dispute or transaction
 - Necessity for outside counsel or separate legal departments for multi-faceted financial firms
 - Position of an in-house lawyer
 - Position of an outside lawyer
- Conflicts between investments and portfolio companies
- Conflicts between entities and affiliates
- Conflicts that arise when the same attorney represents affiliated parties

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Questions?

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Next Program

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- If you are applying for CLE credit, please include the code below on the Attorney Affirmation form.
- Materials from the all presentations during this ethics webinar series will be distributed after the last program on May 30.
- Certificates of attendance will be distributed 45 of the program date.
- The invitation for our next program on May 9, *Common Conflicts Issues*, will be issued later this week.

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Thank you!



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