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# BOARDROOMS ON EDGE

HR's Role in Protecting Your Brand's Reputation

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Your Workforce. Our Business.<sup>SM</sup>

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## **BOARDROOMS ON EDGE**

HR's Role in Protecting Your Brand's Reputation

# *Branded:* How Legal Ethics Impact Company Reputation and In-House Reality

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# Themes to Consider – Interplay of Ethics and Company Reputation

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A key task for chief legal officers and chief compliance officers is to instill and nurture a culture of ethics that is embraced by all and helps guide day-to-day decisions and actions

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During this workshop, we will explore how a company's reputation is impacted by legal ethics decisions and actions

## Interactive Scenarios – Setting the Stage

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Kris Krostup, Esq., came to New World Dynamics, a publicly traded company, fairly recently as an in-house counsel

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NWD has been on a tear, increasing profits and share value year over year ever since Pat Tently-Falz had become as CEO

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Kris and Pat have gotten along quite well, and their relationship has evolved beyond the workplace . . . into a personal one

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Kris may become GC because Upton Left, Esq., the GC that hired Kris . . . well, just upped and left after signing some sort of hush-hush settlement agreement

# Scenario #1 – Protecting the Company’s Reputation

**Randolph Ulysses Kyding**, NWD Board member, stopped by to ask **Kris** (in-house counsel) questions about board processes and duties

- “I come to you as a board member for legal advice about how the NWD Board and its members, including me, fulfill our obligations to the company and its shareholders.”
- Market identifies NWD with Pat (CEO), and, therefore, Pat is key to ongoing results
- Pat has had some “HR Challenges” that R. U. Kyding has not shared with other board members
- Casey Mistit, Pat’s life coach, was in some sort of dispute with Pat that might go public
- “Protecting Pat protects the business and the shareholders, so how do we get this quietly resolved without the board or anybody else screwing it up?”

***Now what do you do if you are Kris?***

Who is (are) the client(s)?  
Any conflicts?  
Who gets told what?

How do you protect the  
reputation?

# Scenario #1 – Playing by the Rules

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- **ABA MODEL RULES OF PROFESSIONAL CONDUCT**

- Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.3 Diligence
- Rule 1.4 Communications
- Rule 1.7 Conflict of Interest: Current Clients
- **Rule 1.13 Organization as Client**

***How could an incorrect ethics decision here negatively impact the company?***

## Rule 1.13 – Organization As Client

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### WHOM DOES THE LAWYER ANSWER TO?

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) **If a lawyer** for an organization **knows that an** officer, **employee** or other person associated with the organization is engaged in action, **intends to act or refuses to act** in a matter related to the representation that is a **violation of a legal obligation** to the organization, **or a violation of law** that reasonably might be imputed to the organization, **and that is likely to result in substantial injury to the organization**, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, **the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization** as determined by applicable law.

## Rule 1.13 – Organization As Client (cont.)

### WHO IS THE CLIENT?



- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.



- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Whose reputation does Kris need to protect?

## Scenario #2 – Investigating the Potential Reputational Concern

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- **Kris (in-house counsel) meets with Pat (CEO) to discuss the info from the board member**
  - **Kris’s statement “Pat, we need to talk about Casey Mistit”** results in an awkward smile from Pat
  - Kris notes that Pat looks exhausted, maybe even drugged/under the influence
- Pat says, **“Maybe you should talk to my other lawyer. . . .”**
- Pat snickers and says, “What’s up?”

Should Kris answer that question?  
Are there questions that need to be asked and answered first?  
Are there explanations of role needed?

*Is this conversation privileged?*

## Scenario #2 – Playing by the Rules

### ABA MODEL RULES OF PROFESSIONAL CONDUCT

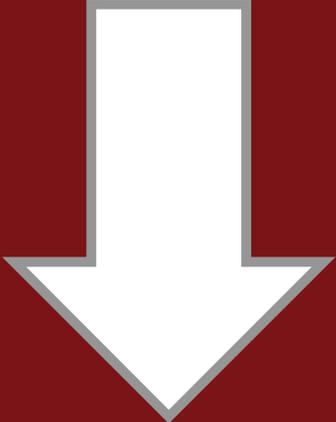
[Rules implicated: RPC 1.6, 1.13, 1.14, 4.2, 4.3, 4.4; Yates memo]

