George Haley Script for the 10th Circuit Judicial Conference Presentation on the ACTL Code of Trial and Pretrial Compared to the New ABA Model Rules of Professional Responsibility.

TITLE: **WHOSE CALL IS IT.**

Scenario One: Rule 1.2 Scope of Representation and Rule 1.4 Communication vs. ACTL Code of Pretrial Conduct Rule 1(c).

Scene I. Mrs. Betty Smith and Mr. George Haley are meeting following a Rule 26 Attorney Planning Meeting with the opposing counsel William Wanker, where the scope of electronic discovery was discussed. Mrs. Betty Smith is the General Counsel of MegaCorp., and Mr. Haley is General Outside Counsel, who is lead counsel on the case. It is a large, complex commercial dispute.

Mrs. Smith: "I can't believe what a jerk Mr. Wanker is. I have never been so insulted in all my life. All of posturing and telling us how he is going to bring down our company and how I will be working for McDonald's when all of this is through. I have never been so insulted. I don't want you to give those scoundrels any quarter. If they ask for any extensions of time, you just tell them no. They said that they have backup tapes for all their emails, I want you file a request for documents tomorrow asking for all emails that even remotely relate to this case. And, on day 31, I want you to file a motion to compel."

(Scene Changes)

30 Days later

(It's a telephone call.)

Mr. Wanker: "Hello, George?"

Mr. Haley: "Yeah."

Mr. Wanker: "This is Bill Wanker."

Mr. Haley: "Hey Bill, what's going on?"

Mr. Wanker: "My document production is due tomorrow and I haven't had a chance to get it all together, would you mind giving me a 30-day extension of time."

(Pause the Scene)

Do you call the client?

Mr. Haley: "Gee Bill, I've got to call my client and see if it is okay and I will call you back."

Mr. Haley: "Hello Betty?"

(Betty Answers)

Mrs. Smith: "Hey George, how are you?"

George: "Well fine. Hey, as expected, I got a call from Wanker today, he wants a 30-day extension to file his response for our document request.

Mrs. Smith: "George, I told you no extensions. You tell him no and that you're going to file a motion to compel tomorrow."

Mr. Haley: "Um – you know we really haven't had a meet and confer on this yet so I don't think we can. You know, if we say no he will just file a motion for an extension of time with the judge and we will just look like jerks. Um – do we really want to burden the court with a motion that the judge will expect us to work out ourselves, you know ..."

Mrs. Smith: "What about my instructions don't you understand? Do you know how much money MegaCorp pays to your law firm every year? Now I expect you to follow my express demands."

Question: What do you do?

Scene II "If it walks like a duck."

Model Rules of Professional Conduct Rule 1.2 and 1.4 vs. ACTL Rule 4(a) and (b)

(Scene Changes)

(90 Days Later)

Judge Smart: "Mr. Wanker, Mr. Haley here seems unhappy that you have not produced any emails and has filed a motion to compel, asking that I order you to produce all the emails related to this project."

Mr. Wanker: "In our Rule 26 Attorneys Planning Meeting, I met with Mr. Haley and MegaCorp's General Counsel, Mrs. Smith. We all agreed that we would not have to preserve electronic documents and emails and uh, gee, it has been more than 90 days now since that meeting and, according to my company's document destruction policy, all of those emails were automatically deleted so I can't produce them now."

Judge Smart: "Well Mr. Haley?"

Mr. Haley: "I'm sorry, but Mr. Wanker's mistaken. We did not agree that electronic documents and emails didn't have to be preserved, in fact, it is quite the opposite. We agreed that they would preserve their backup tapes like we

have. This is a serious matter. We will be requesting a spoilation instruction."

Judge Smart: "Do you have anything written about electronic documents in the Attorneys Planning Report?"

Mr. Haley: "No Your Honor, we expected Mr. Wanker to honor his obligations to follow the local rule and preserve electronic evidence."

Judge Smart: "Is there anything else?"

(Mrs. Smith is waiving to Mr. Haley. He walks over, she whispers loudly in his ear.)

Mrs. Smith: "You're not being aggressive enough. They're liars and the Judge needs to know that. You need to tell the Judge he's lying."

Question: What do you do?

Scene III Who Draws the Line.

Next Scenario: ABA Model Rule 3.4(d) – Fairness to Opposing Party and Counsel vs. ACTL Rule 5(a)(b).

(Mrs. Smith and Mr. Haley are reviewing Board Minutes.)

Mr. Haley: "Betty, what about this one, looks like the Board's discussing the contract at issue in this case. I see on the date it is October 2000, that is a year before any claim was made. I think we will probably have to produce this one."

Mrs. Smith: "Was I present at that meeting?"

Mr. Haley: "Yeah, you're General Counsel and Secretary here – the Minutes show you present."

Mrs. Smith: "It's privileged."

Mr. Haley: "I don't know about that Betty, doesn't look like you were giving any legal advice. It just looks like to me that you and the other board members are just talking about the factual background as to the pros and cons of the deal. You all are just talking about the contract generally, it doesn't seem to me that anybody is giving or receiving any legal advice, so I'm not sure the attorney/client privilege applies. It is before any claim was made, so boy it would be hard to argue work product privilege."

Mrs. Smith: "Don't produce that document, put that document on the privilege log."

Mr. Haley: "I'm kind of uncomfortable with that, I – I don't think it will withstand a challenge."

Mrs. Smith: "I am instructing you to put it on the privilege log anyway. If the other side is smart enough to look for it and ask about it, then okay, maybe we will have to produce it, but right now I'm instructing you – you put that on the privilege log, and then we will see if they ever ask about it."

Question: What do you do?