How to Disagree Well in a Pluralistic Society

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1. Introduction—The Societal and Professional Need for Civil Discourse and Disagreeing Well

   1.1. Escalating Polarization in the United States

      1.1.1. Pew Research Center polling reveals a stark increase in partisan hostility in the United States. In 2022, 72% of Republicans and 63% of Democrats viewed the other party as more immoral than other Americans generally—up sharply from 47% and 35% in 2016. See https://www.pewresearch.org/politics/2022/08/09/republicans-and-democrats-increasingly-critical-of-people-in-the-opposing-party/.

      1.1.2. Moreover, Pew Research Center studies conducted in March 2025 found that 80% of U.S. adults say that, regarding the important issues facing the country, Republican and Democratic voters not only disagree on policies and plans but also disagree on basic facts. See https://www.pewresearch.org/short-reads/2025/07/30/most-americans-say-republican-and-democratic-voters-cannot-agree-on-basic-facts/.

      1.1.3. This national disconnect was strikingly noticeable on June 14, 2025, a day on which "No Kings" rallies were held in locations throughout the country while President Donald Trump attended a military parade in Washington, D.C. to celebrate the U.S. Army's 250th Anniversary.

   1.2. Lawyers' Personality Traits and Lawyers' Conflict Avoidance

      1.2.1. Although lawyers are trained to address conflict generally in professional contexts, research shows that the personality traits of many lawyers make them averse to addressing personal conflict.

      1.2.2. Larry Richard, a lawyer and national expert on lawyer personality research, opines: "Lawyers are the most atypical occupation on the planet. We are more different from the general public than any other occupation since data has been published. We are the original outliers." See https://www.legal500.com/gc-magazine/feature/all-in-the-mind/. He notes certain areas where lawyers are statistically outliers from the general population: "We are very low in psychological resilience when criticized or rejected. We are very thin-skinned, we are easily wounded, we're always imagining critics – and that has big implications for everything, including why we tend to make more risk averse decisions." Id. See also https://www.strategiesandvoices.org/Article-Details/understanding-lawyer-psychology-an-in-depth-exploration-with-larry-richard-phd (reasoning that resilience is considered a learnable trait).

      1.2.3. Additional research using the Hogan Development Survey (HDS), where higher scores are correlated with problematic tendencies, shows that lawyers "have the highest average scores on three scales (all of which fall at the 68th percentile): (a) Excitable –

becoming tense and overly critical, (b) Cautious – being reluctant to take risks and make decisions, and (c) Leisurely – resisting authority."[1]

1.2.4. Recent research in 2024 also found that many lawyers struggle with maladaptive perfectionism, which is associated with a predisposition towards avoiding challenges, conflict, and negative feedback. The study reasons that "perfectionists are often inclined to avoid challenges and feedback, viewing them as threats to their reputation and feelings of self-worth, rather than as opportunities to gain valuable insights and further develop their capabilities" and that "maladaptive perfectionism is also negatively associated with grit (i.e., perseverance in the face of setbacks and challenges and passion for pursuing long-term goals)."[2]

1.3. National Division and Lawyer Conflict Aversion in the Context of Legal Well-Being Crisis

1.3.1. This national polarization and lawyers' tendency towards conflict aversion are situated within the larger well-being crisis facing the legal profession.

1.3.1.1. In 2017 the National Task Force on Lawyer Well-Being published the groundbreaking report titled "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," available online: https://lawyerwellbeing.net/. The report describes the troubling state of affairs regarding the mental health, substance abuse, and overall well-being of lawyers and law students. Notably, the report discussed how lawyers in their first ten years of practice as well as those working in private practice have the highest rates of both problem drinking and depression. *Id.*

1.3.2. More recent, national research on law students shows worsening trends. Researchers conducted extensive studies of law students in 2021 (5,400 respondents) and compared those results to those in 2014 (3,300 respondents). The 2021 study found:[3]

1.3.2.1. Near doubling of respondents with a diagnosis in their life of depression (to 33%) and anxiety (to 40%) with similarly high percentages screening positive for both depression and anxiety;

1.3.2.2. Increase in those needing help for an emotional or mental health problem in the prior year from 42% to nearly 70%;

1.3.2.3. Significant increase in suicidal thoughts in the past year (from 6% to 11%) and in lifetime (from 20% to 33%);

1.3.2.4. Overwhelming number of respondents having experienced trauma (new data in 2021 Survey) with one in five respondents screening positive for PTSD.

