Legal Ethics and Practice Program: Ethics School

The **Legal Ethics and Practice Program (LEAPP)** is a collaborative effort between the Office of Disciplinary Counsel to the Supreme Court of South Carolina and the Professional Responsibility Committee and CLE Division of the South Carolina Bar. LEAPP is a four-part program that is held multiple times each year.

LEAPP **Ethics School** is a full-day program (5.75 hours) that includes a comprehensive review of the Rules of Professional Conduct, giving special attention to those provisions that commonly give rise to disciplinary complaints, including lawyer-client relations, confidentiality, conflicts of interest, and litigation ethics. The faculty includes knowledgeable and experienced members of the Bar who deal with various aspects of lawyer discipline cases and matters involving ethics, professionalism, and legal malpractice.

LEAPP **Trust Account School** is a half-day session (5.25 hours) addressing mandatory accounting and recordkeeping requirements for client trust accounts. Participants also explore hypotheticals based on actual disciplinary cases and discuss tools, techniques, and law office policies that can help the practitioner effectively avoid mistakes, misappropriation, and discipline. Participants work in small groups and conduct a monthly trust account reconciliation.

LEAPP **Advertising School** is a half-day program (4.5 hours) outlining the restrictions and requirements of attorney advertising and solicitation, with a particular focus on new media. Participants review and analyze sample advertisements and solicitation letters to identify potential problems.

LEAPP **Law Office Management School** is a full-day program (5.75 hours) that addresses a variety of issues that arise in the practice of law that can lead to ethical dilemmas, including case management, document management, client communication, employee supervision, succession planning, and stress management. It is a comprehensive workshop on practice management solutions and ethical compliance.

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LEAPP Ethics School

9:00 a.m.	**Scope of Representation, Fees, Termination** Ericka M. Williams, Office of Disciplinary Counsel or Julie K Martino, Office of Disciplinary Counsel
9:55 a.m.	**Communication & Diligence** Ericka M. Williams, Office of Disciplinary Counsel or Julie K Martino, Office of Disciplinary Counsel
10:45 a.m.	**Break**
11:00 a.m.	**Litigation Conduct & Ex Parte Communication** Hon. George M. McFaddin, Jr., S.C. Circuit Court
12:00 p.m.	**Lunch Break**
1:00 p.m.	**Conflicts of Interest** William O. Higgins, Graybill, Lansche, & Vinzani
2:15 p.m.	**Mid-afternoon Break**
2:30 p.m.	**Conflicts of Interest, Con't.** William O. Higgins, Graybill, Lansche, & Vinzani
3:45 p.m.	**Confidentiality** Carey Markel, Office of Disciplinary Counsel
4:15 p.m.	**Adjourn**

Faculty

William O. Higgins is with the Columbia law firm of Graybill, Lansche & Vinzani, LLC, where he practices in the areas of commercial real estate law, tax law, tax-deferred exchanges of real estate, business acquisitions, entity formation, professional responsibility, legal ethics, and lawyer misconduct. He received his B.S. degree from Presbyterian College, his J.D. degree from the University of South Carolina, and his LL.M. degree in taxation from New York University School of Law. Active in the South Carolina Bar, Bill is the chair of the Ethics Advisory Committee. He also serves on the Real Estate Practice Section Council and the Professional Responsibility Committee. He has served as chairperson of the Professional Responsibility Committee and the Ethics 2000 subcommittee and as a member of the Task Force on Multi-Disciplinary Practice.

Carey T. Markel serves as Deputy Disciplinary Counsel in the South Carolina Supreme Court. She brings a broad range of public and private sector experience to her role, including partner in a law firm in South Carolina and Of Counsel to a law firm in Denver. Most recently, Markel served as Senior Assistant City Attorney for the City of Boulder Colorado. While in Colorado, she served on the Colorado Supreme Court's Attorney Regulation Committee. Markel holds a Juris Doctor from Emory University School of Law and a Bachelor of Arts from Auburn University.

Julie Martino serves as Assistant Disciplinary Counsel in the Office of Disciplinary Counsel. Julie joined the ODC in 2011 and is responsible for investigating and prosecuting lawyers who have been accused of violating the Rules of Professional Conduct. She is a member of the National Organization of Bar Counsel and the South Carolina Bar. Prior to joining ODC, Julie was a Staff Attorney at the South Carolina Supreme Court and an Assistant Attorney General in the South Carolina Attorney General's Office where she handled criminal appeals and post-conviction relief cases. Julie is also an adjunct instructor at South University, where she teaches a variety of classes in the Legal Studies Program. Julie graduated from Bradley University in 1984 and received her J.D. from the University of South Carolina School of Law in 1999.

The Honorable George M. McFaddin, Jr., born November 4, 1954, was elected to the circuit court on February 1, 2017. Before that election, he was a family court judge for fifteen years, and he was Sumter County's chief magistrate from 1998 until 2002. From 1986 until 1998 he practiced law in Sumter. Judge McFaddin lives in Salem Black River of eastern Sumter County and is an elder of Salem Black River Presbyterian Church. He is also an affiliate member of The Presbyterian Church in Manning. Judge McFaddin's prior jobs and memberships include farm laborer, apprentice funeral director/embalmer, emergency medical technician/firefighter, public defender and county prosecutor, Disabilities and Special Needs Board, and the Children's Law Committee. He is Vice-Chairman of the Commission on Judicial Conduct. Judge McFaddin earned these degrees from the University of South Carolina: B.A. in 1978; M.P.A. in 1979; J.D. in 1985. He was admitted to the South Carolina Bar in 1985 and later served as a law clerk to the Honorable Rodney A. Peeples of the Second Judicial Circuit. Judge McFaddin's interests include lots of reading, collecting Native American artifacts, certain antiques, fitness, Scottish heritage, the Vietnam War, and loving animals.

Ericka M. Williams serves as Assistant Disciplinary Counsel with the South Carolina Supreme Court Office of Disciplinary Counsel. After graduating from North Carolina A&T State University in 1992 with a B.S. degree in Business Administration, she pursued a legal education at the University of South Carolina where she graduated in 1995. Shortly after graduating from Law School, she became employed with the 15th Judicial Circuit Solicitor's Office as an Assistant Solicitor. She served as Assistant Solicitor for nearly ten years, primarily in the Family Court division. In her current position as Assistant Disciplinary Counsel, she is responsible for the investigation and prosecution of complaints of misconduct made against lawyers.

Beginning and Ending the Attorney-Client Relationship[1]

Determining the Scope of Representation

A common complaint in lawyer grievances is failure to abide by a client's decisions concerning the objectives of the representation in violation of Rule 1.2, which states that:

> A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.2 requires that an attorney consult with her client regarding how to achieve those objectives and to obtain the client's informed consent before taking action in the case. The Comment to the Rule recognizes, however, that the lawyer "should assume responsibility for technical and legal tactical issues." Once the attorney understands the client's objectives, it is up to the attorney to make the decision about the technical and tactical means to pursue those objectives.

The Court has applied Rule 1.2 in situations where a lawyer failed to "take meaningful action" in a case and failed "to provide meaningful representation" to his client.[2] Lawyers have been sanctioned under this Rule for conduct such as repeated, unnecessary requests for continuances,[3] failure to take the necessary steps to conclude a legal matter,[4] and failure to comply with client's demand for payment.[5] In *In re Murphy,* the lawyer was held to have violated Rule 1.2 when he exceeded his authority as personal representative of a deceased relative's estate.[6]

There are circumstances in which a lawyer may limit the scope of representation of a particular client. If the lawyer intends for her representation to be limited to one case or one particular transaction, the lawyer must inform the client and obtain the client's informed consent. "Informed consent" is defined in Rule 1.0(g) as "the agreement by [the client] after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

As an example, if a client hires a lawyer to handle a civil trial and the lawyer does not intend to handle the appeal, the lawyer must inform the client at the very outset of the representation that she will not handle the appeal. The client's consent to the scope of representation must be based

1 Barbara M. Seymour, of the law firm of Clawson & Staubes, LLC, prepared portions of these materials.

2 *Matter of Mitchum*, 331 SC 43, 501 S.E.2d 733 (1998).
3 *Matter of Craig*, 317 SC 295, 454 S.E.2d 314 (1995).
4 *In re Perkins*, 334 SC 639, 519 S.E.2d 96 (1999).
5 *Matter of Glee* 334 SC 9, 507 S.E.2d 326; *In re Williams*, 336 SC 578, 521 S.E.2d 497 (1999)
6 *In re Murphy* 336 SC 96, 519 S.E.2d 791 (1999).

on reasonably adequate information and an explanation of the risks and alternatives to hiring the lawyer for limited representation.

