Keep Your Practice Out of Jeopardy – It's All About Ethics

Teaching Materials[1]

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[1] **DISCLAIMER: THESE PRESENTATION MATERIALS ARE FOR EXAMPLE SCENARIOS FOR DISCUSSION PURPOSES ONLY AND DO NOT SERVE AS A SUBSTITUTE FOR SEEKING OFFICIAL ETHICS ADVICE REGARDING ANY SPECIFIC ETHICS QUESTION.**

CATEGORY 1: CONFLICTS OF INTEREST

Q1. ATTORNEY A WANTS TO REPRESENT TWO CLIENTS IN THE SAME CASE AT FERC. SHE CONSULTS WITH BOTH CLIENTS, AND THE CLIENTS VERBALLY AGREE TO THE JOINT REPRESENTATION. ATTORNEY A THEN SENDS THIS EMAIL: "WHO'S YOUR GIRL NOW, FOLKS? I LAID IT ALL OUT THERE FOR THEM, JUST LIKE RULE 1.7 SAYS, AND THEY BOTH AGREED TO ALLOW ME TO REPRESENT THEM! LOVE ME SOME ME, BAY-BEE!"

CLIENT 1 ULTIMATELY FILES A BAR COMPLAINT AGAINST ATTORNEY A FOR REPRESENTING TWO CLIENTS IN THE SAME CASE. ATTORNEY A POINTS TO HER EMAIL AS EVIDENCE OF THIS.

A1. WHAT IS *CONSENT*?

Consent must be memorialized in writing and preferably should be presented to the client; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum. However, Attorney A's internal notes may not satisfy the requirement. If an attorney does not obtain written consent signed by the client, he or she should take detailed notes or create a detailed memorandum memorializing the conflict issues that were disclosed and discussed with all of the clients, the clients' agreement on how the lawyer would handle the conflict issues, who consented on each client's behalf, and when each client's consent was given.

Virginia Rules of Professional Conduct Rule 1.7 Conflict of Interest: General Rule

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may **represent a client if each affected client consents after consultation**, and:

(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) **the consent from the client is memorialized in writing**.

Comment 20 states:

> [20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

Virginia Rules of Professional Conduct Reference: https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-7/

Q2. 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, CANNOT DO THESE TWO THINGS WITH THE FORMER CLIENT'S INFORMATION.

A2. WHAT IS: 1) *USE INFORMATION RELATING TO OR GAINED IN THE COURSE OF THE REPRESENTATION TO THE DISADVANTAGE OF THE FORMER CLIENT*; OR 2) *REVEAL INFORMATION RELATING TO THE REPRESENTATION*?

Virginia Rules of Professional Conduct Rule 1.9(c) provides as follows:

(c) 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:

(1) ***use information relating to or gained in the course of the representation to the disadvantage of the former client*** except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) ***reveal information relating to the representation*** except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Significant Differences Between VA and ABA Model Rules:

- Section (c)(1) of the Virginia Rule is more broad than the Model Rule, which only prohibits disclosure of information "related to the representation." The Virginia Rule also includes information "gained in the course of the representation."
- The ABA Model Rules do not specify which rules are exceptions, whereas the Virginia Rules specifically reference Rule 1.6 and Rule 3.3.

Virginia Rules of Professional Conduct Reference: http://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-9/

Q3. THIS TERM MEANS THAT LAWYERS IN THE SAME FIRM SHALL NOT KNOWINGLY REPRESENT A CLIENT WHEN ANY ONE OF THE FIRM LAWYERS PRACTICING ALONE WOULD BE PROHIBITED FROM DOING SO.

A3. WHAT IS *IMPUTED DISQUALIFICATION*?

Virginia Rules of Professional Conduct Rule 1.10 – Imputed Disqualification: General Rule:

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should have known that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
(d) The imputed prohibition of improper transactions is governed by Rule 1.8(k).
(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. **Significant Differences Between VA and ABA Model Rules:**

- The ABA Model Rules use a "knowingly" standard for section (a), which as defined in Model Rule 1.10(f), requires "actual knowledge ". In 2015, the Virginia Bar changed the knowledge standard to "knows or reasonably should have known" and added Comment [2a] which states: "[2a] A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict."
- The Virginia Rule did not adopt exceptions to the imputed disqualification rule set forth in Model Rule 1.10(a)(1)-(2).

