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A Lawyer's Guide to Ethical Issues in Enforcement Proceedings

Mary Viviano

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A LAWYER'S GUIDE TO ETHICAL ISSUES IN ENFORCEMENT PROCEEDINGS

MARY VIVIANO AND HEIDI K. RUCKRIEGLE*

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* Mary Viviano is the General Counsel of Vantage Energy LLC; Heidi Ruckriegle is an Associate with the firm of Welborn Sullivan Meck & Tooley, P.C. The views expressed in this article are solely those of the authors.

I. BACKGROUND AND HYPOTHETICAL RELEASE OF FLOWBACK FLUIDS

Historically, states have regulated the technical aspects of oil and gas operations.¹ However, both state and federal agencies are increasingly interested in the regulation of oil and gas production activities² as recent technological advances in hydraulic fracturing allow for the development of significant reserves of shale oil.³ Hydraulic fracturing activities involve the underground pumping of significant quantities of water. The underground pumping process results in “flowback” water when the water used in the fracturing process returns to the surface.⁴ After fracturing a targeted formation, operators must dispose of thousands of gallons of flowback water through recycling, drilling use, and other means.⁵ The rapid increase in use of the hydraulic fracturing process has led to fear of water contamination based on the assumption that fracturing is dangerous and unregulated.⁶ Generally, companies dispose of and recycle flowback water safely using various methods consistent with existing state and federal laws.⁷

While the risk of flowback water spills may not be as great as feared, spills can occur and, in certain circumstances, cause significant damage to surrounding ecosystems and surface waters of the state.⁸ Lawyers for operators and other industry professionals—most notably the operator’s environmental, health, and

1. Bruce M. Kramer, *Federal Legislative and Administrative Regulation of Hydraulic Fracturing Operations*, 44 TEX. TECH L. REV. 837, 838–40 (2012).

2. Dave Grossman, *Regulation, Conversation, and Impact of Shale Gas and Oil in a Low-Price Environment*, in ASPEN INSTITUTE MODERN SHALE GAS AND OIL PRODUCTION FORUM XI (2015), http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/2015-Shale-Forum-Report_11.25.15.pdf

3. Fred Hagemeyer, “Production and Marketing of Hydrocarbons in the U.S. – A Survey of Recent Trends and Development,” *Oil and Gas Agreements: Midstream and Marketing* 1-1, 1-11 (Rocky Mt. Min. L. Fdn. 2011) (observing that “[f]ive years ago, conventional wisdom suggested that the U.S. hydrocarbon resource base was peaking and poised for a long-term decline” but that this wisdom has changed due largely to the hydraulic fracturing boom).

4. See Monika Ehrman, *The Next Great Compromise: A Comprehensive Response to Opposition Against Shale Gas Development Using Hydraulic Fracturing in the United States*, 46 TEX. TECH L. REV. 423, 432–34 (outlining a background on the history and process of hydraulic fracturing as well as major arguments against—and comprehensive responses in support of—shale gas production).

5. Flowback water is also referred to as “produced water.”; Thomas E. Kurth et al., *Shaking Up Established Case Law and Regulation: The Impacts of Hydraulic Fracturing*, 57 THE ADVOC. (Texas) 18, 22 (2011) (explaining the hydraulic fracturing process and overview of the use of water).

6. Nicolas Loris, *Hydraulic Fracturing: Critical for Energy Production, Jobs, and Economic Growth*, 2714 THE HERITAGE FOUNDATION 1, 3, 4 (Aug. 28, 2012), <http://www.heritage.org/research/reports/2012/08/hydraulic-fracturing-critical-for-energy-production-jobs-and-economic-growth>.

7. For a detailed explanation of Federal Regulations of hydraulic fracturing relating to wastewater, see *Natural Gas Extraction - Hydraulic Fracturing*, Environmental Protection Agency, <http://www.epa.gov/hydraulicfracturing#wastewater>; for a comprehensive look at state wastewater regulations related to hydraulic fracturing, see *State Fracking Regulations*, <http://www.alsglobal.com/en/Our-Services/Life-Sciences/Environmental/Capabilities/North-America-Capabilities/-USA/Oil-and-Gasoline-Testing/Oil-and-Gas-Production-and-Midstream-Support/Fracking-Regulations-by-State>.

8. U.S. Environmental Protection Agency, *Draft Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources* ES-17, 18 (June 2015), http://www.epa.gov/sites/production/files/2015-06/documents/hf_es_erd_jun2015.pdf.

safety teams—should be aware of these issues and the applicable regulatory requirements. In light of the American Bar Association Model Rules of Professional Conduct (“Model Rules” or “Rules”), attorneys must have knowledge of the appropriate conduct when responding to a spill incident.⁹ Water contamination is a significant regulatory¹⁰ and reputational¹¹ concern for the industry, especially where operations intersect with drinking water supplies. The operator’s “social license” to operate¹² (*i.e.*, the goodwill of the community, local politicians and activists, and non-governmental organizations to allow the operator to continue to operate without challenge) may be impacted deeply by a single, unfortunate event. Conversely, a compliance crisis may present opportunities to create meaningful improvements within an oil and gas industry organization.¹³ This article investigates several aspects of ethical issues related to the hypothetical incident posed below and the enforcement proceedings that follow. Because other sources have addressed substantive state and federal regulations, this article will not discuss the applicable spill laws and agencies in detail.¹⁴