1.3.3. Similarly, a 2018 survey of 886 Harvard Law students found:[4]

1.3.3.1. 25 percent reported suffering from depression;

1.3.3.2. 24.2 percent reported suffering from anxiety;

1.3.3.3. 20.5 percent said they were at a heightened risk of suicide;

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[1] See https://www.hoganassessments.com/wp-content/uploads/2015/03/Lawyer_Personality_12.1_1.pdf.
[2] See Krill, Patrick et al., The Perfectionist Paradox: Report on the 2024 Perfectionism and Well-Being Survey, available at https://www.nalp.org/2024_lawyer_perfectionism.
[3] See Jaffe, David et al. *'It is Okay to Not Be Okay': The 2021 Survey of Law Student Well-Being* (June 3, 2022). 60 UNIVERSITY OF LOUISVILLE LAW REVIEW 441 (2021), available at SSRN: https://ssrn.com/abstract=4127297 (noting also a promising decrease in the percentage of respondents engaging in binge drinking and the percentage of respondents sharing prescription drugs and using prescription drugs without a prescription).
[4] 1.3.3.7. See Chan, Amanda et al., *Wellness at the Law School: Promises to Keep and Miles to Go Before We Sleep*, HARVARD CRIMSON (March 29, 2018).

1.3.3.4. 66 percent said they experienced new mental health challenges in law school;

1.3.3.5. 61.8 percent said they had frequent or intense imposter syndrome experiences at school and in measuring social connectedness; and

1.3.3.6. 8.2 percent said they had zero people they could open up to about their most private feelings without having to hold back.

1.3.4. These well-being challenges can be exacerbated by technology, as lawyers' increasing use of technology can result in unhealthy reliance on technology and pose risks to their well-being and competence. In May 2019, the Virginia State Bar President's Special Committee on Lawyer Well-Being published a comprehensive report titled "The Occupational Risks of the Practice of Law," available online.[5] The report lists one specific risk of the practice of law as "Technology Addiction" and describes the risk as follows: "Potential Effects: Ever-connected lawyers who feel obligated to be available at all hours experience reduced attention span and productivity, harm to personal relationships, and risk revealing confidential information through sloppy data use." Report at 10.

1.4. Ethical Standards Requiring Lawyers to Attend to Well-Being

1.4.1. This culture of divisiveness in the broader society heightens the need for lawyers to attend to their personal well-being as a component of their general duty of competence. It also underscores lawyers' need to improve their skills in conflict management and disagreeing well.

1.4.2. The ABA Model Rules of Professional Conduct address this intersection between ethics and well-being in the rule on withdrawal from representation:

1.4.2.1. ABA Model Rule 1.16: Declining or Terminating Representation

1.4.2.1.1. (a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client

1.4.3. Some states have amended their rules of professional conduct to emphasize how attorneys should maintain their mental, emotional, and physical well-being in order to remain competent to practice law.

1.4.3.1. California Rule of Professional Conduct 1.1 Competence

1.4.3.1.1. (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

1.4.3.1.2. (b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably[1] necessary for the performance of such service.

1.4.3.2. Virginia Rule of Professional Conduct 1.1 Competence

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

[5] https://vsb.org/Site/Site/lawyers/wellness.aspx

1.4.3.2.2. [7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

1.4.3.3. Vermont Rule of Professional Conduct 1.1 Competence

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

1.4.3.3.2. [9] A lawyer's mental, emotional, and physical well-being may impact the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical well-being necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

1.5. Disagreeing well thus enables attorneys to make civil society more civil, as well as improve attorney well-being and foster attorney competence.

2. Pluralism and Polarization—Societal Structures Shaping Disagreement

2.1. Epistemological Limitations and Pluralism

2.1.1. Disagreements over first principles, the application of human reason, the relative authority placed on other human faculties (e.g., emotion), and other divergent aspects of human experience will invariably result in different, and even mutually exclusive, truth claims, ethical frameworks, and visions of human nature and human flourishing.

2.1.2. This inevitability of disagreement does not mean truth is relative – rather it shows that reasonable people of goodwill may disagree about many fundamental presuppositions and about the resultant conclusions drawn therefrom. In fact, even relativists make absolute epistemological claims about the nature of truth itself.

2.1.3. Our pluralistic society is characterized by the intersection of so many traditions of faith and culture, different ideas of human nature and flourishing, and varying conceptions of the proper role of the state, institutions, and individuals. This should not be surprising given our general epistemological limitations as human beings.

2.1.4. However, what is striking is the polarization of our pluralistic society.

2.2. Representative Principles underlying Polarized Public Square

2.2.1. Universalization of Subjective Experience

2.2.1.1. Reductionistic Anthropology. If our humanity is reduced to one of our constitutive aspects or choices – for example, desire, personality, opinion, sex, race, nationality, political party, etc. – then subjective experience aligned around that aspect becomes an objective universal standard against which others are measured.

2.2.1.2. Subjectivity, Identitarianism, and Tribalism. Subjective experience treated as universal norms results in identitarianism on a personal level and tribalism on a communal level.

