Professional Responsibility and Ethics

Issue Checklist:

o 8.1 - Bar Applicants/Disciplined Lawyers

a. No false statements

b.Failure to disclose/correct a misapprehension

o 8.3 - Reporting Misconduct

o 5.1 - Responsibilities of Supervisory Lawyers

o 5.2 - Responsibilities of Subordinate Lawyers

o 5.3 - Responsibilities of Lawyers over Non-lawyers

o 1.6 - Confidentiality

o 4.1 - Truthfulness in Statements to Others

o 3.3 - Candor Towards Tribunal

o 8.4 - Misconduct

o 1.16 - Declining or Terminating Representation

o Attorney Client Privilege

o Work Product Doctrine

o *Togstad* - when does an attorney/client relationship form (reasonable person standard)

o 1.1 - Competence

o 1.3 - Diligence

o 1.4 - Communication

o 6.2 - Accepting Appointments (judicially appointed representation)

o 2.1 - Advisor (social/political ramifications)

o 1.2 - Scope of the Representation and Authority (objectives vs. means)

d.Cannot counsel to engage in unlawful conduct - only on the legal consequences of actions

o 1.14 - Client with Diminished Capacity

o 7.1 - Communications Concerning A Lawyer's Services (no false statements)

o 1.7 - Conflicts of Interest - Current Clients

o 1.9 - Duties to Former Clients

o 1.18 - Duties to Prospective Clients

o 1.10 - Imputation of Conflicts

o 1.13 - Organization as a Client

o 1.5 - Fees

o 1.15 - Lawyer as a Custodian of Property and Documents

o 5.4 - Professional Independence of a Lawyer

o 1.8 - Conflicts of interest - Special rules

a. Business transactions

b.Using information about the representation to the disadvantage of client

c. Gifts

d.Media Rights

e. Financial Assistance to Clients

f. Compensation from a source other than the client

g. Multiple Clients

h.Limiting Liability

i. Interests in litigation

j. Sexual relationships

k.Imputation of (a) through (i)

o 1.11 - Government lawyers

o 1.12 - Former Judge/Mediator

o Rules we did not go over that may be relevant? (3.4, 4.2)

**General**

o **Rule 1.0** - "knows" denotes actual knowledge of the fact in question; a person's knowledge may be inferred from circumstances

o "Informed Consent" is valid only if the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the purposed course of conduct

o **Preamble [16]:** The Rules do no exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

**The Regulation of Lawyers**

o **Ethics v. Morals**

· *Ethics:*

* + - Principles of conduct that members of a group are expected to observe

· Outgrowth of the profession; lawyers are self governing

· *Morals:*

* + - Help decipher right from wrong

· Usually derived from something outside the individual

o **Institutions that Govern lawyers**

1. *Highest State Courts*

* + - Adopt rules of conduct that govern lawyers
    - Consult with state bar in drafting rules
    - Ultimate responsibility for enforcing these rules

· Often delegate to disciplinary agencies run by

*2.The American Bar Association*

* + - *Private non-profit membership organization*
    - *Drafter of ABA Ethics Rules*

· *Rules have no legal force unless adopted by relevant Governmental authority, usually a state’s highest court.*

*3.The American Law Institute*

* + - *Private organization of judges, lawyers and law teachers that produces summaries of the law called Restatements.*
    - *Restatement (Third) of the Law Governing Lawyers*

**Professional Discipline**

o **Rule 8.1**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

a. knowingly make a false statement of material fact; or

b. fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

o Character portion

· Mental health issues (Grower, terrible difficulty being admitted to Ct Bar because of mental health issues, proven to be competent lawyer)

* + - Does the bar have a right to ask questions pertinent to the mental health history of applicants

· **Cons**: deters treatment, discriminatory, delaying application, qualified candidates look else where

· *In Re Mustafa* (UCLA Law student, denied to bar in DC for past character issues, later committed similar crimes while practicing in Ca)

* + - Are character traits determinative/Does past conduct influence future conduct?

o **Grounds for discipline**

o *In Re Peters*

* + - Fined although he was never charged with a formal violation
    - Purpose of disciplinary system is different than the purpose of the criminal system - weeds out people unfit to practice law

o **Duty to report misconduct:**

· **Rule 8.3**

* + 1. A lawyer shall report another lawyer if:

· She *knows*  the violation was committed; and

· The violation raises a *substantial question* as to that lawyer's honesty, trustworthiness or fitness as a lawyer

* + 1. If she *knows* a judge has committed a misconduct, she must report
    2. Does not require disclosure of information protected by 1.6

Comments:

1. Substantial is seminal; you don't have to report every violation because then not reporting would comprise a violation

2. Lawyers representing lawyers who violated the code don't have to report

o **Lawyer responsibility and ethical misconduct of colleagues and superiors**

· **Rule 5.1** - Partners, Managers, and Supervisors of lawyers:

