

Ethics in Environmental Law

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I. To what extent can an attorney's views about the environment trump or alter ethical obligations under the Rules of Professional Conduct?

- A. "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. . . . An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services." MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. 1 (2018).
- B. But having accepted the case, "A lawyer shall abide by a client's decisions concerning the [lawful] objectives of representation" MODEL RULES OF PROF'L CONDUCT 1.2(a).
1. "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT 1.2(b).
 - "Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities." MODEL RULES OF PROF'L CONDUCT 1.2 cmt 5.
 2. "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." MODEL RULES OF PROF'L CONDUCT 1.2(c).
 - "[T]he terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent." MODEL RULES OF PROF'L CONDUCT 1.2 cmt 6.

- “Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
MODEL RULES OF PROF'L CONDUCT 1.2 cmt 7.
- C. “A concurrent conflict of interest exists if ... there is a significant risk that the representation . . . 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.” MODEL RULES OF PROF'L CONDUCT 1.7(a)(2); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125.
1. “[A] lawyer may not publically take a policy position that is adverse to the position of a client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer’s representation of the client in the matter.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125, cmt. e.
 2. Despite a personal-interest conflict, the lawyer “may represent a client if . . . the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation . . . [and] each affected client gives informed consent, confirmed in writing” MODEL RULES OF PROF'L CONDUCT 1.7(b).
 3. A conflict “based on a personal interest of the disqualified lawyer” is not imputed to the entire law firm if it “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” MODEL RULES OF PROF'L CONDUCT 1.10(a)(1); *see also id.* 1.7 cmt. 10 (“personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm.”)
- “Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would

be imputed to all others in the firm.” MODEL RULES OF PROF'L
CONDUCT 1.10 cmt 3.

D. Professional ethics do not replace personal ethics. *See* MODEL RULES OF PROF'L
CONDUCT pmb. ¶ 7 (“[A] lawyer is also guided by personal conscience and the
approbation of professional peers.”).

1. *See* David B. Wilkins, *Identities And Roles: Race, Recognition, And Professional Responsibility*, 57 MD. L. REV. 1502, 1554-55 (1998) (arguing that “the professional sphere is a ‘secondary’ moral universe” but that “even in circumstances where a lawyer believes that common morality requires that she violate a professional command, she should do so in a manner that acknowledges the morality of the system as a whole.”)
2. There may be, at some point, “a penumbra where rigid formulas must fail. No test more definite can then be found than the discretion of the [decisionmaker], to be carefully and guardedly exercised . . . in furtherance of justice.” *Norwegian Evangelical Free Church v. Milhauser*, 169 N.E. 134, 135 (N.Y. 1929) (Cardozo, J.) (internal quotation marks and citation omitted).

E. Conclusion: An attorney’s views about the environment do not trump or alter ethical obligations under the Rules of Professional Conduct, but are largely accommodated by those rules.

II. Are there circumstances under which environmental ethics compel an attorney to take actions not required by law or actions that may not be in the best interests of their client?

A. “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.” MODEL RULES OF PROF'L CONDUCT 2.1.

B. “The Rules of Professional Conduct are rules of reason.” MODEL RULES OF PROF'L CONDUCT scope ¶ 14.

C. “[D]isciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating

factors and whether there have been previous violations.” MODEL RULES OF PROF'L CONDUCT scope ¶ 19.

- D. *See In re Seelig*, 850 A.2d 477, 491-92 (N.J. 2004) (declining to discipline a lawyer when the attorney violated a Rule of Professional Conduct because “the attorney believed that he had a superseding obligation to his client,” explaining that “[w]hen the totality of circumstances reveals that the attorney acted in good faith and the issue raised is novel, we should apply our ruling prospectively in the interests of fairness” and “respondent's legitimate belief that he was acting ethically and in the best interests of his client is not consistent with a deliberate attempt to prejudice the administration of justice as prohibited by [Rule] 8.4(d).”)
- E. Conclusion: Attorneys may include ethical considerations in their advice but should act to advance their clients' lawful goals.

III. Is it ethical for an attorney to withdraw from representation simply because he or she has a different view on an environmental issue, e.g., climate change or coal mining, than the client?

- A. Why did the lawyer take the case in the first place?
- “Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.” MODEL RULES OF PROF'L CONDUCT pmb. ¶ 9.
- B. “A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.” MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 1 (emphasis added).
- C. *See* MODEL RULES OF PROF'L CONDUCT 1.16(b) (Declining or Terminating Representation): In general, lawyers may withdraw if “withdrawal can be accomplished without material adverse effect on the interests of the client” or, inter alia, “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;” or “other good cause for withdrawal exists.”

- D. Conclusion: An attorney should not choose to represent a client if the attorney feels that differing views on an environmental issue will interfere with complete representation. That said, attorneys generally have broad latitude to withdraw in a manner that does not prejudice the client.

IV. Are there circumstances under which the client’s confidential information about environmental matters can and should be divulged and, if so, what considerations should be taken into account by the attorney before doing so?

- A. “A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.” MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 8 (emphasis added).
- B. “In the course of representing a client a lawyer shall not knowingly: . . .
(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.” MODEL RULES OF PROF'L CONDUCT Rule 4.1.
- C. MODEL RULES OF PROF'L CONDUCT Rule 1.6(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;
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 - (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”
1. Harm is “reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the

threat or reduce the number of victims.” MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

2. Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14.

D. “A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules.” MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15.

- “Other law may require that a lawyer disclose information about a client. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. Model Rules of Prof'l Conduct R. 1.6 cmt. 12.

E. MODEL RULES OF PROF'L CONDUCT Rule 1.13 provides:

(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 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.”

F. The “noisy withdrawal”: “A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a ‘noisy’ withdrawal may have the collateral effect of inferentially revealing client confidences.” ABA Ethics Op. 92-366 (Aug. 8, 1992).

G. Rule 3.3, entitled “Candor Toward the Tribunal,” provides:

(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; . . .

(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.

H. “In the course of representing a client a lawyer shall not knowingly . . . 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.” MODEL RULES OF PROF’L CONDUCT R. 4.1(b).

I. Conclusion: The lawyer’s fundamental duty to preserve client confidences has limits.

V. Here are some potentially relevant quotes.

“I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust . . .”

Louisiana Lawyer’s Oath

“Everyone is entitled to a lawyer . . . but they are not entitled to *you*.”

Sol M. Linowitz & Martin Mayer, *THE BETRAYED PROFESSION* 31 (1994) (internal quotation marks and attributions omitted).

“A lawyer, as a member of the legal profession, is . . . a public citizen having a special responsibility for the quality of justice.”

MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1 (2018).

“The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”

MODEL RULES OF PROF’L CONDUCT scope ¶ 16.

“[Lawyers] must make truthful opposing witnesses look like liars or fools if they can; they must fight for their client’s ‘right’ to oppress and exploit, if the client wishes it; they must defeat just claims on technicalities if it can be done; they must keep information confidential though it means ruination for a hapless third party.”

David Luban, *Introduction* to *THE GOOD LAWYER* 1-2 (David Luban ed. 1983).

“[P]ractices which are lawful can still be wrong.”

Paul R. Tremblay, *Moral Activism Manqué*, 44 *S. TEX. L. REV.* 127, 148 (2002).

“For the law to have any credibility or respect, it must be grounded in reality.”

Holy Cross v. U.S. Army Corps of Engineers, 455 F. Supp. 2d 532, 539 (E.D. La., 2006) (Fallon, J.)

“Render unto Caesar the things which are Caesar’s, and unto God the things that are God’s.”

Matthew 22:21