Futures Industry Association
Law & Compliance Conference
National Harbor, Maryland
April 16, 2026

Ethical Considerations for Derivatives Attorneys Negotiating Terms for Corporate and Derivatives Transactions

By Katherine Cooper*

The fast pace of legal and regulatory developments surrounding digital assets and prediction markets have led to a significant increase in merger and acquisition activity as market participants and investors attempt to position themselves to capitalize on these seismic shifts. At the same time, multiple wars and severe weather events caused by climate change have caused significant supply disruptions leading to a surge in volatility in commodity prices. The resulting "black swan" events have tested, and will continue to test, the contractual terms governing derivative instruments worth trillions of dollars in notional at risk.

We discuss below, some of the legal ethics considerations that derivatives attorneys may need to keep front of mind when engaged by clients to advise them on (i) corporate transactions involving regulated entities or (ii) transaction terms for derivatives trading in this environment. For purposes of our panel discussion and this paper, we will focus on the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules" or "MR") and the versions of the Model Rules as adopted by the District of Columbia, Illinois, New York and Virginia.

Competence

When asked to advise a client considering a corporate transaction involving a derivatives market registrant or a client looking to negotiate the terms of a master agreement to govern future derivatives transactions, a threshold question lawyers should consider is whether they are competent to provide the requested advice. ABA Model Rule 1.1 states:

---

* Katherine Cooper is the Founding Member of Cooper Law PLLC where she advises clients on legal and regulatory issues arising from the trading of commodities, derivatives, futures, securities and digital assets. Katherine also represents clients in related investigations, disciplinary proceedings, enforcement actions and prosecutions. She frequently comments on these issues and her blogs are available at www.cooperlawpllc.com. Katherine is admitted to the New York bar and is an inactive member of the bars of the District of Columbia and Virginia. She is also admitted to the Law Society of Ireland's Roll of Solicitors.

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

Of course, the ABA's Model Rules do not have the force of law, but they have been widely adopted, sometimes with significant variation, by state bar regulatory authorities. In the case of Rule 1.1, both Illinois and Virginia have adopted Model Rule 1.1 as drafted.[1] New York has adopted Model Rule 1.1 as drafted as subsection (a) while adding the following additional subsections:

> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
>
> (c) A lawyer shall not intentionally:
>
> (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
>
> (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.[2]

Subsection (b) of New York's version of Rule 1.1 simply makes explicit what MR 1.1 implies: that a lawyer should not handle a legal matter that the lawyer is not competent to handle. It adds, though, a potential solution to a situation where the lawyer is not competent to handle a matter, which is to associate with a lawyer who is competent.[3] Subsection (c) of New York Rule 1.1 overlaps with MR 1.3 "Diligence" which provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." While overlapping with MR 1.3, NY Rule 1.1(c) places an affirmative obligation on a lawyer not to intentionally fail to seek a client's objectives through reasonably available, legal means.

The District of Columbia, similar to New York, has adopted Model Rule 1.1's language as a subsection (a) and added the following as a subsection (b):

> A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.[4]

---

[1] ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct RULE 1.1: COMPETENCE* (July 12, 2021) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-1.pdf.
[2] *Id*. at 4.
[3] Associating with another lawyer who is not associated with the same firm does require consideration of the requirements of MRs 1.2 1.5(e).
[4] *Variations on Rule 1.1* at 2.

In contrast to New York's Rule 1.1(c) which states that a lawyer cannot intentionally fail to seek a client's objective, DC's Rule 1.1(b) really restates one of the elements of an attorney malpractice claim in the District: "a lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances."[5] Like New York's Rule 1.1(c), however, it reflects a recognition that competence is not simply possessing the requisite legal knowledge and skills but also encompasses the manner in which those skills are applied in practice.[6] A knowledgeable lawyer does not provide competent representation if the lawyer does not act with diligence in the course of the representation.