* + 1. Must make *reasonable efforts* to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules
    2. With direct supervisory authority over another lawyer must make reasonable efforts to ensure that the lawyer conforms with the rules
    3. A lawyer is responsible for another's violation when:

1. The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

2. When a manager or supervisor knows of the conduct at a time when it's consequences can be avoided but fails to remedy it

**Comments:**

1. (a) can apply to people not directly involved with everyday matters

2. (a) requires managerial authorities to come up with policies and procedures designed to ensure conformity with the rules

3. (a) policies and procedures depends on size of firm, experience of lawyers, potential for ethical problems to arise

4. (c)(2) depends on how closely the supervisory authority is and how involved the supervisor is in the matter

· **Rule 5.2** - Responsibilities of a subordinate lawyer

a. Lawyer is bound by the rules despite being under supervision to act

b. A subordinate lawyer does not violate the Rules if that lawyer acts in accordance with a supervisory lawyer's *reasonable resolution of an arguable question* of professional duty.

**Comments:**

o Comment 3 - Essentially, if a subordinate acts without knowing the supervisor's assignment was a violation

· **Rule 5.3** - Responsibilities for non-lawyers

a. a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

2. the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

o **Legal Protections for Subordinate Lawyers**

· Dependent on jurisdiction

* + - *Kelly v. Hunton and Williams*: lawyer afforded protection when forced to resign for a law firm for calling into question the billing practices of a senior partner
    - *Wieder*, NY case, was fired based on his ethical scruples and the court vindicated him. He was discriminated against, law firms can not fire based on reporting ethical violations.
    - Chicago does not provide protection; they say that the duty to report is enough, there is no relief available to attorneys fired for reporting ethical violations to their employers

o **Civil Liability**

· Legal Malpractice

* + - Definition differs by jurisdiction (Sometimes a tort claim, sometimes a contractual claim)
    - Used to be an uncommon practice to file suit against lawyers
    - Many claims are brought as breach of fiduciary duty and negligence combined

**Client Confidentiality**

o Origins:

· Client confidentiality rules stem from fiduciary duties of lawyers to clients and from the constitutional rights of the clients under the 5th and 6th amendments

o **Rule 1.6 - Confidentiality of Information**

a. 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).

* + - Owed to former clients and prospective clients; no fee in necessary to invoke the duty

b.Lawyer may reveal information if he *reasonably believes* it is necessary to

* + - **Harm:** Prevent reasonably certain death or substantial bodily harm
    - **Crime:** 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;
    - **Financial Interests:** 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;
    - **Legal Advice:** Secure legal advice about compliance with the rules
    - **Defend Himself:** 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; or
    - **Court Order/Law:** To comply with other law or a court order

Comments:

1. Comment 2 - A Lawyer should not reveal more information than is necessary

§ Comment 4 - Lawyer may use hypothetical to explain a situation to another lawyer as long as there is no reasonable likelihood that the listener would be able to ascertain the identity of the client or situation

§ Comment 6 - Can reveal a toxic waste spill or something likely to affect a large population

§ Comment 12 - Whether such a law supersedes1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.

§ Comment 13 - when a lawyer is compelled to reveal information, he should assert all nonfrivilous claims that the order is not authorized

Comment 14 - lawyer should seek to persuade the client to reveal information before disclosing it

§ Comment 16/17 - take reasonable precautions to protect against unauthorized disclosure

o **Rule 4.1 - Truthfulness In Statements To Others**

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

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

· **Fork -** contradicts rule 1.6 - must disclose, regardless if it breaches 1.6

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.

Comments:

1. No affirmative duty to inform opposing parties of relevant facts

2. Only relates to statements of fact - certain statements made in negotiations are not considered under this rule as false statements of fact

o **Rule 3.3 - Candor Towards the Tribunal**

a. A lawyer shall not knowingly:

1.make a *false statement of fact* or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

2.fail to disclose to the tribunal legal authority in the *controlling jurisdiction* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

3.offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered*material evidence* and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

* + - Material evidence is that which could have affected the court or outcome of the proceeding

b. A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take *reasonable remedial measures, including, if necessary, disclosure to the tribunal.*

c. Disclose in (a) or (b) despite conflicts with 1.6

d. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comments:

o Comment 2 - although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false

o Comment 8 - the lawyer cannot ignore an obvious falsehood that is inferred from the circumstances

o Comment 10 - first advise a client if he attempts to offer false evidence, then take further steps if necessary to ensure compliance

**Client Frauds and Crimes**

o **Rule 1.6(b)(1)(2) and (3)**

o **Rule 8.4 (c)**

· It is professional misconduct to engage in conduct involving dishonestly, fraud, deceit, or misrepresentation

o **Rule 1.2 (d)**

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

o **Rule 4.1 (a)**

· A lawyer cannot knowingly 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.