Rule 1.2(c) of the Rules of Professional Conduct specifically authorizes "limited scope representation," also commonly referred to as "unbundled legal services." Essentially, what this means is that a lawyer and a client can agree that the lawyer will provide only a portion of the legal services necessary for the client's matter. The Comment provides that a limited scope representation may be appropriate when the client has "limited objectives for the representation." The Comment also contemplates that "the terms upon which representation is undertaken may exclude specific means that may otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent."

An agreement limiting the scope of the representation must be "reasonable under the circumstances." The Comment provides the example of a client whose objective is limited to "securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem." In that case, the lawyer and client may agree that the lawyer's services will be limited to a "brief telephone consultation." The Comment cautions, however, that the time allotted would need to be "sufficient to yield advice upon which the client could rely."

The Comment to Rule 1.5 (Fees) also suggests some limitation on a lawyer's ability to limit the scope of the representation based on the amount of the fee. It states that a lawyer should avoid entering into an agreement that includes terms that "might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client may have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay."

Regardless of the limits on the scope of the representation, an attorney must still comply with all the other requirements of the Rules of Professional Conduct, including but not limited to those related to competence (1.1), diligence (1.2), communication (1.4), fees (1.5), conflicts of interest (1.6, 1.7, 1.8, 1.9, and 1.10), and termination of representation (1.16).

Setting the Fee and Collecting the Bill

There are practical and ethical considerations in setting the fee structure in any given case. With regard to the practical consideration, the lawyer must determine the fee structure that will ensure that payment for work to be undertaken. The fee charged varies based on the nature of the case and the particular circumstances faced by each client. Regardless of the fee structure chosen, the fee must be reasonable. Reasonableness of the fee is both an ethical and legal determination. With regard to the ethical consideration in setting the fee, an attorney must give careful attention to the requirements of Rule 1.5 of the Rules of Professional Conduct.

Rule 1.5(a) sets out the following factors to be considered in determining whether a fee is reasonable. These factors are used by the Commission on Lawyer Conduct and the Supreme Court in determining whether a fee was unethical. These factors are also considered by the Resolution of Fee Disputes Board in determining whether a client must pay a disputed fee. If a fee dispute is resolved in civil litigation, rather than by the Fee Disputes Board, these factors are also applicable for determining the parties' respective obligations.

Rule 1.5 requires lawyers to limit fees and expenses to what is reasonable. Reasonableness is based on an analysis of the eight factors set out in the rule:

(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 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 of work 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.

Questions of reasonableness are generally resolved by the Resolution of Fee Disputes Board or a civil court, rather than by the Supreme Court in a disciplinary action. More often, the Court addresses questions of improper billing in cases where a lawyer fails to adequately explain the fee structure to the client or deliberately inflates a bill. A lawyer can only charge a client for the work that is actually performed for that client. “A lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf. Accordingly, a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended by her.” American Bar Association Formal Opinion 93-379.

At the outset of the representation, the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis for which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

A lawyer may charge hourly rates for services rendered by nonlawyer employees. However, the lawyer has a duty to communicate the basis or rate of those charges, preferably in writing, before or within a reasonable time after commencing the representation. (See Rule 1.5(b)). “[A] lawyer has a duty to disclose to a client the amount to be charged for the services rendered by … nonlawyer employees. The lawyer may not include such services within the time billed by the lawyer without disclosing that the services were performed by nonlawyers. The client should be informed of the

rate for each lawyer, paraprofessional, and other nonlawyer who will work on the client's case." SC Ethics Advisory Opinion 94-37; (Adopted by the Court in *Matter of Jennings*.) "Such services should be separately itemized on the billing to the client and are normally billed at rates lower than the rates for services of a lawyer. [It] would be a fraudulent misrepresentation to the client that legal services had been rendered by a lawyer if the billing for … nonlawyer services were represented as attorney time." New Mexico Advisory Opinion 1990-4.

Fees and expenses submitted to a court in connection with an attorney's fee petition must be accurate and must reflect the fees and expenses actually charged to the client.[7]

In addition to communicating the basis or rate of the fees at the outset of the representation, an attorney must also set forth the anticipated expenses and how they will be collected. Subsection (a) also requires that expenses charged to the client be reasonable. The Comment states that an attorney "may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred."

Regarding contingent fees, Rule 1.5(c) requires a contingent fee agreement to be in writing, specifically setting forth "the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated." The rule also requires that the agreement "clearly notify the client of any expenses the client will be expected to pay." This written fee agreement must be signed by the client. When the case is over, the lawyer is required to provide the client with a written statement "stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

Payment of fees cannot be contingent on the outcome of a criminal case or certain outcomes in domestic cases, such as securing a divorce, awards of alimony, or property settlement. However, an attorney may charge a contingency fee based on the collection of past due alimony or child support.

Hourly fees, in theory, ensure that the attorney will be compensated for the work she does on the client's behalf; however, not all clients can afford hourly rates. When using an hourly fee structure, it is advisable to collect a retainer up front. While not required by the rules, regular monthly billing provides an opportunity to communicate with the client regarding work being done on her behalf.

The Comment to Rule 1.5 cautions against exploiting an hourly fee arrangement by using "wasteful procedures." It is advisable to have written policies regarding hourly billing and periodically audit time records to ensure that there is no overbilling or padding.

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[7] *In re Massey,* 357 S.C. 439; 594 S.E.2d 159 (2004). *See also In the Matter of Anonymous Member of the Bar,* 317 S.C. 10, 451 S.E.2d 391 (1994).

A flat or fixed fee structure is the choice for lawyers in many practice areas because it hedges the risks presented by other fee arrangements. Some lawyers confuse a flat fee with a "nonrefundable" fee and assume that it can be deposited directly into the firm's operating account and it is not subject to refund. Regardless of whether or not an attorney charges a flat fee or a retainer in an hourly billing case, funds received from clients for fees for work that has not been done must be held in trust until earned. There are only two ways that an attorney can earn a fee: by doing the work or by the client's agreement that the fee is earned when paid.

Notably, only fees that the client agrees are earned when paid may be placed directly into the general (or "operating") account. Advance fees (sometimes referred to as "flat fees" or "nonrefundable fees") may be treated as immediately earned if the client agrees in advance in a written fee agreement. A written fee agreement must include notice to the client:

(1) of the nature of the fee arrangement and the scope of the services to be provided;
(2) of the total amount of the fee and the terms of payment;
(3) that the fee will not be held in a trust account until earned;
(4) that the client has the right to terminate the lawyer-client relationship and discharge the lawyer; and
(5) that the client may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

While the Comment to Rule 1.5 suggests to the unwary lawyer that a fee can be "nonrefundable" a careful reading of the rule and the comments makes it clear that all fees, regardless of how they are calculated or collected are subject to refund.

Fee Sharing & Splitting

The Rules of Professional Conduct allow lawyers from separate law firms to work together on a case and share the fee. The Comment encourages division of fees among lawyers because it "facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist." Requirements for fee sharing arrangements among lawyers are set forth in Rule 1.5(e):

(1) the division must be in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client must agree to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee must be reasonable.

While fee sharing is permitted, fee splitting is not. The term "fee splitting" usually refers to the payment of a portion of a legal fee to a nonlawyer. This is specifically prohibited by Rule 5.4 of the Rules of Professional Conduct. The prohibition against fee splitting prevents a lawyer from rewarding a staff member with a percentage of invoices collected, a portion of a fee earned, or a bonus based on success in a particular case. The rule also limits the ownership of law firms to lawyers. Subsection (b) provides that a lawyer "shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Subsection (d) prohibits a

lawyer from practicing "with or in the form of a professional corporation or association authorized to practice law for a profit, if ... (1) a nonlawyer owns any interest therein...; (2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

These restrictions are designed to protect the lawyer's professional independence of judgment. The Comment warns that when "someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client."

There are a few exceptions to the prohibition on splitting fees with nonlawyers, including:

> (1) 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;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
>
> (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provision of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
>
> (4) a lawyer or a 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.

Resolving Fee Disputes

It doesn't matter what type of fee is charged, or whether there is a written fee agreement, or how regular, accurate, and thorough the billing statements, at some point it is likely that an attorney will have a client who won't pay or who demands a refund. In most cases, it is best to work out some sort of compromise with the client. If a compromise that satisfies the attorney and the client can't be reached, one option is the fee dispute arbitration process administered by the South Carolina Bar through its Resolution of Fee Disputes Board.