The following hypothetical, “Incident at Operator Wellpad,” sets up a fictitious hydraulic fracturing flowback spill scenario and examines the applicable Model Rules relating to potential resulting issues. Ethical Rules may apply differently to outside counsel, in-house counsel, or government counsel. Each designation requires appropriate licensure and continuing legal education, including annual ethics requirements, for maintaining compliance status.¹⁵ Depending on the type of counsel, a lawyer may need to consider slightly different duties to the client, the tribunal, the public and other third parties. Lastly, attorneys who change jobs or focus (*e.g.*, from a government agency attorney to an in-house attorney or outside attorney, or from one side of a legal issue to the

9. A full set of the ABA *Model Rules of Professional Conduct* is available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

10. See Press Release, United States Department of Justice, United States Reaches an Agreement with XTO Energy to Prevent Waste Spills from Natural Gas Exploration and Production (July 18, 2013), <http://www.justice.gov/opa/pr/united-states-reaches-agreement-xto-energy-prevent-waste-spills-natural-gas-exploration-and>. (For example, in July 2013 XTO Energy reached a settlement of Clean Water Act violations related to the discharge of fracking wastewater from a storage facility for its fracking operations. As part of the settlement, XTO paid a \$100,000 penalty and spent an estimated \$20 million on a comprehensive plan to improve wastewater management practices to recycle, properly dispose of, and prevent spills of wastewater.)

11. See, *e.g.*, David Spence, *Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk*, 86 CHI.-KENT L. REV. 59 (2011) (discussing the reputational impact of the B.P. oil spill and crisis response).

12. Evan J. House, *Fractured Fairytales: The Failed Social License for Unconventional Oil and Gas Development*, 13 WYO. L. REV. 5, 51 (2013); see also INTERFAITH CTR. ON CORPORATE RESPONSIBILITY AND INVESTOR ENVTL. HEALTH NETWORK, EXTRACTING THE FACTS: AN INVESTOR GUIDE TO DISCLOSING RISKS FROM HYDRAULIC FRACTURING OPERATIONS 3 (2013), <http://disclosingthefacts.org/2013/Extracting-the-facts.pdf>.

13. Craig D. Galli, *A Compliance Crisis Is a Terrible Thing to Waste: Counsel's Role to Enhance Corporate Culture*, 30 ABA NATURAL RES. & ENV. 3, 5 (Winter 2016).

14. For a complete discussion on Federal Laws and Regulations, see Rebecca W. Watson and Nora R. Pincus, “Hydraulic Fracturing and Water Supply Protection-Federal Regulatory Developments,” *The Water-Energy Nexus: Acquisition, Use, and Disposal of Water for Energy and Mineral Development* 6-1 (Rocky Mt. Min. L. Fdn. 2012).

15. *Mandatory Continuing Legal Education by State*, American Bar Association, http://www.americanbar.org/cle/mandatory_cle.html.

other) have special consideration.¹⁶ Former governmental attorneys would do well to also consider Model Rule 1.11, titled “Special Conflicts of Interest for Former and Current Government Officers and Employees,” and the ramifications that movement between the public and private sector can make to their future client representations and advocacy.¹⁷ Rule 1.11 provides that neither the lawyer nor her firm may represent someone in a matter for which the lawyer previously had a governmental role: (i) without the informed, written consent of the governmental entity; or (ii) where, in the process of the prior governmental representation, the lawyer obtained “confidential (government) information”¹⁸ that the government is prohibited by law or privilege from disclosing to the public.¹⁹

A. INCIDENT AT OPERATOR WELLPAD²⁰

Operator has drilled and is now completing three 8000’ Marcellus gas wells (the “Wells”) located on a single pad in Washington County, Pennsylvania. The pad contains two other already producing wells. Operator has two co-venturers in the Wells, each owning a 25% working interest. Operator has contracted with FracCo under a Master Services Agreement to perform the necessary hydraulic fracturing operations to complete the three Wells.

After completing a fracturing stage on location, the FracCo crew was tasked with moving the equipment to the next well. Due to a miscommunication, a crewmember began disconnecting the main waterline while it was still under pressure. The line shifted and swung approximately four feet away from the employee, spraying him and others with flowback water. Approximately 200 barrels of flowback water spilled or was sprayed outside of the containment area and was inadvertently discharged to the ground surface. The release occurred near the top slope of the wellpad, causing fluids to migrate down a steep grade and over two constructed terraces, into the headwater area of a stream channel.

16. For a striking example, suppose an in-house company oil and gas attorney later switched sides to outside counsel to represent landowners claiming royalty underpayment. Suppose he advertised he had “switched sides/kept the playbook” and could rigorously assert these claims with insider knowledge. Any attorney pursuing this type of transition should carefully consider prior representations and whether she is utilizing privileged information to pursue claims in the new area of emphasis.

17. Colo. Rules Prof. Conduct Rule 1.11 (2015). (Colorado’s rules use this framework).

18. See, e.g., PA Eth. Op. 94-132, PA Bar. Assn. Comm. Leg. Eth. Prof. Resp., 1994 WL 928083 (discussing inquiry into application of Rule 1.11 where an attorney who had worked for the U.S. Department of Justice in the Environment and Natural Resources Division was subsequently approached to consult a company on an issue related to a matter she worked on as a government attorney).