2.2.2. Subjectivity and Consequentialism

2.2.2.1. Ends Justify the Means. Without actual objective norms, then truly evaluating ends becomes impossible, as they are simply expressions of personal

passions. Accordingly, the ends justify the means by which such ends are accomplished, as the ultimate moral standard is fulfillment of subjective desires.

2.2.2.2. Over-Politicization and (Ironically) Institutional Distrust. If the ends justify the means, then might makes right. A significant expression of human power is found in political governance, especially when coercive force is monopolized by the state. When combined with the utopian presupposition that it is possible to engineer the perfect society, political alignment (or party) is a significant marker for righteousness. When the personal becomes political in every aspect, nonalignment with policy is tantamount to total lack of virtue. Ironically, the culture is also experiencing a cynical distrust of institutions and organizations, and whether they are truly operating for the benefit of all – or simply the special interests of a few.

2.2.3. Disagreement, Disparagement, and Dehumanization

2.2.3.1. Critical Thinking and Critique. If the bases of universal norms and acceptable truth claims are subjective, then disagreement with a position, opinion, or even proposed plan of action may be seen as a personal critique.

2.2.3.2. Perceived Existential Threats. Thus, when disagreement is perceived as disparagement, it also constitutes dehumanization – an existential threat to an edifice of reality constructed on subjective experience.

3. Practicing Law as the Art of Disagreeing Well

3.1. Despite these societal forces, disagreement need not be either disparaging or dehumanizing. In many ways, the exercise of building community despite deep difference is one of the most humanizing experiences. Learning how to agree and disagree well requires and teaches humility, kindness, and perspective. It also underscores human dignity and worth, all in service of neighborly love.

3.2. The practice of law provides a highly formalized and ritualized framework to seek truth collectively and to disagree well individually, all for the sake of others (our clients). Whether engaging in a transactional, compliance, or litigation matter, the practice of law constantly stands in relation to authority, presumes objective truth, and is inherently subjectively perspectival.

3.2.1. First, attorneys must be constantly aware of authority and how it relates to their own practice, their clients, and the legal issues at hand. Attorneys' ability to practice is intrinsically jurisdictional and must abide by the various rules applicable to the state in which they are practicing or court before which they appear. Likewise, just as attorneys are subject to authorities outside themselves, clients must operate within the state or federal laws to which they are subject. When briefing a matter, attorneys are expected to distinguish between binding authority and persuasive authority, which may flow from different sources, whether statutory or precedential. *Humility* is thus intrinsic to the legal profession, for attorneys and clients always stand in relation to authority outside themselves.

3.2.2. Second, objective reality is presumed, as are the limitations on the parties to know all facts. Representations and warranties are presumed to be objectively true to induce entering into transactions. Discovery processes are intended to reveal objective facts which are not yet known by opposing parties. Imperfect and incomplete knowledge is never assumed to limit the scope of reality, but rather is acknowledged as part of the epistemological limitations of human nature. *Objective* truth is intrinsic to the legal profession, for attorneys and clients act and are accountable for words and deeds which *actually occurred*, even if not fully known.

3.2.3. Third, the adversarial nature of legal practice need not be antagonistic; rather even as each party seeks their own self-interest, the collective enterprise is intended to reveal objective truth from multiple perspectives. Attorneys are expected to speak (and not speak) in furtherance of their client's interest, yet the perspective advocated is not imputed to the attorney acting as client representative. Speaking *for the sake of others' subjective perspectives and interests* is intrinsic to the legal profession, as our legal system is premised on the concept that attorneys advocate from their client's perspective on the truth and they rely on triers of fact to decide whether such perspective is persuasive.

3.3. The ABA Model Rules (and the similar formulations under the various states' rules of professional conduct) speak directly to these issues of authority, objectivity, and subjectivity in the practice of law.

3.4. Attorneys' duties to clients flow from their representational role.

3.4.1. The attorney's role is inherently representational. Rules 1.2 and 1.4 set forth the scope of an attorney's representational role with respect to clients and impose duties that respect the primacy of the client's direction. When representing clients, attorneys are expected to speak for the sake of their clients regarding objective facts and act consistently with the client's subjective perspectives on those facts.

3.4.2. ABA Model Rule 1.2[6]

3.4.2.1. Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

3.4.2.2. Comment (Selected Excerpts)

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such

[6] Text of ABA Model Rules and Comments are excerpted from *Annotated Model Rules of Professional Conduct*, Tenth Edition. Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki.

as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] 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.

3.4.3.ABA Model Rule 1.4

3.4.3.1. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

3.4.3.2. Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client."

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

3.4.4.ABA Model Rule 1.7

3.4.4.1. 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent, confirmed in writing.