The procedures for and requirements of the fee dispute process are set forth in detail in Rule 416, SCACR. In order to proceed before the Resolution of Fee Dispute Board, an attorney must have the client's written consent that she agrees to be bound by the decision of the board. If, on the other hand, a client files a fee dispute claim, consent of the attorney is not required, i.e., the attorney must participate in the investigation of the client's claim and comply with any final decision issued as a result.

While the fee dispute resolution process is essentially binding arbitration, the rule also provides for mediation at the option of the board member assigned to investigate the dispute.

Moreover, once the dispute is submitted to the board, no civil action to collect the fee can be undertaken and the final decision is enforceable in court. However, final decisions of the board can be appealed to the circuit court. Failure to pay a fee dispute award will result in a referral to the Commission on Lawyer Conduct and the imposition of discipline. Filing an appeal does not stay the disciplinary referral unless the lawyer pays the disputed amount to the Bar to be held in trust pending resolution of the appeal.

Common sense should always prevail when it comes to a fee dispute. Filing an appeal to the circuit court is likely to be fruitless (and costly). The circuit court does not review the board's decision *de novo*. Rather, the court can overturn the board's decision only when (1) the decision was procured by corruption, fraud, or other undue means; (2) partiality, corruption, or prejudicial misconduct was evident on the part of a board member; (3) the board members exceeded their powers; (4) in the case of a hearing, the panel members refused to postpone the hearing, upon a showing of sufficient cause; refused to hear evidence material to the controversy; the hearing was conducted so as to substantially prejudice the rights of a party; or the attorney wasn't provided notice of the hearing as required by the rules.

Duties Related to Termination of Representation

Rule 1.16 pertains to a lawyer's ethical obligations at the end of the lawyer-client relationship. Subsection (d) requires that an attorney take reasonable steps to protect her client's interests upon termination of the representation. Those steps may include giving reasonable notice to the client of the attorney's withdrawal from the matter or of the end of the representation, giving the client time to find another lawyer if necessary or appropriate, surrendering papers and property that belong to the client, and returning any unearned fees.

A common violation of Rule 1.16 is a lawyer's refusal or failure to comply with the client's request for the file following termination. Lawyers also violate this rule when they require that the client pay for the file or for a copy of the file. The file belongs to the client. The lawyer can retain a copy at his own expense.

While retaining liens are disfavored, they are not prohibited. The legal right of a lawyer to assert a retaining lien against the file of a client who refuses to pay an earned fee is recognized at common law. The ethical limitations on assertion of a retaining lien are more restrictive than the legal limitations. Specifically, the discharge of the lawyer must be without just cause and withholding of the file cannot cause prejudice to the client. A careful review of the relevant case law is essential in determining whether a lawyer can ethically assert a retaining lien.

Several disciplinary cases issued in the past twenty years have set forth the circumstances under which a lawyer may ethically assert this legal right.[8] Those cases set out a distinct and effective

[8] *See e.g., In re Anonymous Member of the Bar*, 287 S.C. 250, 335 S.E.2d 803 (1985); *In the Matter of Tillman*, 319 S.C. 461, 462 S.E.2d 283 (1995); and *In the Matter of White*, 328 S.C. 88, 492 S.E.2d 82(1997).

process for evaluation of the appropriateness of assertion of a lien on a client file to secure the payment of fees. Generally, a lawyer may not assert a retaining lien on client papers and property if the lawyer was discharged for good cause. If the lawyer was not discharged for good cause, the factors to be considered in determining whether assertion of a retaining lien on client papers and property is proper include the following:

(1) the financial situation of the client;
(2) the sophistication of the client in dealing with lawyers;
(3) whether the fee is reasonable;
(4) whether the client clearly understood and agreed to pay the amount now owing;
(5) whether imposition of the retaining lien would prejudice important rights or interests of the client, other parties, the court, or the public interest;
(6) whether failure to impose the lien would result in fraud or gross imposition by the client; and,
(7) whether there are less stringent means by which the matter can be resolved or by which the amount owing can be secured.

While not prohibited from doing so, if an attorney withholds a client's file or property in order to collect unpaid fees, the attorney does so at her own peril.

Avoiding the Most Common Client Complaints: Inadequate Communication & Lack of Diligence

Lack of diligence and inadequate communication give rise to the most frequent complaints filed against lawyers.

Rule 1.3: **A lawyer shall act with reasonable diligence and promptness in representing a client.**

Missing a court date, a deadline, or a statute of limitations may not be unethical conduct. Some of the factors that ODC looks for in determining violations of Rule 1.3 are ethical violations include but are not limited to a pattern of conduct, prior discipline or a letter of caution involving lack of diligence, and false statements or documents to cover up missed deadlines, appointments, or court dates.

The best way to avoid allegations of lack of diligence is to employ good office management practices. Lawyers who implement technology tools have a distinct advantage when it comes to diligence and time management.

Rule 1.4: **A lawyer shall keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information.**

Closely related to diligence is the rule regarding communication with clients. ODC often conducts investigations into allegations of incompetence and neglect only to find that the lawyer has done an outstanding job of representing the client. The grievance resulted, however, from the fact that the client didn't know what a great job the lawyer was doing because the client wasn't informed.

Rule 1.4(a) requires that the lawyer:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
(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.

It does not matter how competently and diligently an attorney handles a case, a repeated failure to return phone calls may result in discipline. An attorney should be reasonably available and communicate with the client, keeping the client apprised of the status of the legal matter by routinely providing the client with copies of correspondence, pleadings, and other work and the client information needed to make informed decisions.

Rules Related to Litigation:

Rule 3.1: **A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for a client for whom a proceeding could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.**

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.[9] The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by good faith argument for an extension, modification or reversal of existing laws.

Rule 3.2: **A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.**

Dilatory practices bring the administration of justice into disrepute.[10] Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the lawyer. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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[9] *Matter of Edwards*, 371 S.C. 266, 639 S.E.2d 47 (2006) (18 month suspension); *Matter of Young*, 371 S.C. 394, 639 S.E.2d 674 (2007)(public reprimand); *Matter of Collie,* 410 S.C. 556, 765 S.E.2d 835 (2014)(two year suspension); *Matter of Owen*, 417 S.C. 85, 789 S.E.2d 48 (2016) (public reprimand).

10 *Matter of Gorski*, 424 S.C.11, 817 S.E.2d 289 (2018) (one year suspension); *Matter of Yacobi*, 422 S.C.355, 811 S.E.2d 791 (2018) (public reprimand).

Rule 3.3(a)(1): **A lawyer shall not knowingly 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.**

This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a) (3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.[11]

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, 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.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Rule 3.2(a) (2): **A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of a client and not disclosed by opposing counsel.**

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a) (2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Rule 3.3(a) (3): **A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the**

11 *Matter of Whitlark*, 422 S.C. 362, 811 S.E.2d 794 (2018) (six month suspension); *Matter of Samaha*, 417 S.C. 421, 790 S.E.2d 391 (2016) (disbarred).

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.

Paragraph (a) (3) requires, that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.[12] This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. Counsel, however, may allow the accused to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. See also Comment [9]. When a narrative statement is offered under these circumstances, the lawyer may not examine the witness or use the false testimony in the closing argument.

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(h). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Rule 3.3(b): **A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.**

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty

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12 *Matter of Whitlark*, supra; *Matter of Robinson*, 424 S.C. 9, 817 S.E.2d 288 (2018) (nine month suspension).

of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make disclosure to the tribunal. It is for the tribunal then to determine what should be done making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Rule 3.3(c): **The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.**

Rule 3.4(a): **A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.**

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.[13]

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purposes of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. A lawyer may take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence or in any other manner alter or destroy the value of the evidence for possible use by the prosecution. In such a case, applicable law may require the lawyer to turn the

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13 *Matter of Samuels*, 379 S.C. 175, 666 S.E.2d 244 (2008) (public reprimand); *Matter of Samaha*, supra.

evidence over to the police or other prosecuting authority, depending on the circumstances.