19. See *People v. Shari*, 204 P.3d 453, 459 (Colo. 2009) (examining imputed conflicts of interest for lawyers associated in a firm with former or current government lawyers); *Sorci v. Iowa Dist. Ct. for Polk County*, 671 N.W.2d 482, 493 (Iowa 2003) (emphasizing that to accept employment in a case for which the lawyer had substantial responsibility while a government lawyer “would be akin to switching sides, might jeopardize confidential government information, and gives the appearance of professional impropriety in that accepting subsequent employment regarding that same matter creates a suspicion that the lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.”) (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, 62 A.B.A.J. 517, 520 (1976)).

20. For a complete discussion on the regulatory risks and responses associated with surface spills for your client, see Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. Colo. L. Rev. 729, 766 (2013).

The stream channel connects with a river where there is a public drinking water supply intake.

Two days later, the Pennsylvania Department Environmental Protection (“PADEP”) issued the Operator a Notice of Violation (“NOV”) for the following:

Failure to control and dispose of fluids on site in a manner that prevents pollution;

Failure to have secondary containment for hydraulic fracturing activities;

Unpermitted disposal of industrial waste; and

Failure to maintain containment during hydraulic fracturing activities causing a discharge of waste, with a potential to pollute the Waters of the Commonwealth.

A spill incident triggers various challenges for the Operator and, as discussed in detail below, counsel’s analysis and handling of subsequent ethical issues is extremely important for Operator’s continued good standing with the regulator and other affected third parties.

Part II of this article describes ethical issues related to spill management. Part III.A addresses ethical issues for counsel to the operator surrounding the spill and response management in terms of the attorney-client relationship. Next, Part III.B discusses ethical obligations to the agency (in this case the Pennsylvania Department of Environmental Protection) with regulatory authority over the location; and Part III.C covers other interested parties, including: co-working interest owners, contractors, insurance investigators, and surface owners. Finally, Part IV highlights a lawyer’s best ethical practices in responding to possible negative media coverage following a spill. This constantly changing area is greatly impacted by current social media and political conventions. Applicable ABA Model Rules are interwoven through the paper for practitioners to keep in mind as guidance for professional and ethical conduct in response to a flowback water spill.

II. ETHICAL ISSUES RELATED TO SPILL MANAGEMENT

Ethical rules do not simply guide conduct; more importantly, the rules set limits to what constitutes appropriate conduct. An attorney’s breach of the rules can result in disciplinary action by the State Bar regulator, up to and including disbarment.²¹ The American Bar Association’s (“ABA”) goal in drafting, updating, and interpreting the Model Rules is to assure that the highest standards of professional competence and ethical conduct are available to guide practicing

21. See, e.g., *In re Mancuso*, 915 N.Y.S.2d 774, 775 (N.Y. App. Div. 2010) (upholding District Court’s disbarment sanction for attorney who conspired with his brother to commit mail fraud and who violated certain provisions of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act by engaging in conduct that included creating fraudulent partnerships and sending false legal documents to customers to conceal the true nature of the illegal asbestos business conducted by attorney’s brother).

lawyers.²² To date, California is the only state that does not have professional conduct rules following the format of the ABA Model Rules of Professional Conduct.²³ In content, however, they remain similar. The increasing focus on attorneys' ethical conduct in all phases of representation is demonstrated by the Professional Responsibility Exam that all but two states require would-be attorneys to pass to obtain a license to practice law.²⁴

Each state maintains several avenues for individuals to access its rules of professional conduct,²⁵ review ethical opinions interpreting and clarifying the rules,²⁶ and even obtain anonymous advice in the face of a potential conflict.²⁷ Colorado, for example, provides a number of readily available reference materials.²⁸ The ins and outs of when operators in different jurisdictions must obtain outside counsel can be particularly complex. An operator headquartered in one state or having operations in many states may believe it is enough to have local counsel of record retained for the agency proceedings involving the NOV described above. However, there are instances where a favored attorney, such as an expert on flowback water issues, resides outside of the jurisdiction (the Commonwealth of Pennsylvania in our hypothetical) and should be considered and retained before the tribunal.²⁹

Management of flowback fluid has become a major part of the shale gas controversy, from the treatment, recycling, and discharge of the fluid to spill prevention and response.³⁰ It follows that any attorney representing an operator should make every effort to stay current with the relevant substantive state laws, but also the Model Rule's professional ethics guidance in responding to a situation similar to the spill described above.

22. AMERICAN BAR ASSOCIATION, ABA MISSION AND GOALS (2016), http://www.americanbar.org/about_the_aba/ana-mission-goals.html.

23. *State Adoption of the ABA Model Rules of Professional Conduct*, American Bar Association, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.

24. NATIONAL CONFERENCE OF BAR EXAMINERS, JURISDICTIONS REQUIRING THE MPRE (2016), http://www.americanbar.org/about_the_aba/ana-mission-goals.html.

25. *See, e.g.*, Colorado Rules of Civil Procedure, Appendix to Chapters 18 to 20, The Colorado Rules of Professional Conduct (2016), <https://www.cobar.org/index.cfm/ID/22119/CETH/Colorado-Rules-of-Professional-Conduct/>.

26. *See, e.g.*, Formal Ethics Opinions, A joint Project of the Colorado Bar Association Ethics Committee and Continuing Legal Education in Colorado, Inc., <http://www.cobar.org/index.cfm/ID/22342/CETH/Formal-Ethics-Opinion-Subject-Index/>.