Virginia Rules of Professional Conduct Reference: http://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-10/

Q4. MARY, A FORMER FERC ENFORCEMENT ATTORNEY, BECOMES A PARTNER AT A LAW FIRM. AN ENERGY TRADER CALLS THE FIRM SEEKING REPRESENTATION AFTER THE COMPANY RECEIVED A CALL FROM FERC ENFORCEMENT ABOUT POTENTIAL MARKET MANIPULATION. FERC'S INVESTIGATION OF THE COMPANY BEGAN WHILE MARY WAS STILL WORKING AT FERC. MARY CAN PARTICIPATE IN THE MATTER IF SHE HAS NOT DONE THIS.

A4. WHAT IF MARY *HANDLED, INVESTIGATED, ADVISED, OR PARTICIPATED IN THE CONSIDERATION OF* THE INVESTIGATION WHILE AT FERC?

Because this is a FERC fact pattern, FERC rules apply. Notice the absence of "personally and substantially," here – which is the expected imprecise answer.

It depends on whether, in her position in FERC's office of enforcement, Mary handled, investigated, advised, or participated in the consideration of the matter – if she did, she may not participate in the matter; additionally, if Mary had official responsibility over the matter, FERC's regulations prohibit her post-employment participation for 1 year after her employment ceased?

If Mary did participate in the matter while working in FERC's Office of Enforcement, in terms of handling the matter, investigating the matter, advising on the matter or participating in any way regarding the matter, she may not represent the client. If Mary had any official responsibility regarding the matter, she may not represent the client during the 1 year time period following her ceasing employment at FERC.

18 CFR § 385.2103 Appearance of former employees (Rule 2103):

(a) No person having served as a member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission may practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission

which such person has handled, investigated, advised, or participated in the consideration of while in the service of the Commission.
(b) No person having been so employed may within 1 year after his or her employment has ceased, practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which was under the official responsibility of such person, as defined in 18 U.S.C. 202, while in the service of the Commission.
(c) Nothing in paragraphs (a) and (b) of this section prevents a former member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission with outstanding scientific or technological qualifications from practicing before or acting as an attorney or representative in connection with a particular matter in a scientific or technological field if the Chairman of the Commission makes a certification in writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or representation.

FERC Rule Reference: https://www.govinfo.gov/app/details/CFR-2002-title18-vol1/CFR-2002-title18-vol1-sec385-2103

Under **18 U.S.C. 202**, the term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

18 U.S.C. 207 prohibits certain acts by former employees (including current employees who formerly served in ''senior'' or ''very senior'' employee positions) which involve, or may appear to involve, the unfair use of prior Government. Explained and codified in 5 CFR § 2641, including:

- **5 CFR § 2641.201** – Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially. Certain exceptions and waivers apply.
- **5 CFR § 2641.202** – Two-year restriction on any former employee's representations to United States in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of Government service. Certain exceptions and waivers apply.
- **5 CFR § 2641.204** – One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement. Certain exceptions and waivers apply.
- **5 CFR § 2641.205** – Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement. Certain exceptions and waivers apply.

Note: the VA rules may apply to other government officers and employees, but the FERC regulations would specifically apply to former FERC employees.

Virginia Rules of Professional Conduct Rule 1.11(b) – Imputed Disqualification: Special Conflicts Of Interest For Former And Current Government Officers And Employees

(b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

Significant Differences Between VA and ABA Model Rules:

- The ABA Model Rule only requires consent from the government agency, in writing, if a former government employee wishes to represent a private client in a matter in which the attorney participated personally and substantially in while at the government.