- 1 *Rule 1.6: Confidentiality of Information*
- 2 *Rule 1.13: Organization as Client*
- 3 ***Rule 1.14: Client with Diminished Capacity***
- 4 *Rule 4.2: Communication with Person Represented by Counsel*
- 5 *Rule 4.3: Dealing with Unrepresented Person*
- 6 *Rule 4.4: Respect for Rights of Third Persons*

*What tactics should Kris consider using to investigate this situation while protecting the company's reputation and while complying with ethics rules?*

## Rule 1.14 – Client with Diminished Capacity

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A

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

B

When the lawyer reasonably believes that the client has diminished capacity... and cannot adequately act in the client's own interest, the lawyer *may* take reasonably necessary protective action....

C

Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

## Reminder of Individual Liability

“Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation.”

“

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- DEPARTMENT OF JUSTICE – YATES MEMO

- ❑ To be eligible for any cooperation credit, corporations must provide to the Department of Justice all relevant facts about individuals involved in corporate misconduct.
- ❑ Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
- ❑ Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
- ❑ Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
- ❑ Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized.
- ❑ Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

## Scenario #3 – Damage Control

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Mistit story broke; “HR Challenges” went public; the company is trending on social media (not in the good way); NWD stock price has fallen

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Board has received a demand from shareholders that looks like a prelude to a derivative action

- John Rambo (outside counsel) retained by a special committee of the NWD Board
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Rambo wants Upton Left (former GC) to submit to an interview

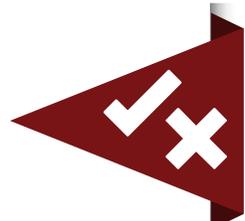
- Upton now works for a competitor (Old Time Views) that wants to exploit NWD scandal; Upton doesn't want to discuss mistakes he made at NWD without ever disclosing
  - Rambo sues Upton for specific performance of the cooperation clause of the severance agreement
  - Rambo threatens to file an ethics charge to force Upton's dismissal based on a conflict of interest unless Upton agrees to talk
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Upton goes to see his lawyer, Sam Trautman, for help and advice

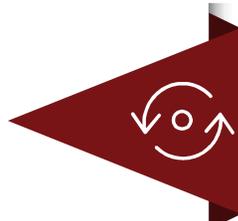


## Scenario #3 – Damage Control

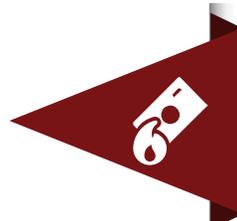
### FIGHTING HARD TO PROTECT THE COMPANY'S REPUTATION



Are non-competes always prohibited for in-house counsel?



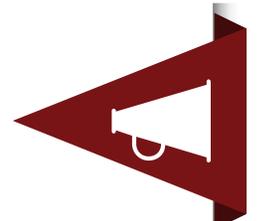
Do conflict-of-interest rules apply to in-house counsel?



Can conflicts bar them from matters?  
Employment?



Can Rambo (outside counsel) threaten Upton (former GC) with ethics charges to force concessions in the breach of contract action?



Can Upton keep quiet on all these issues if he wins the lawsuit?

*At what point does fighting hard to protect the company's reputation actually hurt more than it helps?  
What steps can Rambo take to find this balance?*

## Scenario #3 – Playing by the Rules

### ABA MODEL RULES OF PROFESSIONAL CONDUCT



Rule 1.7 – Conflict of Interest: Current Clients

Rule 5.6 – Restrictions on Rights to Practice

- ✓ NYC Bar Formal Opinion 2017-3: Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party
- ✓ NJ DRB Decision in In Re Kane
- ✓ ABA Formal Opinion 18-481: A Lawyer’s Duty to Inform a Current or Former Client of the Lawyer’s Material Error
- ✓ Patient tolerance of risk
- ✓ Dynamic 3D Geosolutions LLC v. Schlumberger Ltd. (Schlumberger N.V.), 837 F.3d 1280 (Fed. Cir. 2016)

# NYC Bar Formal Opinion 2017-3

- A threat of a disciplinary complaint is not prohibited
  - But “Given the opportunities for abuse . . . the right to threaten a disciplinary grievance is subject to important limitations’
- Further, the threats could violate other laws
  - “It is sufficient to note that under certain circumstances, threats to instigate non-criminal proceedings in order to obtain an advantage in a civil matter may violate laws against extortion or other criminal statutes, just as certain threats to file disciplinary or criminal charges may violate such laws.”