o **Rule 3.3 (b)** - Candor Toward The Tribunal

· A lawyer must take remedial proceedings if a client has engaged in, is engaging in, or will engage in criminal or fraudulent acts related to the proceeding including revealing them to the tribunal

o **Rule 1.16 (b)(2)**

· A lawyer may withdraw from representation if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent

o **Rule 1.16 (a)(1)**

· A lawyer shall withdraw from representation when the representation will violate the rules or other law

o **Noisy Withdrawal**

· When a client uses the lawyer's services to perpetrate fraud, the lawyer must withdraw and repudiate or otherwise disassociate herself from prior work product she knows or has reason to believe if furthering the client's continuing or future criminal or fraudulent conduct

o **Restatement § 63 -** Disclosing information when required by law

· Must take steps to assert the information is privileged and otherwise protected against disclosure

o **Restatement § 67 -** Disclosing Information to prevent, rectify, or mitigate substantial financial loss

· Lawyer must take reasonable steps to persuade client not to engage in this activity, including informing the client of the ability to disclose offered by this section

· Lawyer not subject to discipline, liable for, or barred recovery from taking action or deciding not to take action under these circumstances

o **Restatement § 66 -** Using or Disclosing Information to Prevent Death or Serious Bodily Harm

o Lawyer must only take action after advising client not to act

· Lawyer is not liable for action or inaction under this clause

**Professional Misconduct**

**Rule 8.4** - It is professional 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 that 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 dishonestly, 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; or

f. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law

Comments

· Comment 2 - 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.

· Comment 4 - A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.

**Attorney-Client Privilege**

o **Relationship of confidentiality and privilege**

o *Privilege:* is evidence law (not covered in MRPC) - governs what can be admitted in court

* + - Privilege rules provide that neither a lawyer nor client may be compelled to testify in court about protected communications
    - only covers confidential communication between the client and attorney for the purposes of obtaining legal advice

o *Confidence rules:* require lawyers to protect information regardless or not if someone is trying to compel the information

* + - Ethical rule - required to avoid disclosure to anyone

o You can be punished by the bar for violating confidence, you will only lose the privilege if you violate it

o **Policy Goals**

* + - Encourage full and frank communication between clients and attorneys
    - Promote justice

· Assumption: lawyers need full information to provide adequate representation

· Assumption: clients know about client confidence and attorney client privilege

o **Elements of Attorney-Client Privilege:**

o Definition: A communication between privileged persons in confidence for the purpose of seeking legal advice

o Communication

* + 1. Can be written, spoken, or otherwise - §69

· Extends to nonverbal acts intended to convey information

* + 1. Communications with prospective client and lawyer are privileged § 70

o Privileged Persons

* + 1. Secretaries and paralegals of the lawyer are also privileged
    2. Interpreter is privileged
    3. Psychologists providing support for client
    4. A child's parents
    5. An incompetent person's guardian
    6. Third person (if position is clarified?)

o Communication in confidence

* + 1. Client must reasonably believe the communication is confidential § 71

· Reasonable expectation of privacy (no wire tapping)

o Communication for the purpose of seeking legal assistance

* + 1. Must be asking for strictly legal advice § 72

· Just because you are talking to a lawyer does not make it privileged

o **Waiver of the Attorney-Client Privilege:**

1.Express waiver by client

* + 1. Privilege lost to the entire situation

2.Waiver by inaction

* + 1. If you don't claim the privilege and reveal information, there is no reversing it

3.Waiver by revealing privileged communication to a non-privileged person

* + 1. If you reveal privileged information to a non-privileged person, you waive the privilege - §75

1. Priests, psychologists, physicians and spouses are privileged

* + 1. Lawyer will not waive the privilege in a social conversation unless he has been authorized to

1. Has to have actual and apparent authority

a. Apparent: if it is reasonable to assume that you can disclose information based on how your client has invoked your services

4.Waiver by putting privileged communication into issue

* + 1. If a client sues a lawyer for malpractice because he gave her bad advice -§83

5.Waiver as to a conversation by disclosure of part of it

* + 1. Cannot reveal only half truth - all or nothing - §79

6.Compliance with court orders

o Privilege is posthumous

o *Upjohn* - attorney client privilege extends past the "control group" or upper echelon of management figures who play a substantial role in corporate decision making

o **Crime-fraud Exception**

· No privilege for asking advice about committing a crime or fraud

* + - Even if the lawyer does not know the act is criminal
    - Even if the client does not know the act is not criminal or fraudulent
    - Even if the client does not reveal the act as a criminal act
    - **Fork:** does not apply to past crimes or frauds

o **Federal Prosecutors compelling waiver of the attorney client privilege:**

· Compelling this waiver depends upon:

* + 1. The likelihood and degree to which the privileged information will benefit the government's investigation
    2. Whether the information sought can be obtained in an timely and complete fashion by using alternative means that do not require waiver
    3. The completeness of the voluntary disclosure already provided
    4. The collateral consequences to a corporation of a waiver

o **Work Product Doctrine**

o Protects other documents that are not records of communications such as:

* + - Lawyer's notes and mental impressions

· Must prove that the material prepared by the lawyer in anticipation of litigation

· Highly protected

· Impressions, ideas, legal theory

· Less protected

· Verbatim notes taken

* + - Insurers do not anticipate litigation until a lawyer has become involved and has begun preparing documents (i.e. work done by lawyers before hand is nor protected by the doctrine)

**Lawyer-Client Relationships**

o **Creation of the Attorney-Client Relationship;**

o When a client behaves in such a way as a reasonable lawyer would believe she was being asked advice and when the lawyer behaved in such a way that a reasonable client would believe the lawyer had agreed to provide legal services or at least had not refused to do so.

* + - *Togstad* - lawyer sued for malpractice when he gave a woman erroneous advice about filing suit against a hospital on behalf of her husband
    - For legal malpractice:

1. Attorney client relationship existed

2. The D acted negligently or in breach of a contract

3. Such acts were the proximate cause of plaintiff's damages

4. But for the defendant's conduct, the P would have been successful in the prosecution of the claim

o **Lawyers as agents:**

1. Lawyers and clients have principle-agent relationships

2. Three types of authority

**1. Express authority**

· **Client directly gives lawyer authority to act on his behalf**

· **Certain actions are only valid if lawyer has express authority**

· **Rule 1.2(a)**

**2. Implied Authority**

· **Authority implied by the necessary action needed to ensure adequate representation**

· **Just by hiring the lawyer, the client has given the lawyer authority to take action that advances the client's interests**

**3. Apparent Authority**

· **Actions or representations by the client may give a third party the impression that the lawyer is authorized to act on his behalf**

· **Must be client's statements; lawyer's statements do not qualify**

i. Authority to settle litigation

§ In some jurisdictions, client is bound in a settlement *only* if they give the lawyer express authority to settle

o **Rule 1.1 - Competence:**

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

o Comments:

* + - 2 - A lawyer can provide legal advice on an area in which he has no experience so long as he compensates for it by study or outside consultation with another lawyer
    - 3 - Lower standard of competence for emergencies - minimize the representation given in that situation
    - 5 - Competent handling involved using methods and procedures meeting the standard of competent practitioners and adequate preparation

o **Rule 1.3 - Diligence:**

o A lawyer shall act with reasonable diligence and promptness in representing a client.

* + - i.e. starting and stopping

o Comments

* + - Comment 1 - Must act with zeal in advocacy; however, a lawyer is not bound to press for every advantage that might be realized for a client
    - Comment 2 - A lawyer's work load must be controlled so that each matter can be handled competently.
    - Comment 4 - A lawyer should carry through to conclusion all matters undertaken for a client

o **Ineffective Assistance of Counsel:**

· *Strickland v. Washington* - a lawyer can exercise discretion when deciding how to pursue a case, even when the client advocates additional or different avenues of conduct

* + - Two pronged test to determining Ineffective counsel:

1. The D must show that the counsel's performance was deficient

2. Deficient performance prejudiced the defense

o **Rule 1.4 - Communication:**

a. A lawyer shall:

* + 1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent is necessary;
    2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
    3. keep the client reasonably informed about the status of the matter;
    4. promptly comply with reasonable requests for information; and
    5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

· Comments:

* + - Comment 4 - must at least acknowledge a client's request for information and client telephone calls should be promptly returned or acknowledged.
    - Comment 7 - A lawyer may be justified in withholding information to protect the client's interests, however, he may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person

o **Rule 2.1 - Candor in counseling**

· In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

* + - This rule is relatively unexplored and rarely enforced

o **Rule 1.2 - Scope of Representation and Allocation of Authority**

a. Client decides objectives of representation; lawyer decides the means by which to pursue objectives, such as technical legal and tactical issues - lawyer must reasonably consult the client as to the means under 1.4

* + - Lawyer allowed to take action that is impliedly authorized by the representation
    - Lawyer must abide by clients decision to:

a. Settle

b. Plead guilty

c. Waive jury trial

d. Testify

* + - **Fork:** What is the difference between means and objectives?

b.Representation does not equal endorsement

c. Lawyer may limit the scope of representation if limitation under the circumstances is reasonable and the client gives informed consent

* + - If a client has monetary constraints - Limit the duration or the subject matter/breadth of service

d.**Criminal activity:**

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

· Comments:

* + - Comment 2 - In cases of disagreement as to the means, clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.
    - 7 - there is always a basic level of reasonable professional services that a lawyer must provide, despite (c) above.

o **Rule 6.2 - Accepting Appointments**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

a. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

b. representing the client is likely to result in an unreasonable financial burden on the lawyer; or

c. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

o **Rule 1.16 - Withdrawal of Services**

a. A lawyer must not represent or withdraw representation from (except where mentioned in (c)below) when:

* + 1. the representation will result in violation of the rules of professional conduct *or other law*;
    2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
    3. the lawyer is discharged.