VA Rule Reference: https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-11/

Q5. ATTORNEY A REPRESENTS TWO CLIENTS IN THE SAME CASE BEFORE FERC. DURING THE ENGAGEMENT, HE LEARNS JUICY CONFIDENTIAL INFORMATION ABOUT EACH CLIENT. ONE CLIENT WANTS TO ENTER INTO A PROPOSED SETTLEMENT, BUT THE OTHER CLIENT DOES NOT. ATTORNEY A MUST WITHDRAW FROM THIS REPRESENTATION.

A5. WHAT IS WITHDRAW FROM REPRESENTING BOTH CLIENTS?

This is a conflict under Rule 1.7 that would not be waivable under 1.7(b)(3). One client would be contesting the settlement while the other supports it. Practically speaking, such a representation would likely be a joint representation, and so there could potentially be an agreement between the lawyer and the clients about how such future conflicts would be handled.

Virginia Rules of Professional Conduct Rule 1.7(b): Conflict of Interest: General Rule.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
(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) the consent from the client is memorialized in writing.

Significant Differences Between VA and ABA Model Rules:

- The Virginia Rule is substantially similar to the ABA Model Rule, with slightly different wording.

VA Rule Reference: https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-7/

CATEGORY 2: ETHICS AT FERC

Q6. UNDER FERC RULE OF PRACTICE AND PROCEDURE 2201, FERC GENERALLY PROHIBITS EX PARTE COMMUNICATIONS IN THIS TYPE OF PROCEEDING.

A6. WHAT ARE *CONTESTED ON-THE-RECORD PROCEEDINGS*?

18 C.F.R. § 385.2201(c)(1)(i) states that an on-the-record proceeding includes "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to [R]ule 206 by the filing of a complaint with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation under [P]art 1b of [Title 18, Chapter 1] beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter."

***Bonus Question: In what types of proceedings are ex parte communications permitted?**

Answer: What are notice and comment rulemakings? These are proceedings in which no party disputes a material issue, investigations under Part 1b of Title 18 Chapter 1, and proceedings not having a party or parties. *See* 18 C.F.R. § 385.2201(c)(ii).

Q7. UNDER OFFICE OF GOVERNMENT ETHICS REGULATIONS, A FERC EMPLOYEE IS PROHIBITED FROM PARTICIPATING IN MATTERS IN WHICH THE EMPLOYEE KNOWS A REASONABLE PERSON WOULD QUESTION HIS IMPARTIALITY WITHOUT FIRST OBTAINING APPROVAL FROM THIS OFFICIAL.

A7. WHO IS THE *DESIGNATED AGENCY ETHICS OFFICIAL* ("DAEO")?

Q8. YOUNGUN RECENTLY JOINED FERC STAFF. HIS WIFE OWNS SHARES OF A LARGE PUBLIC UTILITY. UNDER FERC'S RULES, YOUNGUN MUST REPORT HIS WIFE'S EQUITY INTEREST TO THE DESIGNATED AGENCY ETHICS OFFICIAL WITHIN THIS NUMBER OF DAYS OF JOINING THE AGENCY.

A8. WHAT IS *THIRTY DAYS*?

See 18 C.F.R. § 3401.102 (Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission). The rule states that "no employee, and no spouse or minor of an employee, shall acquire or hold any securities issued by an entity on the prohibited securities list . . .includ[ing] . . . public utilities. 3401.102(d) states that "New employees must report in writing to the [Designated Agency Ethics Official] prohibit financial interests within 30 days of commencement of employment."

Q9. YOUNGUN IS STILL EMPLOYED AT FERC BUT IS LOOKING TO LEVERAGE HIS FERC EXPERIENCE IN THE PRIVATE SECTOR. HE'S ENTERED INTO NEGOTIATIONS FOR EMPLOYMENT WITH RATE-BASE-R-US LLC. DURING THE COURSE OF THOSE NEGOTIATIONS, YOUNGUN IS PROHIBITED FROM DOING THIS.

A9. WHAT IS PARTICIPATE *PERSONALLY AND SUBSTANTIALLY* IN ANY MATTER THAT, TO HIS KNOWLEDGE, HAS *A DIRECT AND PREDICTABLE EFFECT* ON THE FINANCIAL INTERESTS OF RATE-BASE-R-US, LLC?