27. *See, e.g.*, Ethics Hotline, Colorado Bar Association Ethics Committee, <https://www.cobar.org/index.cfm/ID/383/CETH/Ethics-Hotline/Calling-Committee/>.

28. *See* Robert M. Linz, *Colorado Legal Ethics: Guide to Resources*, 39 COLO. LAW. 109 (Aug. 2010).

29. Model Rules of Prof'l Conduct r. 5.5 (Am. Bar Ass'n 1983) (explaining that a lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. However, a lawyer may be admitted to practice law in another jurisdiction by court rule or order or by law to practice for a limited purpose or on a restricted basis, e.g. appearing as counsel in a proceeding *pro hac vice*).

30. CHARLES G. GROAT & THOMAS W. GRIMSHAW, THE ENERGY INST. UNIV. OF TEX. AT AUSTIN, FACT-BASED REGULATION FOR ENVIRONMENTAL PROTECTION IN SHALE GAS DEVELOPMENTS (2012), http://heartland.org/sites/default/files/texas_fracking_study_feb_2012.pdf (finding that for the nation as a whole, the attitudes in newspapers, broadcast media, and online news sources were uniformly about two-thirds negative, with 25% or less referencing scientific research).

III. ETHICAL DUTIES OF LEGAL COUNSEL

A. LAWYER'S RELATIONSHIP WITH AND DUTIES TO OPERATOR

1. Competence

First and foremost, a lawyer has certain duties to her client, the Operator. Rule 1.1 speaks to a lawyer's competence: A lawyer shall provide competent representation—the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.³¹ Subject to limited exceptions, under Rule 1.2, a lawyer must abide by the client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the method by which objectives are to be pursued. In other words, a lawyer may only take actions on behalf of the client that he is authorized to carry out in the course of representation.³² A lawyer representing the Operator must be familiar with the type of operations at hand and be prepared to advise her client regarding the public response to the hypothetical spill. Ultimately, however, the decision on how to respond to the PADEP, perform required remediation, and coordinate with co-working interest owners and subcontractors, belongs to the client.

While a lawyer cannot counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent, a lawyer may discuss the legal consequences of any proposed course of conduct with a client.³³ Direct participation in a criminal scheme may result in a criminal charge or conviction for the lawyer.³⁴ A notorious environmental example is *People v. InFerGene Co., Inc.*, in which a California biotechnology company filed for bankruptcy.³⁵ After being evicted by its landlord, the company abandoned containers containing radioactive waste. This abandonment occurred because an associate at the corporation's law firm believed that removal of the materials would constitute a pre-petition claim under the Bankruptcy Code. The associate wrote to the landlord stating that the company would not remove the waste.

The District Attorney's office filed felony charges against the law firm and the associate.³⁶ The District Attorney based the charges on an assertion that the letter effectuated an abandonment of hazardous waste, which equated to an illegal disposal, thereby violating the environmental laws. Stating that the attorneys knew or should have known that they were causing hazardous waste to be disposed, the prosecutor emphasized that attorneys advising clients to violate

31. Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 1983).

32. See Model Rules of Prof'l Conduct r. 1.2, 1.4 (Am. Bar Ass'n 1983).

33. VINCE FARHAT & CALON RUSSELL, "HOUSTON, WE HAVE A PROBLEM": CLIENTS WHO ENGAGE IN UNLAWFUL CONDUCT DURING YOUR REPRESENTATION (2016), http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_newsletter_unlawful_conduct_authcheckdam.pdf; see, e.g., *Attorney Grievance Comm'n of MD v. Coppola*, 19 A.3d 431, 442 (Md. 2011) (explaining disbarment was an appropriate sanction for attorney who engaged in misconduct involving dishonesty by assisting the children of an incompetent person in the execution and recording of forged and fraudulent documents).

34. Model Rules of Prof'l Conduct r. 8.4 (Am. Bar Ass'n 1983).

35. See generally Scott L. Olson, *The Potential Liabilities Faced By In-House Counsel*, 7 U. Miami Bus. L. Rev. 1, 38 (1998).

36. *Id.*

environmental laws will be prosecuted. Although a municipal court judge twice dismissed the charges against the law firm,³⁷ the case provides an indication of the potential liability that counsel may face for environmental crimes executed in representation of the client.

2. Duty to Investigate, Meritorious Claims and Defenses

A spill can involve several parties, each with a role in how the incident occurred. Of primary importance for the lawyer is adequate investigation into the facts surrounding the incident. Germane facts may be hard to pin down, for example, when distinguishing between the statements of the FracCo employee sprayed with the flowback water (concerned for his personal health and safety) and the operator's onsite man, who has a different perspective (and may want to minimize the consequences). The proper collection and recording of the facts surrounding the incident is an obvious requirement in "competently" representing one's client.³⁸ Further, in interactions and communications with the client, Rule 1.3 requires that a lawyer shall act with reasonable diligence and promptness. Rule 1.4 more specifically covers communications with the client. Under Rule 1.4, a lawyer has the obligation to:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . ;
- (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.³⁹

Each of these requirements can be a land mine if the lawyer's factual investigation is inadequate. Counsel will need frequent communication with its operator-client to ensure compliance with the five obligations of Rule 1.4. A lawyer must communicate a matter to the extent reasonably necessary to permit the client to make informed decisions.⁴⁰

37. Scott L. Olson, *The Potential Liabilities Faced by in-House Counsel*, 7 U. Miami Bus. L. Rev. 1, 38 (1998); see Marianne Lavelle, *Judge Drops Charges Against S.F. Law Firm*, Nat'l L.J., Apr. 6, 1992, at 15.