· Some courts may not permit firing of a lawyer too close to trial

b.Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

* + 1. withdrawal can be accomplished without *material adverse effect* on the interests of the client;
    2. the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent;
    3. the client has used the lawyer's services to perpetrate a crime or fraud;
    4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
    5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
    6. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
    7. other good cause for withdrawal exists.

· Lawyer must notify the tribunal and seek approval to withdraw

c. A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. Lawyer may be ordered by a tribunal to continue representation despite a good cause to do so.

*d.Take steps to protect client's interests*:

* + 1. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

o **Rule 1.14 - Clients with Diminished Capacity**

a. A lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client with diminished capacity due to minority, mental impairment, or some other reason.

b.If the lawyer meet reasonably believes that the client:

* + 1. has a diminished capacity; and
    2. is at risk of substantial physical, financial or other harm unless action is taken; and
    3. cannot adequately act in his own interest

the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a:

§ **Guardian ad litem** - empowered to speak on behalf of the client (even against the client's will) on a particular legal matter

§ **Conservator** - given power to manage financial affairs of the client, who loses power to buy, sell, or hold property

§ **Guardian** - manages the client's financial affairs and may make medical and personal choices for the client

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.

o Comments:

o 5 - adult protective agencies

o 6 - consult a social worker

**Conflicts of Interest**

o **Rule 7.1 - Communications Concerning A Lawyer's Services**

o A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

o Comments:

o Comment 2 - truthful but misleading statements are prohibited.

o **Concurrent conflict**

o Rule 1.7, 1.8, 1.18 - Conflict between two present obligations of a lawyer

* + - Two clients, a client and another person, or a client and lawyer's own interests

o **Successive Conflict**

o Rules 1.7 and 1.9 - Conflict between an obligation to a present client and obligation to a former client

o **Imputed Conflict**

o Rule 1.10

* + - Conflict between an obligation of a lawyer to a client and the obligation of another lawyer who is affiliated with the first lawyer

o **How do you know when to withdraw from representing a client**

o Conflict must be analyzed under **1.16**

* + - Either mandatory or permissive

§ Whether withdrawal would have a materially adverse affect on the client

§ Are there other lawyers available

§ Which client is paying more

§ Rules don't provide much guidance in this respect

o **How to resolve a client conflict:**

a. Clearly identify the client or clients or former client and determine whether each is a liability

b.Determine whether a conflict exists

c. Decide whether the lawyer is permitted to represent the client

d.If so, consult and get informed consent

o **Challenging waiver of conflicts**

· A defendant is foreclosed from challenging their conviction on the basis of a conflict that they have waived

* + - **Fork:** some conflicts cannot be waived

o **Consequences of conflicts of interest:**

· Legal sanctions

* + - Disqualification/Discipline/Malpractice liability /Injunction against representation/Fee forfeiture

· Business repercussions

* + - Client may retain a different lawyer/Client may mistrust you/Professional reputation may suffer

o **Rule 1.7 - Concurrent Conflicts**

a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* + 1. the representation of one client will be *directly adverse* to another client; or

§ Directly adverse - if a lawyer acts as an advocate in one matter against a person the lawyer represents, even in an unrelated matter

§ Directly adverse is suing another client or cross examining another client

* + 1. there is a *significant risk* that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

b.Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if:

* + 1. the lawyer *reasonably believes* that he will be able to provide *competent and diligent* representation to each affected client;
    2. the representation is not prohibited by law;
    3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
    4. each affected client gives informed consent, confirmed in writing.

· Confirmed in writing does not mean they have to have signed anything, just signifies that they have had a conversation

· Comments:

* + 1. Comment 6 - representation of economic competitors does not by default constitute a conflict of interest - simultaneous representation will not ordinarily violate 1.7 if matters are *unrelated*
    2. Comment 11 - lawyers who are related as a parent, child, sibling or spouse may not represent clients against each other unless they have obtained informed consent - this conflict is not imputed to those lawyer's respective firms
    3. Comment 23 - The potential for conflicts is so grave that ordinarily a lawyer should decline to represent more than one criminal co-defendant in a case
    4. Comment 24 - Normally, a lawyer may argue a case that may create precedent that is adverse to another client on an unrelated matter

· However, if the lawyers action on behalf of one client will materially limit the lawyers effectiveness on behalf of another, then absent informed consent the lawyer must refuse to represent one of the clients

* + 1. Comment 31 - A lawyer should not keep information between joint clients confidential unless both parties have agreed to keep information confidential

· **In order to resolve a conflict of interests under 1.7 lawyer must: (comment 2)**

* + 1. Identify clients (past, present)
    2. Determine whether the conflict of interests exists
    3. Decide whether the conflict is consentable (whether he can represent them despite it)

§ Will the lawyer be able to provide adequate representation

§ Is it prohibited by law?