See 5 C.F.R. § 2635.604. *See also*, 18 CFR § 385.2103 related to other FERC rules applicable to post-employment participation in matters before FERC.

Q10. AFTER PROTRACTED NEGOTIATIONS, YOUNGUN LEAVES FERC TO JOIN RATE-BASE-R-US, WHICH IS INVOLVED IN SEVERAL MATTERS PENDING BEFORE THE COMMISSION. BECAUSE YOUNGUN WAS

RESPONSIBLE FOR **ONE OF THOSE MATTERS WHILE AT FERC, RATE-BASE-R-US DECIDES HE SHOULD MANAGE THAT MATTER AS PART OF HIS NEW RESPONSIBILITIES. IF HE ACCEPTS, YOUNGUN WILL HAVE VIOLATED THIS PROHIBITION.**

A10. WHAT IS THE PROHIBITION ON FORMER FERC EMPLOYEES PARTICIPATING WITHIN ONE YEAR OF LEAVING FERC IN ANY PROCEEDING OR MATTER BEFORE THE COMMISSION FOR WHICH SUCH PERSON HAD OFFICIAL RESPONSIBILITY WHILE WORKING AT FERC?

***Bonus Question: Where is this prohibition stated?**

A10(BONUS). 18 C.F.R. § 385.2103(b); FERC RULE OF PRACTICE AND PROCEDURE 2103.

CATEGORY 3: NEW AND IMPROVED

Q11. ATTORNEY ALICIA FLORRICK'S LAW FIRM WAS A TARGET OF THE INFAMOUS GOTTAWEEP RANSOMWARE ATTACK THAT RESULTED IN A DATA BREACH OF CONFIDENTIAL CLIENT INFORMATION. SHE IS ABLE TO SATISFY HER ETHICAL DUTY TO ACT REASONABLY AND PROMPTLY TO STOP AND MITIGATE DAMAGES OF THE BREACH BECAUSE SHE HAD THIS IN PLACE.

A11: WHAT IS AN *INCIDENT RESPONSE PLAN*?

MRPC Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Formal Opinion 483 (Lawyers' Obligations After an Electronic Data Breach or Cyberattack):

"When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach.

. . . While every lawyer's response plan should be tailored to the lawyer's or the law firm's specific practice, as a general matter incident response plans share common features:

> The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm's network.
>
> Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response."

Q12. DEFENSE ATTORNEY PERRY MASON WOULD LIKE TO REPRESENT JOHN DOE, BUT UNFORTUNATELY JOHN DOES NOT HAVE THE FUNDS TO COVER PERRY'S LEGAL FEES. JOHN EXPRESSES AN INTEREST IN USING A BROKER TO FINANCE HIS LEGAL FEES AND ASKS PERRY FOR A REFERRAL. ALPHA ADVISORS HAS PROVIDED THE MOST FAVORABLE QUOTE, BUT PERRY REFERS JOHN TO HIS CLIENT, BETA BROKERAGE, WHICH HAS PROMISED TO PAY THE LEGAL FEES MORE QUICKLY THAN ALPHA. PERRY HAS VIOLATED THIS RULE.

A12. WHAT IS THE RULE AGAINST CONFLICTS OF INTEREST (MODEL RULE 1.7(A)(2))?

MRPC Rule 1.7(a)(2): (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: . . . (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."

ABA Formal Opinion 484 (Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee): "[I]n referring a client to a finance company or broker, a lawyer must be alert to the possibility of a material limitation conflict of interest under Model Rule 1.7(a)(2). Arguably the greatest risk is that the lawyer will recommend the finance company or broker to the client even though fee financing is not in the client's interests because the client's arrangement of financing best assures payment or timely payment of the lawyer's fee. A conflict of interest might also exist if the finance company or broker is also a client of the lawyer. . . . In either instance, the client may give informed consent to the representation notwithstanding any material limitation conflict provided that the Model Rule 1.7(b) requirements are satisfied."