38. Mod. Rules Prof. Conduct r. 3.1 (Am. Bar Ass'n 1983) (explaining that due diligence is a fundamental duty of the practice of law and required by Rule 3.1, which states 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).

39. Mod. Rules Prof. Conduct r. 1.4.

40. *Id.*

3. Confidentiality

The question remains of how to treat communications between the operator and subcontractor, both of whom will be working quickly to control the spill and limit any residual impacts. They will also be concerned about liability and indemnity for any legal action by the injured FracCo worker or claims for damages to property under the Master Services Agreement between them. Generally, under Rule 1.6 of the Model Rules, a lawyer shall not reveal information relating to the representation of a client, and shall make efforts to not inadvertently disclose information related to the representation, unless (i) the client gives informed consent, (ii) the disclosure is impliedly authorized in order to carry out the representation, or (iii) the disclosure is permitted as one of the listed exceptions to the rule.⁴¹ Confidentiality is a fundamental requirement that is lifted only in the most extreme circumstances.⁴²

In the flowback spill hypothetical, information obtained through a client will likely not meet one of the seven enumerated exceptions to Rule 1.6.⁴³ And absent extraordinary circumstances, such as criminal conduct, the confidentiality requirement is a bright-line mandatory rule: no disclosure related to the attorney-client communication is permissible.⁴⁴ However, that confidentiality (which may go to legal strategies, defenses and the like between client and its counsel) does not extend to investigation of the facts, which in our scenario likely means that statements from individuals present during the incident and the results of inspections and testing of equipment involved in the incident may be shared amongst counsel to each party, even prior to the discovery process of any lawsuits filed.⁴⁵ It should also be noted that in the confusion immediately surrounding the incident, both the operator's and contractor's environmental health and safety team, as well as other personnel, will be communicating fre-

41. Mod. Rules Prof. Conduct r. 1.6 (explaining that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary as exceptions to Rule 1.6:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.)

42. David S. Krakoff & Susan H. Ephron, *The Ethics Of Disclosure In The Environmental Arena*, ALI/ABA Criminal Enforcement of Environmental Laws (Oct. 20, 1994).

43. See Mod. Rules of Prof. Conduct r. 1.6.

44. *Id.*

45. Mod. Rules Prof. Conduct r. 1.6 cmt.

quently. Creating a framework for communications so that the necessary managers and counsel are informed, while attorney-client privilege remains intact as to each involved party, goes a long way towards fulfilling counsel's duty to her client.

4. Advisor

Finally, with respect to the lawyer's relationship with the client, Rule 2.1 is important because it explains the lawyer's role as an advisor.⁴⁶ In all client representations, a lawyer shall exercise independent professional judgment and render candid advice. Advice from a lawyer is not restricted to the law and may include other considerations such as moral, economic, social and political factors relevant to the client's situation.⁴⁷ Counsel to a hydraulic fracturing operator has a responsibility to be apprised of these external considerations in rendering advice related to the spill.

B. REPRESENTATION BEFORE AGENCY ON NOV

1. Candor to the Tribunal

An important Rule for counsel to keep in mind is Candor to the Tribunal, Rule 3.3. Under this Rule 3.3(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.

Similarly, under 3.3(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, if necessary, disclose such conduct to the tribunal. These duties imposed by Rule 3.3 continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.⁴⁸

For counsel to the Operator as well as counsel representing the agency or other interested parties, this Rule sets forth the special duties of lawyers as officers of the court to avoid any conduct that might undermine the integrity of the adjudicative process. Per the Rule, a lawyer acting as an advocate for the Operator or any other represented party in an adjudicative proceeding before

46. See Mod. Rules Prof. Conduct r. 2.1.

47. *Id.*

48. Mod. Rules Prof. Conduct r. 3.3.

the PADEP on a notice of violation has an obligation to present the client's case with persuasive force.⁴⁹ However, performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.⁵⁰ As such, although a lawyer in this adversary proceeding is not required to present an impartial position on 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, fact, or evidence that the lawyer knows to be false.⁵¹

2. Fairness to Opposing Party and Counsel

Similar to counsel's duties under Rule 3.3, Rule 3.4 seeks to protect the integrity of the judicial and adversary system. Rule 3.4 acknowledges that the procedure of the adversary system contemplates that the evidence in a case is to be positioned competitively by the contending parties.⁵² Fairness in the adversary system is secured by the Rule 3.4 prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and any other similar behavior.⁵³ This rule includes a prohibition against frivolous discovery requests on pretrial procedure and failure to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.⁵⁴ During representation, Rule 3.4 bars counsel from alluding 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 or the credibility of the witness.⁵⁵

In terms of the hypothetical posed, Rule 3.4 allows for counsel to present evidence that supports the zealous representation of the client. It does not, however, condone the use of unsubstantiated evidence.⁵⁶

3. Impartiality and Decorum

With respect to impartiality and decorum under Rule 3.5, a lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law.⁵⁷ Likewise, during a proceeding, a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.⁵⁸

Under this Rule, any conduct intended to disrupt a tribunal is prohibited.⁵⁹ This means that counsel to the Operator or other parties cannot seek to communicate with the PADEP in regard to the agency decision-makers evaluating the NOV. Any appearance of impropriety is frowned upon and the best way

49. *See id.*

50. *Id.*

51. *Id.*

52. Mod. Rules Prof. Conduct r. 3.4.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Mod. Rules Prof. Conduct r. 3.5.