In determining whether a lawyer has requisite knowledge and skill to provide competent representation, the Comments to the Model Rules[7] explain that a lawyer can consider in addition to the lawyer's training and experience in the field in question "the preparation and study the lawyer is able to give the matter."[8] The comments add that:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study.[9]

Comment 5 discussing "Thoroughness and Preparation" notes that

> complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.[10]

Corporate transactions involving the sale of interests in regulated entities and the negotiation of swap master agreements most likely fit the description of "complex transactions." Moreover, they are very likely to involve sophisticated parties with significant legal teams, including both inhouse

---

[5] *Crawford v. Katz*, 32 A.2d 418, 427 (D.C. Ct. App. 2011).
[6] *See In re Johnson*, 298 A.3rd 294, 311 (D.C. Ct. App. 2023).
[7] Based in substantial part on the ABA Model Rules of Professional Conduct, the New York Rules of Professional Conduct have been adopted by the Appellate Division of the New York State Supreme Court and are published as Part 1200 of the Joint Rules of the Appellate Division, 22 N.Y.C.R.R. Part 1200. However, the Appellate Division did not adopt the Preamble, the Scope or the Comments to the ABA Model Rules of Professional Conduct. *NYSBA NY Rules of Professional Conduct* ii (2025) available at https://nycourts.gov/ad3/agc/rules/22NYCRR-Part-1200.pdf
[8] ABA MR 1.1 Comment 1.
[9] *Id.* Comment 2.
[10] ABA MR 1.1 Comment 5.

counsel as well as outside counsel, so that any particular lawyer or law firm may only be responsible for a subset of the overall advice that needs to be given.

Allocation of Authority Between Client and Lawyer and
Between Multiple Lawyers or Law Firms

Model Rule 1.2 addresses the allocation of responsibility between client and lawyer. Subsection (a) sets as a general rule that it is the client that determines "the objectives of [the] representation" and a lawyer must "consult with the client as to the means by which they are to be pursued." Subsection (c) provides that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." With regard to these provisions of MR 1.2, the versions adopted by the District of Columbia, Illinois, New York and Virginia are not materially different.[11] Comment 6A to MR 1.2 provides that "[i]n obtaining consent from the client [to limit the representation], the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded."[12] Although in the case of the sophisticated parties likely to be involved in a corporate transaction involving regulated entities or those negotiating swap trading agreements this guidance may seem unnecessary, it is likely a good practice for the lawyer to confirm in an email what the lawyer understands to be the scope of the lawyer's representation, and in some cases, what is not in scope.

Diligence or Zeal (at least in DC)

Related to competence as mentioned above, the Model Rules require a lawyer to act with diligence in the representation of a client. Simple and to the point, Model Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."[13] Model Rule 1.3 replaces the older Canon 7 of Professional Responsibility's directive that a lawyer should represent a client "zealously within the bounds of the law." Dropping the concept of zealousness – even with the limitation of "within the bounds of the law" – was based on the concern that it may have led some lawyers to disregard their loyalty to the integrity of the justice system, candor to tribunals, and grant the client undue authority over decision making in the course of the representation.[14]

---

[11] *See* ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER* (Mar. 25, 2024) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-2.pdf

[12] ABA MR 1.2 Comment 6A.

[13] ABA MR 1.3.

[14] *See* B. Rudin & B. Hutchings, *Zealous Advocacy: A Doctrine Whose Time Has Passed?* (NYSBA Aug. 20, 2024) available at https://nysba.org/zealous-advocacy-a-doctrine-whose-time-has-passed/?srsltid=AfmBOop20yGUy5D3VVso4mYn_2YNE7o4Hznyq0DmyGMRkU4ZOudkImSO

Illinois has adopted MR 1.3 as drafted.[15] New York's version includes the language from MR 1.3 as subsection (a) and then adds two further subsections to read as follows:

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
>
> (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.[16]

Similar to New York, Virginia's version of Rule 1.3 states:

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
>
> (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.[17]

The District of Columbia was reluctant to part with the concept of zeal entirely. Its Rule 1.3 provides:

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
>
> (b) A lawyer shall not intentionally:
>
> > (1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
> >
> > (2) Prejudice or damage a client during the course of the professional relationship.
>
> (c) A lawyer shall act with reasonable promptness in representing a client.[18]

In explaining what zealous representation requires, the D.C. Board of Professional Responsibility has pointed to Comment 1 that a lawyer "pursue a matter on behalf of a client despite opposition,

---

[15] ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct RULE 1.3: DILIGENCE* (Nov. 18, 2022) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-3.pdf

[16] *Id.* at 3.

[17] *Id.* at 4.