Q13. BOB ATTENDED AN ENERGY LAW CLE, AFTER WHICH HE RECEIVED A "CERTIFICATE OF ATTENDANCE," AFTER WHICH HE ADDS "CERTIFIED SPECIALIST IN ENERGY LAW" TO HIS WEBSITE. HE ALSO PUBLISHES A BLOG POST ANALYZING HIS CLIENT'S LITIGATION STRATEGY FOR AN UPCOMING TRIAL. BOB HAS VIOLATED THESE RULES OF PROFESSIONAL CONDUCT.

A13. WHAT ARE THE

- **RULE AGAINST *DISCLOSING CLIENT INFORMATION* (MODEL RULE1.6(A))**
- **RULE PROHIBITING *TRIAL PUBLICITY* (MODEL RULE 3.6)**
- **RULES ON *COMMUNICATIONS CONCERNING A LAWYER'S SERVICES* (MODEL RULES 7.1 AND 7.2(C))?**

MRPC Rules 1.6(a): (a) 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).

MRPC Rule 3.6(a): A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

ABA Formal Opinion 480 (Confidentiality Obligations for Lawyer Blogging and Other Public Commentary):

"Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs, listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity)."

MRPC Rule 7.1: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

MRPC Rule 7.2(c): A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.

MRPC Rule 7.2 comment [9]: Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

Q14. LOUIS FINDS OUT THAT MIKE PRACTICES TECHNOCOLOGY, A RELIGION WHOSE CORE BELIEF IS THAT MARTIANS CONTROL HUMANS THROUGH CYBERNETIC BRAIN IMPLANTS. PUT OFF BY MIKE'S RELIGIOUS VIEWS, LOUIS AVOIDS ASSIGNING HIM ANY CASES AND PASSES ON HIM FOR PROMOTIONS, INSTEAD PROMOTING LESS QUALIFIED ASSOCIATES WHO ARE NOT TECHNOCOLOGISTS. LOUIS' CONDUCT IS AN EXAMPLE OF THIS.

A14. WHAT IS *DISCRIMINATION*?

MRPC Rule 8.4(g): It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Note: So far, Model Rule 8.4(g) has only been adopted by a handful of states, while several states rejected the rule citing Free Speech concerns. However, lawyers should be mindful that some states and the District of Columbia already have anti-discrimination rules in place. For example:

DC Rule of Professional Conduct Rule 9.1: A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

Q15. MIKE ROSS OBSERVES THAT HIS FIRM EMPLOYS AND PROMOTES VERY FEW LAWYERS WHO ARE WOMEN, PEOPLE OF COLOR, OR MEMBERS OF THE LGTBQ COMMUNITY. IN RESPONSE, HE IMPLEMENTS A SERIES OF RECRUITING, MENTORING, AND CAREER DEVELOPMENT INITIATIVES THAT ARE TARGETED SPECIFICALLY TO FEMALE, MINORITY, AND LGBTQ ATTORNEYS. MIKE'S CONDUCT IS PERMISSIBLE UNDER THE MODEL RULES BECAUSE IT IS AN EXAMPLE OF THIS.

A15. WHAT IS *DIVERSITY AND INCLUSION*?

MRPC Rule 8.4 comment [4]: Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

CATEGORY 4: OOPS, I DIDN'T MEAN TO UPLOAD THAT!!

Q16. BY CLICKING ON A LINK IN AN EMAIL THAT APPEARED TO COME FROM HER IT DEPARTMENT ASKING HER TO CHANGE HER PASSWORD, ATTORNEY ELLE WOODS INADVERTENTLY OPENED UP HER ENTIRE EMAIL SERVER TO A HACKER. ELLE HAD RECENTLY RECEIVED SOME INCREDIBLY SENSITIVE CLIENT INFORMATION, BUT SHE WAS ABLE TO REASSURE HER CLIENTS THAT ALL OF THEIR INFORMATION REMAINED SECURE BECAUSE IT WAS PROTECTED BY THIS.

A16. WHAT IS *ENCRYPTION*?

MRPC Rule 1.1 comment [8] mandates that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

> **ABA Ethics Opinion 477** concludes that "a fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances."