3.4.4.2. Comment (Selected Excerpts)

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For

conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients

under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

3.5. Speak (or don't speak) for others' sake.

3.5.1. Of course, an attorney frequently must exercise good independent judgment in the course of representation. Wisdom and discernment are also intrinsic to the attorney's role, especially when evaluating risk or helping a client navigate legal ambiguity. An attorney is often in a position to provide perspective to clients based on their distance from the matter at hand, which facilitates both independent judgment as well as measured responses. ABA Model Rule 2.1 anticipates that attorneys often act as advisors to their clients, in addition to being advocates, and to speak with due attentiveness to the client's context. In fact, attorneys may sometimes be obligated to share even unwelcome truths with clients for the clients' sake.

3.5.2. ABA Model Rule 2.1

3.5.2.1. Advisor

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.

3.5.2.2. Comment

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer

may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

3.6. The ends do not justify the means.

3.6.1. Yet speaking on a client's behalf and advocating for the client's subjective perspective is not without limit, for as previously discussed, attorneys are also under authority. Notably, Rules 3.1, 3.3, 3.4, and 4.1 clearly demonstrate that the ends do not justify the means, and that there are certain ethical responsibilities which inform the outer bounds of an attorney's representation or even supersede a client's direction. Attorneys must proceed with candor, fairness, and truthfulness.

3.6.2. ABA Model Rule 3.1

3.6.2.1. Meritorious Claims and Contentions

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, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

3.6.2.2. Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."

"[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because

the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

3.6.3.ABA Model Rule 3.3

3.6.3.1. 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.

(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.

3.6.3.2. Comment (Selected Excerpts)

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not

required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

3.6.4.ABA Model Rule 3.4

3.6.4.1. Fairness to Opposing Party and 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;"

(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.

3.6.4.2. Comment (Selected Excerpts)

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

3.6.5.ABA Model Rule 4.1

3.6.5.1. Truthfulness in Statements to 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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

3.6.5.2. Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give

notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

3.7. Rules of Engagement to Disagree without Disparagement or Dehumanization

3.7.1. In the context of this national divisiveness and the ethical norms of the profession, it is imperative that lawyers adopt specific methods and frameworks for disagreeing well in a pluralistic society. Consider these principles, methods, and frameworks below.

3.7.2. Presume innate human dignity and personhood by virtue of their being human. It is essential to remember at all times that your interlocutor is another human being. A fundamental presupposition is the personhood flows simply from being human – not what one can do, what one likes, or what one believes. Engagements between human beings who recognize each other's humanity have the potential for disagreement without dehumanization. As a corollary, having disagreements in person is more effective than virtually or anonymously – incarnational communication reminds all parties of mutual humanity. Adopt a more robust view of human dignity than the weak view offered by reductive subjectivity. Proceed with compassion and truly seek human flourishing – both for yourself and for others.

3.7.3. Remember that reasonable people of goodwill may disagree. No one has all the answers, but that does not mean that truth is unattainable. On any given point where people disagree, you may be right, you may be wrong, or you may be partially right. Just as the blind men and the elephant had partial truths, but not the whole picture, so also, we speak and act from particular perspectives. Accordingly, believe you are right but understand you may be wrong. Proceed with both conviction and humility. It is possible to advocate for a position that is objectively correct without being arrogant; it is possible to change one's mind from an incorrect position.

3.7.4. Don't take things too personally. Deploy both emotional and strategic distance. Separate persons from positions. Understand that critiquing one's argument is not necessarily criticizing one as a person. Just as advocating for a client's position does not impute such a position to the attorney, so also is it possible to separate opinions on an issue from one's character.

3.7.5. Attack arguments, not people. Consider the strengths and weaknesses in your opponents' arguments, but never engage in ad hominem attacks and always avoid strawman arguments.

3.7.6. Don't assume motives; give others the benefit of the doubt, and don't assume nefarious or malicious intent just because an opinion is mutually exclusive from one's own.

3.7.7. Likewise, distinguish facts and stated positions from inferences. Listen for understanding; seek to understand before responding. Understand what one believes and why one believes it. Note, too, that it is sometimes wise not to speak at all; not all errors need to be corrected immediately (or by any given person).

3.7.8. Distinguish expression from communication; whereas expression finds its end and fulfillment once the speaker finishes speaking, communication requires the receiving party to understand effectively. Accordingly, be sensitive to and anticipate potential misinterpretations, and adjust communication accordingly both for effective advocacy and given the effect of words on the listener. Always be gracious when speaking and listening.

3.7.9. Disagreeing well using legal skills enhances lawyer well-being during and outside of the practice of law. Effective advocacy requires emotional regulation and impulse control. Procedural norms reduce anxiety. Managing conflict well provides relational stability and positive professional identity formation.

4. Discussion of real situations and hypothetical scenarios to cultivate our understanding of how to disagree well as attorneys in professional and personal contexts.