[18] *Id.* at 2-3.

obstruction, or personal inconvenience to the lawyer."[19] In terms of disciplinary cases, it seems the concept of zeal as used in D.C. Rule 1.3 is raised largely contexts of neglect., which is important to keep in mind when we consider the duty of truthfulness below.[20]

Although the Model Rules dropped any reference to zeal in the text of the rules, it is referenced in Comment 1 to Rule 1.3 which says that a lawyer should:

> take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and ***with zeal in advocacy upon the client's behalf***.[21]

In line with deemphasizing zealousness, Comment 1's next sentence explains that a "lawyer is not bound, however, to press for every advantage that might be realized for a client."[22]

<u>Attorney-Client Privilege and Confidentiality</u>

Model Rule 1.6 is entitled *Confidentiality of Information*. Its subsection (a) provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." In the context of a lawyer advising on a corporate transaction or swaps agreement, the relevant circumstances under which a lawyer is allowed to reveal information relating to the representation of a client are:

> (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;
>
> . . .
>
> (6) to comply with other law or a court order . . . .[23]

---

[19] *In re Wright*, 702 A.2d 1251, 1255 (D.C. Ct. App. 1997).
[20] *See*, *e.g.*, *In re Glass*, 318 A.3d 331 (D.C. Ct. App. 2024); *In re Young*, 316 A.3d 884 (D.C. Ct. App. 2024); *In re Johnson*, 298 A.3d 294 (D.C. Ct. App. 2023); *In re Askew*, 225 A.2d 388 (D.C. Ct. App. 2020); *In re Ekekwe-Kaufman*, 210 A.3d 775 (D.C. Ct. App.2019); *In re Dickens*, 174 A.3d 283 (D.C. Ct. App. 2017).
[21] MR 1.3 Comment 1 (emphasis added).
[22] *Id.*
[23] ABA Model Rule 1.6(b)(2), (3) & (6).

The District of Columbia, Illinois, New York and Virginia have each adopted Rule 1.6 with significant variations.[24] But D.C., Illinois and New York grant lawyers discretion to disclose client confidences to prevent a client from committing a fraud reasonably certain to result in substantial injury to the finance interests of another person if the lawyer's services are being used.[25] Virginia Rule 1.6(b)(3) provides:

> To the extent a lawyer reasonably believes necessary, the lawyer may reveal . . . such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation . . . .[26]

All four grant lawyers the discretion to reveal confidential information to comply with law or a court order.[27]

In addition, New York grants a lawyer discretion to reveal what the rule defines as "Confidential information" to the extent reasonably necessary

> to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.[28]

Under New York Rule 1.6, "Confidential information" includes information protected by the attorney-client privilege, information likely to be embarrassing or detrimental to the client if disclosed or information the client has asked to be kept confidential.[29]

---

[24] See ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 1.6 CONFIDENTIALITY OF INFORMATION* (March 2023) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-6.pdf

[25] D.C. Rule 1.6(d) provides:

> When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> > (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
> > (2) 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 the crime or fraud.

Illinois Rule 1.6(b)(2) & (3); NY Rule 1.6(b)(2)(disclosure to prevent client from committing a crime); Virginia Rule 1.6(b)(3) (allowing disclosure ").

[26] VA Rule 1.6(b)(3).

[27] D.C. Rule 1.6(e)(2)(A) ("when permitted by these rules or required by law or court order"); Illinois Rule 1.6(b)(6); N.Y. Rule 1.6(b)(6) ("when permitted or required under these Rules or to comply with other law or court order"); Virginia Rule 1.6(b)(1).

[28] N.Y. Rule 1.6(b)(3).

[29] N.Y. Rule 1.6(a).

Truthfulness, Zealousness versus Diligence, Duty to Correct and Client Confidences

A lawyer negotiating corporate transaction documents involving regulated entities or the terms of a swap trading master agreement may run into circumstances where the duty of truthfulness, the lawyer's duty to either zealously or diligently represent the client and the lawyer's duty not to disclose the client's confidences come into, if not conflict, at least opposition.

Model Rule 4.1, *Truthfulness in Statements to Others*, provides:

> 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 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.[30]

The District of Columbia and Illinois have adopted MR 4.1 as drafted. New York Rule 4.1 simply states: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."[31] Virginia's adopted Model Rule 4.1 as drafted except it omitted references "to a third party" in both subsections (a) and (b) and in (b) deletes "material" and the language after "client."[32]

Comment 1 introduces a term "misrepresentation" which is not used in Model Rule 4.1 or in any of the four state adoptions. Comment 1 provides:

> 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. As to 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.[33]

---

[30] ABA MR 4.1.
[31] ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS* 3 (Feb. 23, 2022) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-4-1.pdf
[32] *Id.* at 4.
[33] MR 4.1 Comment 1.