Rule 3.4(b): **A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.**

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Rule 3.4(c): **A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for open refusal based on an assertion that no valid obligation exists.** [14]

Rule 3.4(d): **A lawyer shall not in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.**[15]

Rule 3.4(e): **A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.**

Rule 3.4(f): **A lawyer shall not request a person other than the client to refrain from voluntarily giving relevant information to another party unless:**

(1) the person is a relative or an employee or other agent of the client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5(a): **A lawyer shall not seek to influence a judge, juror, member of the jury venire or other official by means prohibited by law.**

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, Rule 501, SCACR, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The South Carolina version of paragraph (a) differs from the Model Rule in its reference to a "member of the jury venire" rather than "prospective juror" since any person technically could be the latter.

A lawyer may on occasion want to communicate with a juror or member of the jury venire after

14 *Matter of Samaha*, supra; see also *In re Biddle*, 412 S.C. 630, 773 S.E.2d 590 (2015) (three year suspension).

15 *Matter of Samuels*, supra.

the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Rule 3.5(b): **A lawyer shall not communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.**

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceedings such as judges, masters or jurors, unless authorized to do so by law or court order.[16]

Rule 3.5(c): **A lawyer shall not communicate with a juror or member of the jury venire after discharge of the jury if:**

(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment.

Rule 3.5(d): **A lawyer shall not Lawyer shall not engage in conduct intended to disrupt a tribunal.**[17]

16 *Matter of Duffy*, 418 S.C. 370, 793 S.E.2d 299 (2016) (public reprimand)

17 *In re Thompson*, 366 S.C. 367, 622 S.E.2d 540 (2005) (disbarred).

Rule 8.3: **(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.** [18]

(b) A lawyer who is disciplined or transferred to incapacity inactive status in another jurisdiction shall inform the Commission on Lawyer Conduct in writing within fifteen days of discipline or transfer.

(c) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(d) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(e) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(f) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Self-regulation of the legal profession requires, under some circumstances, that members of the profession report themselves to disciplinary authorities in order to protect the interests of the profession, the public, and the judicial process. Paragraphs (a) and (b) set forth the limited circumstances under which a lawyer is required to self-report. Any lawyer admitted to practice in South Carolina has a duty to self-report under paragraphs (a) and (b). The disciplinary procedures for handling matters giving rise to mandatory self-reports are set forth in Rules 17 and 29, RLDE, Rule 413, SCACR.

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct by another lawyer. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the

18 *Matter of Parrott*, 421 S.C. 105, 804 S.E.2d 852 (2017) (nine month suspension).

offense. The South Carolina version of paragraph (d) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (c).

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Disciplinary Counsel unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.

Paragraph (f) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (c) and (d) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.4: **It is professional misconduct for a lawyer to:**

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) commit a criminal act involving moral turpitude;

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

(f) 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

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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. 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. The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 402(h)(3): Lawyer's Oath: [19]

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect, and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment, and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge, or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice.

19 *In re Anonymous*, 392 S.C. 328, 709 S.E.2d 633 (2011) (Letter of caution); see also *Matter of Campbell*, 420 S.C. 515, 804 S.E.2d 630 (2017) (three year suspension).

Ethical Issues in Circuit Court: Things You Don't Think Matter (But Matter a Lot)

George M. McFadden, Jr.
South Carolina Circuit Court Judge

1

There Are Rules!

2

Rules Impacting Courtroom Behavior

- Rules of Professional Conduct – Rule 407, SCACR
- Code of Judicial Conduct – Rule 501, SCACR
- Rules for Lawyer Disciplinary Enforcement – Rule 413, SCACR
- Lawyer's Oath – Rule 402(h), SCACR

3

Conduct Before the Court

As a lawyer, you are an "officer of the legal system" and have "special responsibility for the quality of justice."

Paragraph [1], Preamble, Rule 407, SCACR

4

Conduct Before the Court

You "should demonstrate respect for the legal system and those who serve it, including judges, other lawyers and public officials."

Paragraph [5], Preamble, Rule 407, SCACR

5

Conduct Before the Court

You must maintain "a professional, courteous and civil attitude toward all person involved in the legal system."

Paragraph [9], Preamble, Rule 407, SCACR

6

Ex Parte Communication

7

Ex Parte Communication

"A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Canon 3(B)(7), Rule 502, SCACR

8

Ex Parte Communication

"A judge shall not initiate, permit, or consider **ex parte communications**, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding **except that**..."

Canon 3(B)(7), Rule 502, SCACR

9

Ex Parte Communication

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

Canon 3(B)(7), Rule 502, SCACR

10

Ex Parte Communication

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Canon 3(B)(7), Rule 502, SCACR

11

Ex Parte Communication

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Canon 3(B)(7), Rule 502, SCACR

12

Ex Parte Communication

"Ex parte communication" is defined as "prohibited communication between counsel and the court when opposing counsel is not present."

Brown v. Bi–Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003) (quoting *Black's Law Dictionary* 597 (7th ed. 1999).

13

Ex Parte Communication

"It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred.

The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration.

This is why the prohibition is not against 'prejudicial' ex parte communications, but against ex parte communications."

Burgess v. Stern, 311 S.C. 326, 330–31, 428 S.E.2d 880, 883 (1993)(quoting *In re: Wisconsin Steel,* 48 B.R. 753 (D. Ill. 1985).

14

Ex Parte Communication

Be mindful when communicating with the court:

- Be careful about email communications with the court
- Be careful about sidebar communications
- Do not copy the judge on communications among the lawyers, unless the judge specifically instructs you to do so
- Any time you communicate in writing with the judge, you must communicate with all counsel of record "at the same time and by the same means." Rule 5(b)(3), SCRCP

15

Ex Parte Communication

"A lawyer shall not .. communicate ex parte with [a judge, member of the jury venire or other official] during the proceeding unless authorized to do so by law or court order"

Rule 3.5(b), RPC, Rule 407, SCACR.

16

Conduct in the Courtroom

17

Civility Oath – Your Promises

I do solemnly swear (or affirm) that:

***

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

***

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

***

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

Rule 402(h), SCACR

18

Candor Toward the Tribunal

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;

Rule 3.3(a), RPC, Rule 407, SCACR

19

Candor Toward the Tribunal

A lawyer shall not knowingly:

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position but not disclosed by opposing counsel;

Rule 3.3(a), RPC, Rule 407, SCACR

20

Candor Toward the Tribunal

A lawyer shall not knowingly:

(c) Offer evidence the lawyer knows to be false, and take reasonable remedial measures regarding evidence the lawyer later learns is false

Rule 3.3(a), RPC, Rule 407, SCACR

21

Candor Toward the Tribunal

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

Rule 3.3(d), RPC, Rule 407, SCACR.

22

Fairness to Opposing Party/Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

Rule 3.4(a), RPC, Rule 407, SCACR

23

Fairness to Opposing Party/Counsel

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Rule 3.4(b), RPC, Rule 407, SCACR

24

Fairness to Opposing Party/Counsel

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

Rule 3.4(c), RPC, Rule 407, SCACR

25

Fairness to Opposing Party/Counsel

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Rule 3.4(d), RPC, Rule 407, SCACR

26

Fairness to Opposing Party/Counsel

A lawyer shall not:

(e) in trial,

- allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,
- assert personal knowledge of facts in issue except when testifying as a witness, or
- state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

Rule 3.4(e), RPC, Rule 407, SCACR

27

Impartiality/Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, member of the jury venire or other official by means prohibited by law;

Rule 3.5(a), RPC, Rule 407, SCACR

28

Impartiality/Decorum of the Tribunal

A lawyer shall not:

(c) communicate with a juror or member of the jury venire after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

Rule 3.5(c), RPC, Rule 407, SCACR

29

Impartiality/Decorum of the Tribunal

A lawyer shall not:

(d) engage in conduct intended to disrupt a tribunal

Rule 3.5, RPC, Rule 407, SCACR

30

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

Rule 4.1(a), RPC, Rule 407, SCACR

31

Truthfulness in Statements to Others

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

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.1(b), RPC, Rule 407, SCACR

32

Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 4.4, RPC, Rule 407, SCACR

33

Misconduct

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Rule 8.4(d), RPC, Rule 407, SCACR

34

Misconduct

It shall be grounds for discipline for a lawyer to engage in

conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or

conduct demonstrating an unfitness to practice law.

Rule 7(a)(5), RLDE, Rule 413, SCACR

35

Misconduct

It shall be grounds for discipline for a lawyer to

Willfully violate a valid court order issued by a court of this state or another jurisdiction

Rule 7(a)(5), RLDE, Rule 413, SCACR

36

Conduct in Proceedings

A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability or age, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or other similar factors, are issues in the proceeding.

Canon 3B(6), CJC, Rule 501, SCACR

37

Questions?