Q17. ATTORNEY VINNY GAMBINI IS REPRESENTING HIS COUSIN BILL, WHO WORKS FOR A STATE ELECTRIC ENERGY COOPERATIVE, AND WAS INDICTED AFTER AN FBI INVESTIGATION REVEALED THAT CO-OP OFFICIALS USED FEDERAL GRANT MONEY TO GO ON EXTRAVAGANT YEARLY TRIPS TO COACHELLA. VINNY FILED A RESPONSE TO FBI ALLEGATIONS AGAINST BILL, WHO IS SUPPOSED TO BE A COOPERATING WITNESS, WITH THE FEDERAL COURT UNDER SEAL. HE THEN SUBMITTED A VERSION FOR PUBLIC FILING, REMOVING SENSITIVE INFORMATION ABOUT BILL'S NAKED MUD DANCING AT COACHELLA USING THE HANDY WORD "TRACK CHANGES" FEATURE. UNFORTUNATELY, REPORTERS ARE ABLE TO EASILY CRACK THE CODE BY READING THE STRUCK-THROUGH LANGUAGE, AND SOON BILL'S EXPLOITS ARE SPLASHED ACROSS THE HEADLINES OF THAT TRASHY TABLOID *PUBLIC UTILITIES FORTNIGHTLY*. VINNY'S USE OF TRACKED CHANGES IN THIS CASE IS AN EXAMPLE OF DOING THIS IMPROPERLY.

A17. WHAT IS *REDACTING/REDACTION*?

MRPC Rule 1.1 comment [8] mandates that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

MRPC Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Q18. JAMES MCGILL AND SAUL GOODMAN ARE OPPOSING COUNSEL IN A FERC PROCEEDING. JAMES RECEIVES AN EMAIL FROM SAUL WITH THE SUBJECT "FINAL ESTATE DOCUMENTS." ATTACHED ARE WILL AND TRUST DOCUMENTS FOR PRESIDENT SELINA MEYER, WHO IS A T&E CLIENT OF ONE OF SAUL'S PARTNERS. JAMES KNOWS THESE DOCUMENTS MUST HAVE BEEN SENT TO HIM IN ERROR, BUT HE CAN'T RESIST A PEEK, AS PRESIDENT MEYER'S FINANCIAL SITUATION HAS BEEN THE SUBJECT OF MUCH SPECULATION. JAMES MUST DO THIS.

A18. WHAT IS *PROMPTLY NOTIFY THE SENDER*?

James' ethical obligations as recipient of inadvertently transmitted confidential information from Saul is to promptly notify Saul. *See* MRPC **Rule 4.4(b)**

Q19. ATTORNEY ALLY MCBEAL LIKES TO SHOW HOW ACCESSIBLE SHE IS BY ENCOURAGING CLIENTS TO TEXT HER ON HER 10-YEAR-OLD, COMPLETELY UNSECURED FLIP PHONE. ONE OF HER CONTACTS AT CLIENT CYBERDYNE RECENTLY TEXTED HER ABOUT THE COMPANY'S TOP-SECRET UPCOMING MERGER WITH INGEN TECHNOLOGIES. ALLY TEXTS ALL OF HER CLOSEST RELATIVES URGING THEM TO BUY MORE INGEN STOCK. LATER THAT DAY, HER PHONE IS STOLEN, AND THE FOLLOWING DAY, TRADING IN INGEN IS EXTREMELY HEAVY. IN ADDITION TO ENGAGING IN INSIDER TRADING, ALLY HAS VIOLATED THIS RULE OF PROFESSIONAL CONDUCT.

A19. WHAT IS RULE 1.1/1.6?

MRPC Rule 1.1 comment [8] mandates that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

MRPC Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Q20. ATTORNEY MIRANDA HOBBES IS DEFENDING A CLIENT ACCUSED OF SENDING ILLICIT PHOTOS TO A CO-WORKER. HER CLIENT CLAIMS SENDING THE PHOTOS WAS AN ACCIDENT, AND THE PHOTOS WERE REALLY JUST CLOSE-UPS OF FUNGI IN HIS BACKYARD. LOOKING FOR A SECOND LAY OPINION BEFORE BRINGING IN A FUNGUS EXPERT, MIRANDA ATTACHES ONE OF THE PHOTOS TO A WHATSAPP CHAT SHE'S IN WITH SOME OTHER LAWYER FRIENDS TO GET THEIR OPINIONS. MIRANDA'S BEHAVIOR IN THIS INSTANCE HAS VIOLATED THIS RULE OF PROFESSIONAL CONDUCT.