“Rule 3.4(e) Does Not Prohibit Threats to Instigate Non-Criminal Proceedings”

## Scenario #4 – Report to the NWD Board

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- The report from outside counsel is being presented to the board tomorrow
- Kris has been give an advance copy and asked to attend the meeting as acting GC
- Kris believes the report is inaccurate and incomplete in material ways
- Outside counsel asked for Kris’s feedback
  - Kris responds, “Looked good to me, generally. Let’s see how the board reacts.”

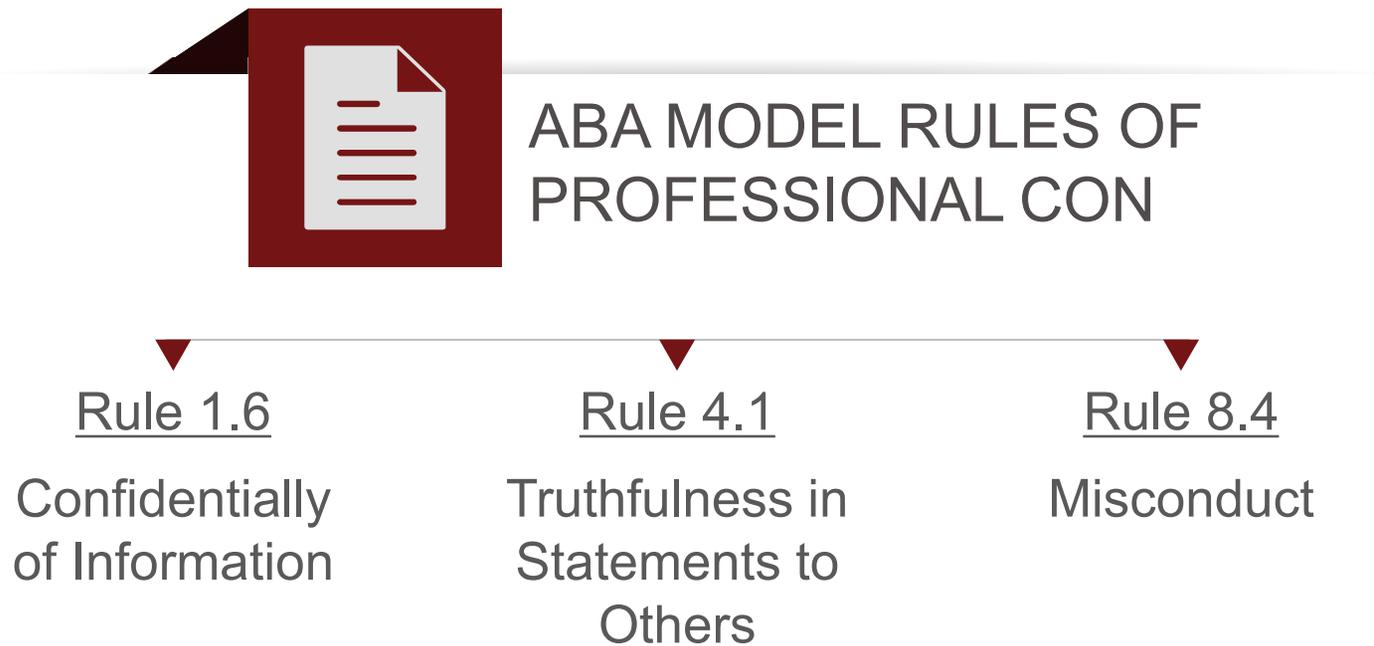
**Should Kris discuss the discrepancies with anyone?  
With whom? When?**

**Does Kris have any obligations to say more to outside  
counsel?**

***What are Kris’s obligations to the NWD  
Board? Special Committee? Pat?***

## Scenario #4 – Playing by the Rules

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## Rule 4.1 – Truthfulness in Statements to Others

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



Make a false statement of material fact or law to a third person; or

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Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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**Any Questions?**

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