38

Screening for Conflicts and Obtaining Waivers

The following materials are a summary of the relevant Rules of Professional Conduct and their accompanying official Comments.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

An attorney shall not represent a client if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk of materially limiting the representation of one client because of responsibilities to another client, a former client, or a third person; or
(3) there is a significant risk of materially limiting the representation of one client because of an attorney's own personal interest.

Unless:

(1) the attorney reasonably believes that she 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 attorney in the same litigation or other proceeding before a tribunal; and,
(4) each affected client gives informed consent, confirmed in writing.

In order to resolve a conflict of interest, the lawyer must:

1) clearly identify the client or clients;
2) determine whether a conflict of interest exists;
3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and
4) if so, consult with the clients and obtain their informed consent, confirmed in writing.

In order to effectively identify conflicts of interest an attorney must have an internal conflicts checking system, *i.e.,* "reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved."

<u>Direct Conflicts:</u>

<u>Multiple Representation in Civil Litigation</u>. An attorney cannot represent opposing parties in the same litigation, regardless of the clients' wishes. A conflict may also arise when representing two clients on the same side. The risks of this arrangement include:

- a substantial discrepancy in the parties' testimony;
- incompatible positions in relation to an opposing party;
- substantially different possibilities of settlement of the claims or liabilities in question.

Multiple Representation in Criminal Matters. According to the Comment, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."

Opposing Interests Between Current Clients. According to the Comment, a lawyer may not oppose someone in one matter that the lawyer represents in another matter, even when the matters are wholly unrelated. The risks include:

- A feeling of betrayal on the part of the original client that results in harm to the lawyer-client relationship that will likely to impair effective representation of the client.
- The new client may have concerns that the lawyer will pursue her case less effectively out of loyalty to the original client.
- A conflict may arise if the lawyer has to cross-examine a client who appears as a witness in a lawsuit involving another client.

Inconsistent Legal Positions. Taking inconsistent legal positions on behalf of multiple clients presents a conflict of interest if "there is a significant risk that [the attorney's] action on behalf of one client will materially limit [the attorney's] effectiveness in representing another client in a different case." Under these circumstances, the attorney must refuse one of the cases or withdraw from one or both cases.

A conflict arises, for example, "when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client." However, "[t]he mere fact that advocating a legal position on behalf of one client may create precedent adverse to the interests of [another] client … in an unrelated matter does not create a conflict of interest."

Relevant factors in making the determination include:

- where the cases are pending,
- whether the issue is substantive or procedural,
- the temporal relationship between the matters,
- the significance of the issue to the immediate and long-term interests of the clients involved, and
- the clients' reasonable expectations in retaining the atorney.

Conflicts in Class Action Suits. When an attorney represents the plaintiffs or defendants in a class-action, unnamed members of the class are ordinarily not considered to be clients for purposes of applying the conflicts rule.

Part-time Prosecutors. Part-time prosecutors are not necessarily disqualified from simultaneous representation of other civil or criminal defense clients in private practice, as long as their prosecutions are limited in nature and scope and are not related to the private practice cases.

<u>Organizational Clients</u>. Although representation of an organization does not necessarily mean that the attorney also represents a constituent or affiliate of that organization, the attorney cannot accept a case that is adverse to an affiliate in an unrelated matter if:

>The circumstances are such that the affiliate should also be considered a client
>There is an understanding between the attorney and the organizational client that the attorney will avoid representation adverse to the client's affiliates, or
>The attorney's obligations to either the organization or the adverse client are likely to limit materially the representation of the other.

If an attorney is a member of an organization client's board of directors, the attorney must determine whether the responsibilities of the two roles conflict or could potentially conflict in the future.
In making this determination, consideration should be given to:

>The frequency with which such situations may arise,
>The potential intensity of the conflict,
>The impact or effect of the attorney's resignation from the board, and
>The possibility that the organization can obtain legal advice from another lawyer in such situations.

If the arrangement creates a "material risk" that an attorney's independent professional judgment will be compromised, the attorney should:

>Either not serve as a director or cease to act as the organization's lawyer when conflicts of interest arise;
>Or advise the other members of the board of the risks and consequences of a potential conflict and that board meeting discussions in the attorney's presence may not be protected by the attorney-client privilege.

<u>General Considerations in Common Representation</u>.

An attorney must exercise caution when contemplating dual or multiple representation in any case.

The Comment provides some considerations in making this decision:

>Is contentious litigation or negotiations between the clients imminent or contemplated?
>Is it likely that the lawyer's impartiality among the clients cannot be maintained?
>Has the relationship between the clients already assumed antagonism?
>Is there a likelihood that the clients' interests cannot be adequately served by common representation?
>Will the lawyer represent both or one of the parties on a continuing basis or in future matters?
>Does the situation involve creating or terminating a relationship between the parties?
>What effect will the common representation have on the attorney-client privilege?

If an attorney decides to undertake common representation, as part of the process of obtaining each client's informed consent, the attorney must advise each client that information will be shared among the clients

and that joint representation will be terminated if one client decides that some matter material to the representation should be kept from the other.

Indirect Conflicts.

General Considerations. The Comment addresses conflicts in situations where the clients' interests may not be directly adverse:

> "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of a lawyer's other responsibilities or interests. For example, if asked to represent several individuals seeking to form a joint venture a lawyer are likely to be materially limited in a lawyer's ability to recommend or advocate all possible positions that each may take because of a lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with a lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

Transactional Conflicts. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the attorney's relationship with the client or clients involved, the functions being performed, the likelihood that disagreements will arise and the likely prejudice to the clients.

The Comment provides guidance by way of examples:

- > If an attorney is asked to represent the seller of a business in negotiations with a buyer also represented by the attorney in another, unrelated matter, the attorney cannot undertake the representation without the informed consent of each client.
- > If an attorney is asked to prepare wills for more than one member of the same family, depending upon the circumstances, a conflict of interest may arise.
- > If an attorney is asked to represent an heir or a personal representative in an estate matter, the identity of the client may be unclear.

Whether a conflict in a non-litigation setting is consentable depends on the circumstances. If the interests of the clients are generally aligned, an attorney can seek consent to take on or continue the multiple representation, even though there is some difference in interest among the clients. Otherwise, each client would have to retain separate counsel.

When is it appropriate to seek a conflicts waiver from a client? Ordinarily, clients may consent to representation notwithstanding a conflict, as long as it is informed consent and, where required, confirmed in writing signed by the client. Certain conflicts are nonconsentable:

(1) conflicts that render the attorney unable to competently and diligently represent both clients;

(2) conflicts prohibited by law;
(3) representing adverse parties in the same litigation.

Informed Consent

Rule 1.0(f) defines informed consent– "a person agrees to a course of conduct after communication by the lawyer of reasonably adequate information and explanation about the material risks and reasonable alternatives."

To obtain informed consent, an attorney must explain to the client:

>the nature of the conflict
>the risks involved in moving forward in spite of the conflict;
>the advantages of moving forward in spite of the conflict;
>reasonably available alternatives

What Constitutes *Confirmed* in Writing? Rule 1.0(b) provides, "there is a writing that confirms that the person has given informed consent."

Case Note: A lawyer who claims that a client consented to proceed in spite of a conflict has the burden of proving consent. See *In re Anonymous Member of SC Bar*, 315 S.C.141 at 143, 432 S.E.2d 467 at 468 (1993). Not only will a lack of a writing be sufficient proof that a lawyer has engaged in a conflict of interest, the lawyer could also be disciplined if there is a writing but it fails to set forth the details of the disclosure to the client.

Can a Client Revoke Consent? According to the Comment, a client can revoke the consent and can terminate representation at any time.

> "Whether revoking consent to the client's own representation precludes a lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or [to the lawyer] would result."

Potential Conflicts. An attorney can obtain a waiver of a potential conflict, as long as that potential conflict is consentable. The Comment in this regard is quite useful:

> "The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that may arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the

material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation."

Note that if the affected client or clients don't consent to the representation despite the conflict or if the conflict is not consentable, the attorney must:

(1) Decline or withdraw from the representation;
(2) Seek court approval of withdrawal where necessary; and
(3) Continue to protect client confidentiality.

Other rules may also require return of the client's file, refund of any paid fees, etc.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

Rule 1.8(a)*: Transactions with Clients: An attorney must 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 are fair and reasonable to the client;

(2) the client is advised in writing of:

> the full terms of the transaction in a manner that can be reasonably understood by the client;

> the desirability of seeking the advice of independent legal counsel on the transaction and why the advice of independent legal counsel is desirable;

> the material risks of the proposed transaction, including any risk presented by the attorney's involvement; and,

> the existence of reasonably available alternatives.