A20. *MRPC RULE 1.6* (BOTH (A) AND (C)) AND *RULE 1.1* COMMENT [8]

MRPC Rule 1.6(a): "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)"

MRPC Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

MRPC Rule 1.1 comment [8] mandates that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

CATEGORY 5: PRACTICE BEFORE FERC

Q21. THIS ACRONYM IS USED TO DESCRIBED ENGINEERING, VULNERABILITY, OR DETAILED DESIGN INFORMATION ABOUT PROPOSED OR EXISTING INFRASTRUCTURE THAT (I) RELATES TO THE PRODUCTION, GENERATION, TRANSMISSION OR DISTRIBUTION OF ENERGY; (II) COULD BE USEFUL TO

A PERSON PLANNING AN ATTACK; (III) IS EXEMPT FROM MANDATORY DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT; AND (IV) GIVES STRATEGIC INFORMATION OTHER THAN THE LOCATION OF THE INFRASTRUCTURE.

A21. WHAT IS *CEII*?

See 18 C.F.R. § 388.113.

Q22. A COMPLAINANT MAY FILE A COMPLAINT UNDER FERC RULE OF PRACTICE AND PROCEDURE 218'S SIMPLIFIED PROCEDURES FOR SMALL CONTROVERSIES IF, AMONG OTHER THINGS, THE AMOUNT IN CONTROVERSY IS LESS THAN THIS AMOUNT.

A22. WHAT IS $100,000?

See 18 C.F.R. § 385.218, which states that the simplified procedures for complaints involving small controversies applies if "the amount in controversy is less than $100,000 and the impact on other entities is de minimis."

***Bonus Question: What is the fee to file a petition for declaratory order under 18 C.F.R. § 381.302?** $27,130.

Q23. THE COMMISSION OR A PRESIDING OFFICER MAY EXCLUDE ANY PERSON FROM A HEARING IF SUCH PERSON EXHIBITS THIS TYPE OF CONDUCT, WHICH IS DERIVED FROM A LATIN WORD MEANING "REBELLIOUS."

A23. WHAT IS "C*ONTUMACIOUS*" CONDUCT?

18 C.F.R. § 2102(b) ("Contumacious conduct in a hearing before the Commission or a presiding officer will be grounds for exclusion of any person from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.")

Q24. YOUNGUN HASN'T YET MEMORIZED THE FERC RULES OF PRACTICE AND PROCEDURE. HE KNOWS THEY ARE MEMORIALIZED IN 18 C.F.R., BUT HE CAN'T REMEMBER WHERE. TO FIND THEM, HE SHOULD TURN TO THIS PART OF 18 C.F.R.

A24. WHAT IS *PART 385*?

Q25. YOUNGUN WORKS FOR A LARGE ELECTRIC UTILITY. ON HIS FIRST DAY OF WORK, HE'S INADVERTENTLY CAUSED HIS NEW COMPANY TO VIOLATE THE NATURAL GAS ACT OR THE NATURAL GAS POLICY ACT. HIS COMPANY MAY OWE UP TO THIS AMOUNT AS THE MAXIMUM CIVIL PENALTY FOR EACH DAY OF THE VIOLATION.

WHAT IS *$1,269,500*?

SEE 166 FERC ¶ 61,014.

Q26. THIS OFFICIAL IS RESPONSIBLE FOR ASSIGNING A PRESIDING JUDGE AND SETTING A HEARING SCHEDULE FOR ADMINISTRATIVE LITIGATION AT FERC.

A26. WHO IS THE *CHIEF ADMINISTRATIVE LAW JUDGE*?

***Bonus Question: Who is the current Chief ALJ at FERC?** Carmen A. Cintron