§ Does the representation involve litigation where the lawyer is representing one client against another client whom the lawyer is representing in the matter

* + 1. If so, consult the clients, obtain their informed consent, and send written confirmation of informed consent

§ Lawyer must communicate all adverse effects that may befall the client if he waives the conflict

§ Lawyer must often disclose information to from one client to another in order to obtain informed consent; if the former client declines to allow the information to be shared, the lawyer cannot obtain informed consent

§ Clients may withdraw consent

· Lawyer may have to discontinue representing a client who revokes consent or the client to whom consent was revoked

iv. Advanced waivers of consent are allowed in certain situations

· **Informed consent -** Client should be told:

* + - How interests of the lawyer and the client can give rise to conflict
    - Alternative courses of action and strategic considerations that would be foreclosed or made less readily available by a conflict
    - Effect of the representation or the process of obtaining other client's informed consent upon confidential information

· Dual representation issues, rule 1.4 conflicts

o **Rule 1.10 - Conflicts and Law Firms - Imputation of Conflicts**

a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by 1.7 or 1.9, unless

* + 1. the prohibition is based on a personal interest of the disqualified lawyer and does not present a *significant risk of materially limiting* the representation of the client by the remaining lawyers in the firm; or
    2. the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and

i. the disqualified lawyer is timely screened and not paid

ii. written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

iii. certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

b.When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

* + 1. the matter is the same or *substantially related* to that in which the formerly associated lawyer represented the client; and
    2. any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

c. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

d.The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

o **Rule 1.18 - Duties To Prospective Client**

a. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

b.Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

c. A lawyer shall not represent a client with interests materially adverse to those of a prospective client in the *same or a substantially related* matter if the lawyer received information from the prospective client that could be *significantly harmful* to that person in the matter. If a lawyer is disqualified, firm is also disqualified.

* + - **Exceptions:** Rule 1.9, paragraph (d)

d. When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

* + - both the affected client and the prospective client have given informed consent, confirmed in writing, or:
    - the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

i. the disqualified lawyer is screened and unpaid in relation to the matter; and

ii. written notice is promptly given to the prospective client.

o Comments:

· Comment 2 - Not all persons who communicate information to a lawyer are entitled to protection

· Comment 4 - lawyers, in order to avoid acquiring disqualifying information, should limit the initial interview to only such information as reasonably appears necessary for that purpose

o **Rule 1.13 - Organizational Clients**

a. A lawyer retained by an organization represents the organization acting through its duly authorized constituents.

* + - No definition of "organization" - usually, the more formal an organization, the more likely that the lawyer represents it rather than its individual constituents
    - Where there is uncertainty as to who the duly authorized constituents are, consult outside law (corporate law)

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.

c. Except as provided in paragraph (d), if:

* + - the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and
    - the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer *reasonably believes* necessary to prevent *substantial injury* to the organization.

d. Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

e. A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or withdraws... shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed.

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 constituents so long as he complies with Rule 1.7 and, if necessary, ascertains informed consent from the appropriate corporate representative

o **Rule 1.9 - Duties to Former Clients**

a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client unless the former client gives informed consent, confirmed in writing.

* + - There are multiple definitions of materially adverse - authorities differ in interpreting this phrase

· Broad: Use of the former client's confidences may harm the former client's interest

· Middle: advocating against specific items that were done in the former representation

· Narrow: you are on both sides of the litigation

* + - If the matter is not substantially related, there is no conflict

b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

* + - whose interests are materially adverse to that person; and
    - about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

· **After evaluating a conflict under 1.9, go back an analyze the conflict under 1.7**

· **Playbook conflict** - if you are very familiar with a client's general litigation strategies, you may have a conflict

· Comments:

§ 2 - The scope of a "matter" depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

§ 3 - Matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

**Fee Conflicts**

o **Fees**

· Rule1.5 provides very little guidance as to what is required and what is prohibited in terms of excessive fees

* + - Difficult to pin down practices that are prohibited and required

**Rule 1.5**

a. A lawyer shall not make an agreement for, charge, or collect an *unreasonable fee* or an unreasonable amount for expenses. Factors for determining reasonableness are:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.

b. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

c. A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law.