(3) the client is given a reasonable opportunity to seek independent legal advice; and,

(4) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the attorney's role in the transaction, including whether the attorney is representing the client in the transaction.

Rule 1.8(c)*: Solicitation of Gifts from Clients An attorney may not solicit a substantial gift from a client who is unrelated to the attorney. An attorney may not prepare an instrument for a client that gives a substantial gift to the attorney or to a relative of the attorney (spouse, child, grandchild, parent, grandparent or other relative or individual with whom the attorney maintains a close, familial relationship).

An attorney is allowed to accept an unsolicited gift from a client if the gift and the circumstances are fair to the client. According to the comment, "a simple gift such as a present given at a holiday or as a token of appreciation is permitted."

Although a lawyer is allowed to prepare a will or other instrument (such as a deed) for a relative that gives herself a gift, the better practice is to not do it.

According to the Comment, the rule against solicitation of gifts from clients does not prohibit the attorney from having herself or a partner or associate named as personal representative of the client's estate or to another "potentially lucrative fiduciary position." However, the attorney must comply with Rule 1.8 and Rule 1.7.

Rule 1.8(d)*: Literary Rights. While representing a client, a lawyer may not make or negotiate an agreement that gives herself literary or media rights to a portrayal or account based on the client's legal matter or the lawyer's representation of the client.

Rule 1.8(e)*: Loans to Clients. A lawyer cannot provide financial assistance or make or guarantee a loan to a client (*e.g.,* for living expenses) in connection with pending or contemplated litigation, except:

(1) advance litigation expenses with reimbursement contingent on the outcome of the case; and,

(2) pay court costs and expenses of litigation on behalf of an indigent client.

Other than a contingency fee arrangement, it is a conflict of interest for a lawyer to have a financial stake in her client's litigation.

Rule 1.8(f)*: Accepting Compensation from Someone Other than the Client. Sometimes someone other than the client is paying the bill (family member, an insurance company, etc.). This arrangement presents a conflict of interest because the person paying the bill often has interests that conflict with those of the client. An attorney may only accept such compensation if:

(1) the client gives informed consent;

(2) the person who pays the fee does not interfere with the lawyer's independent professional judgment or relationship with the client; and,

(3) the attorney keeps information relating to representation of the client confidential.

Rule 1.8(g)*: Aggregate Settlements/Agreements for Multiple Clients. When representing two or more clients in a related matter, an attorney cannot participate in making an aggregate settlement of the claims without informed consent, in a writing signed by each client. In a criminal case, an attorney is prohibited from negotiating an aggregated plea agreement without a waiver.

Rule 1.8(h)*: Limiting Malpractice Liability. An attorney cannot make an agreement that prospectively limits her liability to a client for malpractice unless the client is independently represented in making the agreement.

An attorney may only settle a claim or potential claim for malpractice liability with an unrepresented client or former client if:

(1) the attorney advises the client in writing of the desirability of seeking the advice of independent legal counsel in connection with the settlement; and,
(2) the attorney gives the client a reasonable opportunity to seek such advice.

Agreements that attempt to limit liability for malpractice prospectively are prohibited unless the client is independently represented in making the agreement.

The Comment authorizes:

(1) An agreement with the client to arbitrate legal malpractice claims, but only when an arbitration agreement would be enforceable and when the lawyer informs the client of the scope and effect of the arbitration agreement.
(2) Lawyers to practice in the form of a limited-liability entity, but only where permitted by law; when each lawyer remains personally liable to the client for his or her own conduct; and, when the firm complies with all legal requirements, such as client notification or maintenance of adequate liability insurance.
(3) An agreement that defines the scope of the representation, but only when the definition of the scope of the representation does not make the lawyer's obligations "illusory," which would amount to an attempt to limit liability.

Rule 1.8(i)*: Acquiring an Interest in Client's Case. An attorney shall not acquire a proprietary interest in the cause of action or subject matter of litigation of a client's matter, except an attorney may

(1) acquire a lien authorized by law to secure the fee or expenses (including liens granted by statute, liens originating in common law, and liens acquired by contract with the client); and,
(2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.8(k): Family Relationships Between Opposing Counsel: If an attorney is the parent, child, sibling or spouse of the lawyer who represents a client directly adverse to her client, the attorney cannot proceed with the representation without the client's informed consent. This rule applies to adverse parties in the same matter or in substantially related matters. In this situation, no writing is required and the conflict is not imputed to others in the firm.

Rule 1.8(l): Advising the Client and the Court in the Same Case: In any adversarial proceeding, an attorney shall not advocate for a client and advise the hearing officer or judge. This rule also prohibits direct and indirect ex parte communication.

This rule addresses administrative proceedings in which an attorney is an advisor to a public administrative body in front of which the attorney also prosecute cases. It does proscribe an attorney from prosecuting

* The conflicts set forth in subsections (a) through (i) of Rule 1.8 are imputed to all of the lawyers in the firm.

an administrative matter if another lawyer in the attorney's office is the advisor to the administrative body. Each attorney must not communicate with each other or share information about that particular case. To do so would be an *ex parte* communication with the hearing officer. With regard to government lawyers, use of an effective conflicts screen that prevents sharing of information among the government lawyers allows an agency of the government to carry out its administrative functions while also protecting the due process rights of litigants and others involved in the proceedings.

Examples from the Comment:

> >A lawyer advising the Board of Dentistry may not prosecute a disciplinary action against Dentist Doe while at the same time advising the Board on matters relative to the Doe matter. A lawyer may advise the Board on the Doe matter while another lawyer employed by the same employer prosecutes the Doe matter, but the two lawyers may not share information with one another, except in the regular course of discovery, with notice to Doe.
>
> >General counsel employed by a state supported university may not defend the university in a dispute brought by an employee under the university's internal employee grievance system while at the same time serving as an advisor to the internal panel which is adjudicating the employee grievance matter. One lawyer in general counsel's office may advise the employee grievance body on the particular matter while another lawyer in the same office defends the university in the matter, as long as the two lawyers do not share information concerning the matter.
>
> >Lawyers in private practice would be prohibited from representing an adjudicatory body in a particular matter while another lawyer in the same law firm prosecutes or defends the same matter before the adjudicatory body.

<u>Rule 1.8(m) Sex with Clients</u>: A lawyer shall not have sexual relations with a client if:

(1) The client is in a vulnerable condition;
(2) The client is subject to the lawyer's control or undue influence;
(3) The sexual relationship could have a harmful or prejudicial effect on the client's interests; or,
(4) The sexual relationship may adversely affect representation of the client.

A lawyer's relationship with her clients is one of trust and confidence. A sexual relationship with a client presents a significant danger of harm to client interests and should be avoided.

The Comments lists three types of problems that sex with clients causes:

(1) A question may arise as to the voluntariness of the client's consent to a sexual relationship. Lawyers are in a position of extraordinary trust and may not use that power and influence to entice a vulnerable client into an otherwise undesired sexual relationship.
(2) Sexual relationships are inappropriate when the existence of the relationship could prejudice a client's legal interests, especially when the client is involved in a domestic relations case.

(3) A lawyer engaged in an intimate sexual relationship with a client may not be able to exercise the proper degree of professional judgment and independence required to fully represent the client. In any of these circumstances, a sexual relationship between lawyer and client is not appropriate, and the client's own emotional involvement renders it unlikely that a client can give adequate informed consent to the relationship.

RULE 1.9: DUTIES TO FORMER CLIENTS

After termination of a client-lawyer relationship, there are continuing duties with respect to confidentiality and conflicts of interest. Therefore, an attorney may not represent someone with interests adverse to a former client except in certain circumstances.

Rule 1.9(a) Duties to Former Clients. When an attorney has represented a client, the attorney is thereafter not allowed to represent someone else in the same or a substantially related matter when that person's interests are materially adverse to the former client unless informed consent is obtained and confirmed in writing from the former client.

Examples from the Comment:

> A lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.
> A lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.
> A lawyer who has represented multiple clients in a matter could not represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.

On the other hand, if an attorney regularly handles a particular type of problem for a former client, the attorney is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

Examples from the Comment:

> A lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

> A lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations, but would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

The Comment states that certain information is not ordinarily disqualifying:

(1) Information that has been disclosed to the public or to other parties adverse to the former client;

(2) Information that has been rendered obsolete by the passage of time;
(3) In the case of an organizational client, general knowledge of the client's policies and practices; however, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such representation.