58. *Id.*

59. *Id.*

for counsel to avoid even the suggestion that it has violated Rule 3.5 is to not attempt to communicate with any persons serving in an official capacity as part of the proceeding.

4. Truthfulness

In exchanges with other interested parties, Rule 4.1 mandates a lawyer's duty to remain truthful. As such, in the course of representing a client, a lawyer shall not knowingly make false statements of material fact or law or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client (unless disclosure is prohibited by Rule 1.6).⁶⁰ The essence of this rule is to authorize conduct that is in accordance with generally accepted conventions in negotiations and formulating agreements, such as good faith and fair dealing, while simultaneously prohibiting flat out lies and untruths.⁶¹ Misstatements may undermine a relationship that is formed between the operator and working-interest owners, subcontractors, or regulatory bodies. It is especially important for the lawyer not to be perceived as untrustworthy in a flowback spill situation that will require cooperation by all to resolve and conduct the necessary remediation. Unfortunately, a perception of dishonesty may arise from an innocent misstatement, but it is much worse for a lawyer to invite such a negative perception by deliberately lying or withholding key information. This rule speaks for itself and is fundamentally important to the legal process.

5. Communications with Person Represented by Counsel

With respect to the PADEP agency proceedings on their NOV, it is likely that the agency is represented by either in-house or outside counsel. The Model Rules speak to situations where a lawyer needs to communicate with persons represented by counsel in Rule 4.2.⁶² In representing a client, a lawyer shall not communicate about the subject of the representation with anyone the lawyer knows to be represented by a lawyer, unless the lawyer has the consent of the other lawyer.⁶³ On its face, this no-contact rule appears to protect represented administrative agency personnel from contacts by opposing counsel when counsel for the agency has not consented to contact. The as "authorized by law"⁶⁴ language of Rule 4.2 includes the constitutional right to petition the government for redress of grievances and the policy of ensuring a citizen's right of access to the government.⁶⁵ Thus, in general, a lawyer may communicate with regulatory agencies and other government officials without having to request consent from counsel to the government. However, courts, the ABA, state bar associations,

60. Mod. Rules of Prof. Conduct r. 4.1.

61. *See id.*

62. Mod. Rules of Prof. Conduct r. 4.3.

63. *See id.*

64. Mod. Rules of Prof. Conduct r. 4.2. (stating that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer *or is authorized to do so by law or a court order*;) (emphasis added).

65. John M. Burman, *The Anti-Contact Rule and Communications with Government Entities*, 24 Wyo. Law. 14 (Feb. 2001)

and the American Law Institute differ on the application of the rule in the administrative context.⁶⁶ Before communications with any agency official, the lawyer for the Operator should familiarize herself with the interpretations of the rule in the jurisdiction in which she is practicing and exercise caution in contacting a government agency on behalf of the client. Communication with private groups such as the co-working interest owners and subcontractor is more strictly limited by the rule because no “authorized by law” exception applies. If a spill of hydraulic flowback water occurs, it would be prudent for counsel to seek consent from the other counsel before discussing the spill with any of the represented parties. An attorney is always permitted to contact an individual upon the consent of counsel.⁶⁷

C. ETHICAL OBLIGATIONS TO OTHER INTERESTED PARTIES

As we have seen, under the Model Rules, a lawyer’s ethical obligations extend beyond the client. In our hypothetical flowback spill, the lawyer will have to work with various interested parties, including surface owners, co-working interest owners, insurance company adjustors and contractors—all within the ethical guidelines of the Model Rules.

1. Confidentiality of Information Related to the Client’s Issue

In certain circumstances, Rule 2.3 allows a lawyer’s report or evaluation for the client to be shared with someone other than the client as an exception to the disclosure protections of Rule 1.6.⁶⁸ For example, a lawyer may provide a legal evaluation of the spill (such as for insurance purposes) at the client’s request. Otherwise, the lawyer cannot freely share her evaluation; when the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely.⁶⁹ In that circumstance, the lawyer shall not provide the evaluation unless the client gives informed consent. Often such evaluations are prepared under the rubric of an attorney work-product.⁷⁰ A Rule 2.3 disclosure is exclusively authorized in connection with the client’s consent of counsel sharing a report or evaluation. All other attorney-client information relating to the evaluation or other communications is otherwise protected by confidentiality under Rule 1.6.

2. Fairness

For unrepresented persons (such as the surface owner or potentially the subcontractor), the Model Rules provide guidance under Rule 4.3. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested in the issue.⁷¹ Further,

66. See J.B. Ruhl, *Legal Ethics When Advocacy Involves the Government—Can We Talk?*, 44 Rocky Mt. Min. L. Inst. (1998).

67. See Mod. Rules Prof. Conduct r. 4.2.

68. Mod. Rules of Prof. Conduct r. 2.3.

69. Mod. Rules of Prof. Conduct r. 2.3 cmt.

70. The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts.

71. Mod. Rules of Prof. Conduct r. 4.3.

when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.⁷² Importantly, the lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.⁷³ Essentially, counsel should give equal respect and concern, without providing legal advice, to an unrepresented party involved in the flowback water spill hypothetical. Respectful treatment of unrepresented persons in managing the spill response is not simply an ethical obligation but also an effort that will prevent delays or other issues and help facilitate an agreeable resolution amongst all parties involved, including unrepresented individuals.