§ Must specify, in writing, the percentage of recovery to be earned by the lawyer in event of a settlement and to indicate whether the percentage charged depends on how the case proceeds

§ Must indicate whether expenses will be deducted before or after the contingency fee is calculated

§ Must explain the expenses that the client will be liable for even if she receives no recovery

§ At the end of the matter, the lawyer must provide a written statement detailing how the fees and expenses were apportioned and calculated

§ Contingency fees must be "reasonable"

§ **Fork:** Sometimes governed by statute

d. A lawyer shall not enter into an arrangement for, charge, or collect:

1. any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

2. a contingent fee for representing a defendant in a criminal case.

o Comments

· Comment 1 - (a)(1-8) are not exclusive factors in determining the reasonableness of a fee.

· Comment 5 - using wasteful procedures to exploit fee arrangements is prohibited

· Comment 6 - After the divorce, despite section (d), a lawyer may charge a contingency fee to collect past due alimony or child support

o *Brobeck* - (lawyer charged 1 million dollars for services to a company as a minimum contingency fee, court found in his favor)

o **Policy:** why the fee was not excessive

* + - The company had just won one of the largest suits in history and, on appeal, had it reversed entirely; wanted to hire the most competent lawyer possible - deliberately entered into agreement
    - No unfair bargaining, no taking advantage of another's ignorance, no terms disguised

§ Evidence that the fee agreement was the product of extensive bargaining, assisted by other lawyers; the P objected to being unable to bill hourly, ultimately accepted the contingency basis with the disclaimer that he would be paid a sizeable contingency fee upon success

§ D was a multimillion dollar company with independent counsel attempting to secure the best possible counsel to advise it; the fee was exorbitant, however, they derived a substantial benefit from hiring this attorney

§ Fair and reasonable; he was the best lawyer qualified for the job, potentially saved them 18 million dollars, regardless of the low amount of work, he did a good job

o *Fordham* - (Lawyer, inexperienced with criminal defense, charged a D's father 50k in attorney's fees for a OUI case, which he won; he billed 227 hours and came up with a novel defense involving inconsistent breathalyzer results)

o **Rule:** A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee - an inexperienced lawyer cannot charge 3 to 4 times as much as an experienced one

* + - Legal fee must be objectively reasonable
    - Should not charge for a teaching yourself

o **Unethical Billing Practices:**

o **Bill padding -** Strictly forbidden to bill for more hours than worked

o **Rounding -** Lawyers are allowed to round up according to the agreed upon time increment (i.e. 15 minutes)

o **Overhead Costs -** Unethical to bill for overhead costs like running a library, malpractice insurance, office space, electricity, etc

o **Double billing/Billing for Recycled Work/Billing for Personal Expenses/Fictitious hours**

o **Running the Meter -** Comment 5 to Rule 1.5 prohibits this practice - using wasteful procedures to exploit fee arrangements

o **Forbidden and restricted fee arrangements:**

o **Purchasing claims of clients:**

* + - Rule 1.8(i) - A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may; however, if a lawyer purchases a claim from a client and ceases to represent that client, he can collect the claim
    - He may also:

i. obtain a lien on a client's property

· Comment 16 - the lawyer must comply with rule 1.8(a) to acquire a lien

· May be difficult to get informed consent in this situation

· A lawyer who withdraws for good cause under 1.16 is entitled to payment on a quantum meruit basis

· A lawyer who is fired may also collect fees on a quantum meruit basis

ii. contract with a client for a reasonable contingent fee in a civil case.

o **Financial assistance to a client:**

* + - Rule 1.8(e) - lawyer cannot provide financial assistance to a client other than court costs and expenses of litigation, which must be repaid (although repayment can be contingent on the outcome)

§ Lawyer may also pay court costs and expenses of an indigent client (who is not obligated to repay)

§ Costs include costs for medical examinations

o **Publication rights:**

* + - 1.8(d) - a lawyer may not enter into an agreement with a client to give the lawyer literary or media rights to make a portrayal or account based in substantial part on information relating to the representation

§ **Policy**: lawyer may be tempted to do things bad for the client and good for the book

§ **Fork**: after the case is over, a lawyer may do this in exchange for some of the fees owed

o **Malpractice:**

· 1.8(h)(1) - lawyer may seek waiver of malpractice liability from a client with independent legal representation

· 1.8(h)(2) - lawyer may settle a malpractice claim with an unrepresented client as long as lawyer advises the client in writing that it is a good idea to get independent legal advice before making such a settlement

* + - Comment 14 - A lawyer may include an arbitration clause in his agreement with a client so long as he explains the benefits and detriments, receives informed consent, and the agreement doesn't insulate the lawyer from liability

o **Fee Division:**

· Under 1.5(e) lawyers from different firms may divide fees so long as 1) the division of fees is proportionate to the work produced, 2) the client consents and that agreement is confirmed in writing, and 3) the fee is reasonable