<u>Rule 1.9(b) Duties to the Clients of Former Firm</u>. When an attorney leaves a law office, the attorney cannot knowingly represent a person against a former client of her old firm in the same or a substantially related matter without informed consent, confirmed in writing when:

(1) the old firm's former client's interests are materially adverse to that person; and
(2) the attorney acquired confidential information material to the matter about the former client.

The Comment provides guidance:

(1) The client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised.
(2) The rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel.
(3) Lawyers' ability to form new associations and take on new clients after leaving a firm should not be unreasonably hampered.

According to the Comment, "[i]f the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel."

<u>Rule 1.9(c) Protection of Information Acquired from Former Clients</u>. An attorney is prohibited from revealing or using information relating to the representation to the disadvantage of the former client except as permitted or required by other provisions of RPC or when the information has become generally known.

The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

Without informed consent, confirmed in writing, lawyers in the same firm cannot knowingly represent a client when any one of them has a conflict under Rules 1.7, 1.8(c), or 1.9, unless:

(1) The conflict is based on a personal interest of the prohibited lawyer, and
(2) There is not a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Compare the two examples from the Comment:

> Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, but that lawyer will do no work on the case and the personal beliefs of that lawyer will not

materially limit the representation by others in the firm, the firm should not be disqualified.

> If a lawyer in the firm has on ownership interest in an entity that is the opposing party in a case, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of that lawyer would be imputed to all others in the firm.

Public Representation of Indigent Clients Exception. A public defender or legal aid lawyer is not disqualified because another lawyer in the organization represents another client in the same or a substantially related matter, if:

(1) The two lawyers are timely screened from access to confidential information of the other client;
(2) Neither lawyer participates in the other one's case; and
(3) Each lawyer retains authority over the objectives of the representation of her own client.

What is a "Firm"? Rule 1.0(d) defines firm as a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. However, note that the conflicts rule treats legal services organizations differently from other law firms by permitting screening.

What is a "Screen"? Rule 1.01(l) defines screen as isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obliged to protect.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

General Considerations. A current or former government lawyer is subject to the Rules of Professional Conduct and may also be subject to specific statutes or government regulations regarding conflicts of interest.

The Comment provides guidance:

>A lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency.
>A lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by the rules.

Former Government Lawyers. A former public officer or government employee is prohibited from:

(1) Revealing or using information relating to the representation to the disadvantage of the former client except as permitted or required by other provisions of RPC or when the information has become generally known; and,
(2) Representing a client in connection with a matter the attorney "personally and substantially" participated in as a public officer or employee without informed consent, confirmed in writing from the attorney's former client, i.e., the government employer.

This conflict disqualification is imputed to former government lawyer's new firm, unless:

(1) the lawyer is screened from any participation in the matter;
(2) the lawyer receives no part of the fee; and,
(3) Written notice is promptly given to the former government employer.

The notice to the former government agency should describe the lawyer's prior involvement in the matter and the proposed screening procedures and should be given as soon as the conflict arises.

Current Government Lawyers. Current government lawyers are subject to the conflicts provisions of Rule 1.7 and 1.9 and are prohibited from:

(1) Participating in a matter in which the lawyer participated "personally and substantially" while in private practice or nongovernmental employment, without informed consent, confirmed in writing; or

(2) Negotiating for private employment with anyone involved as a party or as lawyer in a matter in which the lawyer is participating personally and substantially. (There is an exception for judicial law clerks subject to Rule 1.12(b)).

A "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;
(2) any other matter covered by the conflict of interest rules of the appropriate government agency; or
(3) a matter that continues in another form, depending on the extent to which the successive matters involve the same basic facts, the same or related parties, and the time elapsed.

Disqualification is Not Imputed to Co-Workers. According to the Comment "[b]ecause of the special problems raised by imputation within a government agency, [the rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

One who “personally and substantially” participated in a matter as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, cannot:

(1) represent anyone in connection with the case without informed consent from all parties, confirmed in writing, or
(2) negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in the case.

Although a former judicial law clerk to the judge cannot subsequently represent a party in the case without the required consent, she is allowed to negotiate for employment with a party or lawyer involved in the case, but only after she has notified the judge.

Disqualification under this rule is imputed to the firm unless:

(1) the former judge, etc. is timely screened from any participation in the matter and receives no part of the fee; and
(2) Written notice is promptly given to the parties and any appropriate tribunal.

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

"Adjudicative officer" includes judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

Third-party neutrals are also subject to more stringent standards of personal or imputed disqualification under other law or codes of ethics specifically applicable to them.

RULE 1.13: ORGANIZATION AS CLIENT

When an attorney is employed or retained by an organization, the attorney represents the organization acting through its duly authorized constituents and must act in the best interest of the organization.

According to the Comment,

> “When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by [the attorney] even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in [the lawyer’s] province.”

"Constituents" means officers, directors, employees and shareholders of corporations and the positions equivalent to officers, directors, employees and shareholders that are held by persons acting for organizational clients that are not corporations.

If an attorney becomes aware that a constituent of 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 which reasonably may be imputed to the organization, and that is likely to result in substantial injury to the organization, the attorney must to 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, unless the lawyer reasonably believe that it is not necessary in the best interest of the organization to do so.

Must the Attorney Report the Wrongdoing to the Highest Authority? In most circumstances, yes. However, the Comment suggests that there may be a situation where it is not required, or where it is not in the best interests of the organization to do so. Where appropriate, the lawyer could ask the offending constituent to reconsider his action or inaction. The example from the Comment:

> "If the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of [the attorney's] advice, [the attorney] may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority."

Factors to consider in determining how to proceed:

>The seriousness of the violation,
>The potential consequences of the violation,
>The responsibility in the organization of the person involved,
>The apparent motivation of the person involved,
>The policies of the organization concerning such matters, and
>Any other relevant considerations.

Client Confidentiality. Regardless of how the attorney decides to proceed, she must minimize the risk of revealing confidential information to people outside the organization to the extent possible. When one of the constituents of an organizational client communicates with the organization's lawyer in the constituent's organizational capacity, the communication is protected by client confidentiality.

If, despite the attorney's efforts, the "highest authority" insists upon, or fails to address in a timely and appropriate manner, a clear violation of law?   If the attorney "reasonably believes" that the violation is "reasonably certain to result in substantial injury to the organization," then the attorney is permitted to reveal confidential client information, but only if and to the extent necessary to prevent substantial injury to the organization.

The Comment provides guidance:

> "If an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6."

Termination of the Representation. If an attorney reasonably believes that she was fired because of actions required by this rule, (or quits because of the circumstances that required or permitted her to take action under this rule), she must proceed as she reasonably believe necessary to assure that the organization's highest authority is informed of her discharge or withdrawal.

Conflicts Between the Organization and Its Constituents. The Rule provides that,

> "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, [the attorney] shall explain the identity of the client when [she] knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom [she] is dealing."

If the organization's interest become, or potentially could become, adverse to the interest of one or more of its constituents, the attorney should advise the adverse constituent:

(1) that there is a conflict or potential conflict of interest,
(2) that the attorney cannot represent the adverse constituent,
(3) that such person may wish to obtain independent representation,
(4) that the attorney is the lawyer for the organization and cannot provide legal representation for the adverse constituent, and
(5) that discussions between attorney for the organization and the adverse constituent may not be privileged.

Representing Both the Organization and a Constituent. While representing an organization, an attorney may also represent any of its directors, officers, employees, members, shareholders or other constituents, but the conflict and consent requirements of Rule 1.7 apply. If the organization's consent to the dual representation is required by Rule 1.7, the individual who is to be represented cannot be the one who waives the conflict on behalf of the organization. It has to be waived by another official with authority or by the shareholders.

Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the attorney must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

When the Client Organization is a Government Agency - Comment:

> "Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials,

a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority."

PART III: UNDERSTANDING YOUR CONFIDENTIALITY OBLIGATION

(01/29/2020)*

Maintaining client confidentiality is fundamental to the lawyer-client relationship. In order to ensure client confidentiality is maintained, lawyers should ask a number of questions:

Do I / we fully understand what confidentiality means?

Do I / we have adequate protections in place to safeguard confidential client information?

Are we maintaining our filing, communication, and technology systems in a manner adequate to ensure that our ethical obligations are met with regard to client confidentiality?