Though a lawyer should put the interests of her client above others, the lawyer must nonetheless be attentive to and respectful of the rights of third persons. Undoubtedly, the flowback spill scenario will result in competing interests and opposing desired outcomes. Rule 4.4 explains that in the process of representing the client's interests a lawyer shall not take any action that lacks substantial purpose other than to embarrass, delay, or burden a third person.⁷⁴ Model Rule 4.4 aims to prevent unscrupulous lawyers from derailing agency proceedings or other lawsuits by obfuscation or other misconduct relating to the facts at issue. In obtaining evidence, a lawyer shall not use methods that violate the legal rights of a third person.⁷⁵ Rule 4.4 also speaks to the inadvertent sharing of electronic documents, an all too common reality in the digital age.⁷⁶ Under the rule, a lawyer for any of the involved parties, whether it's the PADEP, Operator, or any other party, must promptly notify the sender if she receives a document or electronically stored information relating to the representation of the lawyer's client and she knows or reasonably should know that the sender inadvertently shared the message.

IV. ETHICAL RESPONSE TO POST-SPILL NEGATIVE MEDIA COVERAGE

The recent boom in shale gas, particularly in major population centers, has resulted in significant media attention on the hydraulic fracturing process and elevated concerns that the process negatively impacts water quality.⁷⁷ Incidents such as the hypothetical spill can bring unexpected issues if, or more realistically, *when*, the media gets involved. Lawyers should be keenly aware of possible negative media coverage and the impact that it can have on the client.⁷⁸ Industry must effectively address the social and environmental concerns

72. *Id.*

73. *Id.*

74. Mod. Rules of Prof. Conduct r. 4.4.

75. *Id.*

76. *Id.*

77. Examples include the Oscar-nominated documentary following claims of frac-related groundwater contamination, *Gasland*, and a *New York Times* series of op-ed pieces addressing natural gas production and hydraulic fracturing. See *Gasland*, <http://www.hbo.com/documentaries/gasland>; see also *Drilling Down Series*, http://www.nytimes.com/interactive/us/DRILLING_DOWN_SERIES.html?_r=0.

78. CHARLES G. GROAT & THOMAS W. GRIMSHAW, THE ENERGY INST. UNIV. OF TEX. AT AUSTIN, FACT-BASED REGULATION FOR ENVIRONMENTAL PROTECTION IN SHALE GAS

surrounding fracking to gain the social acceptance necessary to operate effectively and profitably.⁷⁹

Negative coverage is no longer restricted to traditional media outlets. Any individual or organization may have a captive audience online. Blog posts and social media comments often focus on tales of woe but regularly fail to state facts and cite to legitimate trustworthy sources.⁸⁰ Even early scientific studies and other studies without peer review have promoted findings that were later discredited by scientific scrutiny identifying fundamental flaws.⁸¹

In its haste to raise doubts and questions about shale development, the media often overlooks the fact that science and engineering are at the core of developing oil and natural gas.⁸² Decades of applied science and empirical research—from both inside and outside industry—have shown that the risks associated with oil and natural gas development are manageable by constantly updated industry standards and an overlapping network of local, state, and federal rules.⁸³ Improperly addressed, these concerns threaten to curb the development of unconventional resources.⁸⁴

Not all media is bad news, however. A 2013 flowback water spill in Colorado presents an example of industry working with the state commission, local community, and news outlets to show its respectable efforts to work with all parties involved.⁸⁵ After a 30-hour, 84,000-gallon fracking flowback fluid spill, PDC Energy offered to go above and beyond an otherwise minor fine by entering into an administrative order by consent. PDC Energy formally agreed to pay \$35,000 in response to the spill, despite the fact that soil tests and ground-water samples indicated there was little to no contamination, according to the company's incident report filed with the Colorado Oil and Gas Conservation Commission ("COGCC").

In response, the COGCC director noted: "PDC's response was exemplary. It presented for the staff a very interesting, unusual and challenging enforcement proposition. They could have fought this. They probably would have won.

DEVELOPMENTS (2012), http://heartland.org/sites/default/files/texas_fracking_study_feb_2012-.pdf (finding that for the nation as a whole, the attitudes in newspapers, broadcast media, and online news sources were uniformly about two-thirds negative, though only 33% or less referenced scientific research).

79. See INT'L ENERGY AGENCY, *GOLDEN RULES FOR A GOLDEN AGE OF GAS: WORLD ENERGY OUTLOOK SPECIAL REPORT ON UNCONVENTIONAL GAS* (2012), http://www.worldenergyoutlook.org/media/weowebbsite/2012/goldenrules/weo2012_goldenrulesreport.pdf.

80. See, e.g., Walter Tsou, MD, MPH, *The Big Secret? Fracking Fluids*, PHYSICIANS FOR SOCIAL RESPONSIBILITY (June 18, 2012), <http://www.psr.org/environment-and-health/environmental-health-policy-institute/responses/the-big-secret-fracking-fluids.html>.