Comment 2 to Model Rule 4.1 explains that the rule's truthfulness requirement is limited to statements of fact:

> 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 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; 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.[34]

As noted in Comment 1 to Model Rule 4.1, Model Rule 8.4 entitled *Misconduct* is also relevant. Model Rule 8.4(c) states that "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[35] The District of Columbia, Illinois and New York have adopted Model Rule 8.4(c) as drafted.[36] Virginia's version makes it misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."[37]

Comment 2 to Model Rule 8.4 discusses the concerns regarding the application of the rule which may have motivated Virginia's limiting addition to Model Rule 8.4(c)'s draft language:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.[38]

---

[34] *Id.* Comment 2.
[35] MR 8.4(c).
[36] ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct RULE 8.4:MISCONDUCT* (June 2024) available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf
[37] *Id.* at 28.
[38] MR 8.4 Comment 2.

However, it seems that Virginia is at odds with the ABA drafters whose comment states that offenses involving dishonesty are necessarily of the category of misconduct that rises to the level calling into question a lawyer's fitness to practice law. Virginia, on the other hand, appears to contemplate that there are kinds of dishonesty that do not necessarily call into question a lawyer's fitness to practice law.

As we will discuss during our panel, given the oftentimes bespoke nature of over-the-counter swaps, it is easy to see how misunderstandings of contractual terms may arise. When negotiating the terms of a contract on behalf of a client a lawyer becomes aware that the other party misunderstands the terms of the contract what are the lawyer's ethical obligations. Under Rule 1.3, a lawyer must act diligently on behalf of the client. As explained in Comment 1, this means a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Under Rule 1.6, a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation," or if necessary to prevent the client from committing a crime or fraud.

As set out in the comments to Model Rule 4.1, a lawyer does not generally have an affirmative duty to correct a counterparty's misunderstanding of fact or law. However, incorporating or affirming the counterparty's misstatement may constitute a misrepresentation, which presumably would violate Rule 4.1(a) as well as implicate Rule 8.4(c). Model Rule 4.1(b)'s affirmative duty to disclose a material fact is limited to a situation where to fail to disclose the fact would assist the client in committing a criminal or fraudulent act. And that affirmative duty is further is limited if the disclosure of the material fact is protected by the lawyer's confidentiality duties under Rule 1.6.

Commentators frequently note in the context of Rule 4.1 that New York has not adopted the Comments to the Model Rule.[39] The sole authority that some forms of deception constitute permissible puffery is found in the Comments. The Comments to the New York Rules of Professional Conduct are based on the ABA Model Rule Comments as drafted by the New York State Bar Association. Although New York courts often reference the NYSBA's comments, they are not officially part of the New York Rules.[40] Moreover, in considering a lawyer's responsibilities under New York Rule of Professional Responsibility 4.1, one should note that New York did not adopt Model Rule 4.1(b)'s duty to disclose and corresponding limitation on that duty not to disclose a client confidence in violation of Rule 1.6 does not apply. Moreover, New York Rule 1.6(b)(3) uniquely grants a lawyer ***discretion*** to reveal Confidential information to the extent

---

[39] *See*, *e.g.*, J.S. Johnsen, *Deception, Dissembling, and Dishonesty in Negotiation: Even If You Can, Should You?* (ABA Litigation Section Articles Sept. 30, 2021) available at https://www.americanbar.org/groups/litigation/resources/newsletters/commercial-business/deception-dissembling-dishonesty-negotiations/

[40] *Id.*

reasonably necessary to withdraw a representation based on inaccurate information even where the circumstances do not rise to the level of the commission of a crime or fraud.

The District of Columbia, Illinois and Virginia Rules of Professional Conduct do not include New York's 1.6(b)(3) allowing a lawyer to disclose a confidence to withdraw a previous representation made by the lawyer that was based on materially inaccurate information outside of the context from the commission of a crime or fraud by the lawyer's client. Moreover, under their rules the affirmative duty to disclose under Rule 4.1(b) is only triggered if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. And that duty is limited if disclosure requires revealing a client confidence protected by Rule 1.6 under the District of Columbia and Illinois Rules.[41]

[41] *Cf.* MR 4.1(b) (adopted verbatim by DC and Illinois) *with* VA Rule 4.1(b)("a lawyer shall not knowingly … fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").