* + - **Fork:** Lawyers in the same firm may always divide fees
    - Comment 7 - Must accept responsibility for being sued as if they were partners
    - Confirming in writing essentially means to give the client a writing memorializing it
    - Rule 1.0 (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

· **Referral:**

* + - If a lawyer collects a fee for referral, she must take on financial and ethical responsibility for the representation as if the lawyers were associated in a partnership

§ Governed under 1.5(e) qualifications - (Lawyers are treated as if they were partners)

· **Non-lawyers:**

· **Rule 5.4 - Professional Independence**

* + - A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

§ an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

§ a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

§ a lawyer or law firm may include nonlawyer employees in a *compensation or retirement plan*, even though the plan is based in whole or in part on a profit-sharing arrangement; and

§ a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

* + - A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
    - A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
    - A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

§ a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

§ a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

§ a nonlawyer has the right to direct or control the professional judgment of a lawyer.

o **Rule 1.15 - Lawyer as a Custodian of Client Property and Documents**

a. A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

* + - Comingling the client's and lawyer's money is a grave offense

b.A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

c. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

d.Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall *promptly deliver* to the client or third person *any funds or other property* that the client or third person is *entitled to receive* and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

e. When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

* + - Lawyer should not pay herself disputed fees until the fee dispute is resolved, they should be kept in a trust account

**Specific Rules (1.8)**

a. **Business Transactions -**  A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest *adverse* to a client unless:

1. the transaction and terms on which the lawyer acquires the interest are *fair and reasonable* to the client and are fully disclosed and transmitted *in writing* in a manner that can be reasonably understood by the client;

2. the client is advised *in writing*, and given a reasonable opportunity, to seek the advice of independent legal counsel on the transaction; and

3. the client gives *informed consent*, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

· **Fork:** Does not apply to a standard legal contract or if the client sells something that they normally sell

b. **Confidential Information -**  A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

c. **Gifts -**  A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

f. **Compensation-** A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;

2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

3. information relating to representation of a client is protected as required by Rule 1.6.

g. **Aggregate settlement -**  A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

j. **Sexual relations -**  A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

k. **Imputation -** (a) - (i) apply to all lawyers at a firm if they apply to one

Comments

· Comment 6 - (c) Does not prohibit receiving unsolicited gifts, however, if a gift is too large, a client can sue for its return

· Comment 18 - Sexual relationships that predate the client-lawyer relationship are not prohibited

**Government Lawyers**

**Current and former Government Lawyers (1.11)**

a. Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

1. is subject to Rule 1.9(c); and

2.shall not otherwise represent a client in connection with a matter in which the lawyer participated *personally and substantially* as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

* + - **Substantial** - the employee's involvement has significance to the matter, or forms a basis for reasonable appearance of such significance

· Knowledge of, official responsibility, and mere administrative involvement do not qualify as substantial

* + - **Personally** - participate directly (approving recommending, rendering of advice, investigating, etc)

b. When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

1. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

2. written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

c. Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are *adverse* to that person in a matter in which the information could be used to the *material disadvantage* of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

d. Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

1. is subject to Rules 1.7 and 1.9; and

2. shall not:

* + 1. participate in a matter in which the lawyer participated *personally and substantially* while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
    2. negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

e. As used in this Rule, the term "matter" includes:

1. any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

2. any other matter covered by the conflict of interest rules of the appropriate government agency.

Comments:

· Comment 10: In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

**Judge Rules:**

**Rule 1.12** Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

a. Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

b. A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

c. If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

1.the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

2. written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

d. An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

· **Judicial Canons**

1. A judge shall uphold and promote the independence, integrity, impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety

2. A judge shall perform the duties of judicial office impartially, competently, and diligently

3. A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of the judicial office

4. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary

**RULE 2.11 (Model Code of Judicial Conduct) -** Disqualification

A. A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

1. The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.

2.The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

* + 1. a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
    2. acting as a lawyer in the proceeding;
    3. a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
    4. likely to be a material witness in the proceeding.

3.The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

4.The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than [$[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

5.The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

6. The judge:

* + 1. served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
    2. served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
    3. was a material witness concerning the matter; or
    4. previously presided as a judge over the matter in another court.

B. A judge shall keep informed about the judge’s personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse or domestic partner and minor children residing in the judge’s household.

C. A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

**RULE 3.1 (Model Code of Judicial Conduct) -** Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

A. participate in activities that will interfere with the proper performance of the judge’s judicial duties;

B. participate in activities that will lead to frequent disqualification of the judge;

C. participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;

D. engage in conduct that would appear to a reasonable person to be coercive; or

E. make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.