81. See, e.g., Steve Everly, *Jumping the Gun: How the Media Rushes to Promote Fracking Critics* (Sept. 11, 2014), <http://energyindepth.org/national/jumping-gun-media-promotes-fracking-critics/>.

82. Vanessa Klass, *What's the Big Fracking Deal?*, 42 W. St. L. Rev. 159, 166 (2015).

83. Steve Everly, *How Anti-Fracking Activists Deny Science: Water Contamination*, ENERGY IN DEPTH (Aug. 13, 2016), <http://energyindepth.org/national/how-anti-fracking-activists-deny-science-water-contamination/>.

84. See GOLDEN RULES, *supra* note 79, at 9-10.

85. Jason Pohl, *PDC Energy to pay \$35,000 for February Fracking Fluid Spill*, THE TRIBUNE (June 17, 2003), <http://www.greeleytribune.com/news/6965826-113/pdc-commission-crews-enforcement#>.

But they understand that's not the best thing for the industry to do, and I appreciate that very much.⁸⁶

Another media source is the increasingly popular documentary films. Although few studies have investigated the effect of documentaries on collective behaviors and social movement campaigns, one new study uses the internet and social media to show how a documentary film systematically reshaped public perception and ultimately led to municipal bans on hydraulic fracking.⁸⁷ Negative public sentiment about hydraulic fracking is more readily apparent in online activity and social media chatter because traditional newspapers typically face heightened obligations to show both sides of an issue. It is important that counsel to the industry organizations is aware of the perceptions and that she actively presents a positive image.

Model Rule 3.6 speaks to media-related issues. Although the rule refers to trial publicity issues, it also serves as analogous guidance for any media related issue a lawyer might encounter in the course of representing the client. The rule allows a lawyer to make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. But, such a statement shall be limited to such information as is necessary to mitigate recent adverse publicity.

The following ten helpful tips, borrowed from an ABA article on "Avoiding Ethical Lapses When Using Social Media," can assist a lawyer in determining whether her media and social media activities are ethical based on the Model Rules and various State Ethics Opinions:⁸⁸

1. Social media profiles and posts may constitute legal advertising;
2. Avoid making false or misleading statements;
3. Avoid making prohibited solicitations;
4. Do not disclose privileged or confidential information;
5. Do not assume you can "friend" judges;
6. Avoid communications with represented parties;
7. Be cautious when communicating with unrepresented third parties;
8. Beware of inadvertently creating attorney-client relationships;
9. Beware of potential unauthorized practice violations;
10. Tread cautiously with testimonials, endorsements, and ratings.

While not all ten tips apply to the flowback spill hypothetical, each tip presents a thoughtful recommendation on navigating legal issues in the era of increased media, particularly social media. Along with the ABA, various states have considered how the model ethics rules apply to a lawyer's online activities.

86. *Id.* (quoting COGCC Director Matt Lepore).

87. ION BOGDAN VASI ET AL., STUDY USES INTERNET, SOCIAL MEDIA TO SHOW HOW FRACKING DOCUMENTARY INFLUENCED PUBLIC PERCEPTION, POLITICAL CHANGE (2015), <http://journals.sagepub.com/doi/pdf/10.1177/0003122415598534>.

88. Christina Vassiliou Harvey et al., *10 Tips for Avoiding Ethical Lapses When Using Social Media*, AMERICAN BAR ASSOCIATION BUSINESS LAW TODAY (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/03_harvey.html.

In fact, the New York State Bar Association has published a “Social Media Ethics Guideline” specifically explaining guiding principles predicated upon the New York Rules of Professional Conduct and ethics opinions interpreting the state rules.⁸⁹

The takeaway for counsel to a hydraulic fracturing operation is not to avoid use of social media and other means of communication. Despite the risks associated with using social media as a legal professional, technology brings opportunities to the legal profession to promote greater understanding, foster community, and educate the public about the legal issues and governing law related to hydraulic fracturing. Media reporting will surely be an element of a flowback fluid release response, and counsel will need a plan to guide the message or be able to answer with a comprehensive picture of the situation.

V. CONCLUSION

Flowback water spills can lead to regulatory issues, protests from local communities, or other problems that can create operational disruptions that increase costs and lower revenues. These impacts alone should drive counsel to react swiftly. The industry and relevant regulating bodies must work together to ensure the continued safety and health of citizens and that state economies can continue to improve as hydraulic fracturing secures the energy future. The ABA Model Rules of Professional Conduct apply to an attorney’s decisions and actions surrounding hydraulic fracturing spill issues and provide comprehensive guidance on what constitutes ethical action in counsel’s response.

The Model Rules are act-centered, and it is exceedingly important to adhere to the rules closely given the constant scrutiny of industry. Model Rule 8.4 captures general behavior lawyers should know to avoid.⁹⁰ It is misconduct to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

89. Social Media Ethics and Guidelines of the commercial and federal litigation section of the New York State Bar Association (June 9, 2015), https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

90. Mod. Rule Prof. Conduct r. 8.4.

(g) 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.

To state it simply, lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.⁹¹ In addition to considering the general information in this article, lawyers should be aware of ethics rules and ethics opinions adopted by the specific jurisdictions in which they are licensed. The ABA Model Rules, along with State Rules of Ethics, may not provide ethical guidance for every situation, thereby leaving a decision to personal ethics. In that case, a lawyer should act cautiously and tread lightly.

91. *Id.*