Answering "no," or "we don't know" to any of these questions places the lawyers in the firm at risk of violating the confidentiality rules. These materials provide an overview of the rules governing client confidentiality and suggest means for ensuring compliance with those rules.

Rule 1.6 - Confidentiality

The primary provision in the Rules of Professional Conduct regarding client confidentiality is Rule 1.6, which provides:

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) 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;

(4) 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;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) 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;

(7) to comply with other law or a court order; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.6, RPC, Rule 407, SCACR.

Rule 1.6 begins with a broad prohibition against revealing client information: "A lawyer shall not reveal information relating to representation of a client…." While "reveal" is not defined, it means generally to "make (something secret or hidden) publicly [or generally] known: divulge." Webster's Third New International Dictionary 1942 (1986); Miriam-Webster's Collegiate Dictionary (11th Ed. 2003). Thus, the word "reveal" is a broad concept and includes making something known in any fashion. Likewise, "information relating" to the lawyer's representation of the client is also broad.

The exceptions to the prohibition are spelled out in the rule: (A) where the client consents after consultation, (B) disclosures that are impliedly authorized in order to carry out the representation, or (C) disclosures as stated in paragraph (b) of Rule 1.6 (containing a list of things that a lawyer may reveal despite the prohibition contained in paragraph (a)).

The Comments

The Comments to Rule 1.6 provide helpful guidance to the Rule's operation:

> [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.
>
> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(g) for the definition of informed consent. Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to

communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[5] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[7] Disclosure of information related to the representation of a client for the purpose of marketing or advertising the lawyer's services is not impliedly authorized because the disclosure is being made to promote the lawyer or law firm rather than to carry out the representation of a client. Although other Rules govern whether and

how lawyers may communicate the availability of their services, paragraph (a) requires that a lawyer obtain informed consent from a current or former client if an advertisement reveals information relating to the representation. This restriction applies regardless of whether the information is contained in court filings or has become generally known. See Comment [3]. It is important the client understand any material risks related to the lawyer revealing information when the lawyer seeks informed consent in accordance with Rule 1.0(g). A number of factors may affect a client's decision to provide informed consent, including the client's level of sophistication, the content of any lawyer advertisement and the timing of the request. General, open-ended consent is not sufficient.

Disclosure Adverse to Client

[8] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[9] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the

representation in limited circumstances.

[10] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Detection of Conflicts of Interest

[14] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more

firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [6]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[15] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [6], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[16] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 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. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[17] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer to comply

with the court's order.

[18] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[20] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal

laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

[21] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

(Last amended by Order dated November 27, 2019.)

Unfortunately, client confidentiality is an easy rule to break simply because lawyers, their associates, their experts, or their assistants often misunderstand the definition or parameters of confidential client information. Many presume that confidential information consists only of secrets told to the lawyer in confidence. However, confidential information is not just client "secrets" of which third parties have no knowledge. Under Rule 1.6, "confidential information" is ANY INFORMATION related to the lawyer's representation of the client or the client's legal matter, regardless of whether it is secret and regardless of its source.

Confidentiality vs. The Lawyer/Client Privilege

The Rules of Professional Conduct prohibit the lawyer from revealing any information relating to the representation of the client. It is important to distinguish this concept of client confidentiality (an ethical limitation) from the lawyer/client privilege (an evidentiary limitation). Where the lawyer/client privilege protects the client from having his or her secrets revealed in court by the lawyer, the duty of confidentiality applies in all circumstances (in court and outside of court) to all information about the client and the client's case, that is related to the representation of the client. While the privilege can be waived inadvertently when the client reveals secrets to a third party or when the secret becomes public knowledge, client confidentiality under Rule 1.6 applies regardless of general or specific knowledge of the information by those outside of the

relationship.

Metadata, Disclaimers, and Inadvertent Disclosure

The primary concern with email related to client matters is protection of confidential information. Because email and text messaging have become the primary method of day-to-day communication, in both the social and professional setting, clients expect to be able to relay information to and receive information from their lawyers electronically. Inherent in electronic communication is the risk of both inadvertent misdirection and intentional interception. While it would be difficult to completely avoid establishing regular communication with your clients via email, it is important to set limitations and expectations at the outset of the representation.

First, clients should be instructed not to submit any sensitive, highly confidential or potentially detrimental information by email. Documents or information that could be damaging to the client's legal interests should always be conveyed in person. Protecting email by passwords may help, but the best way to protect confidential information related to the representation is delivery in person (i.e., by "snail mail" or hand delivery).

Second, clients should have a clear expectation of your availability and accessibility through email. If you or a staff member does not check your email in the evening or on the weekends or when you are in court or otherwise out of the office, the clients need to be aware of that fact so that they do not expect immediate responses to their email inquiries.

Finally, if any information related to the legal representation is going to be discussed or shared electronically, you need to instruct your client to take security precautions, such as a frequent password changes and avoidance of shared computers.

Email is easily misdirected. Most email software will save previously used email addresses for you and will automatically fill in an address as you type it. If you are not paying attention, you are likely to include unwanted addresses in your message. This feature should be turned off on all office computers.

Even without the automatic address feature, the "Reply" and "Reply-All" buttons oftentimes result in delivery of messages to unintended recipients. In 2005, the Supreme Court of South Carolina amended Rule 4.4, RPC, to address the growing concern about the inadvertent disclosure of confidential file material. Subsection (b) states that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment [2] to the Rule states the Rule is a recognition of the fact that "lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers." The Comment says that the purpose of the Rule is to permit the sender to take protective measures. The Comment adds that "[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person." The Comment specifically identifies email

communication as a “document” under the Rule.

Even if the document transmitted electronically is delivered to the intended recipient, it may contain information that should not be disclosed. Electronic documents contain hidden information, including previous drafts, edits and the identity of who made them, and electronic comments that the sender might believe have been deleted prior to transmission. While the vast majority of this “metadata” is completely innocuous and of no interest to anyone, there is a real risk of disclosure of information that could harm the client’s case. An easy way to avoid inadvertent disclosure of metadata is to deliver electronic documents in .pdf format. This is delivery of a picture or image of the document as opposed to the document itself.Most current versions of email and word processing software contain a feature that will convert documents to .pdf with a few clicks of the mouse. Just be sure you are not sending a version that can be converted back to its metadata or “scrubbed” to reveal confidential information previously “deleted.”

<u>Electronic Storage of Client Data</u>

Access to the file room or filing cabinets should be limited. In large offices there may even be staff members that have no need for access to client files. If client information is stored in a computer database, access to that database must be controlled. Computer passwords should be periodically changed and should not be written down in the office. If members of the legal team take client files, computer disks, or laptops containing client information outside the office, policies should be established for securing those files and computers. All waste paper should be shredded.

Modern technology presents lawyers with new opportunities to improve responsiveness and efficiency. At the same time, however, advances in communication technology present new challenges to professionals obligated to ensure the integrity of client information. While faxing and emailing client information is not a violation of client confidentiality, such mechanisms should be utilized with caution and attention. Sending sensitive client information by fax and email should be avoided whenever possible. When using faxes, call ahead to confirm the number and ensure that the intended recipient is available to receive it. Faxes should be prominently marked confidential and should request that the recipient call the sender to confirm receipt.

As with faxes, email addresses should be confirmed prior to use and messages should be set up to generate a return receipt. It is also important to include a prominent confidentiality statement in the text of client-related email messages. Clients who wish to communicate with the law office by fax or email should be advised in writing of the lack of a guarantee of security, and should be advised in writing against transmittal of sensitive information by such means.

<u>Confidentiality and Closed Files</u>

The Comments to Rule 1.6 state that the “duty of confidentiality continues after the client-lawyer relationship has terminated.” Rule 1.6, Comment [22]. The Court recently added a file retention rule to Rule 1.15 (Safekeeping of Property). Lawyers are permitted, under certain circumstances, to destroy client files after six years. However, the method of destruction must preserve client confidentiality. Rule 1.15(i) provides:

> Absent any obligation to retain a client's file which is imposed by law, court order, or rules of a tribunal, a lawyer shall securely store a client's file for a minimum of six (6) years after completion or termination of the representation unless:
>
> (1) the lawyer delivers the file to the client or the client's designee; or
>
> (2) the client authorizes destruction of the file in a writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.
>
> If the client does not request the file within six (6) years after completion or termination of the representation, the file may be deemed abandoned by the client and may be destroyed unless there are pending or threatened legal proceedings known to the lawyer that relate to the matter. A lawyer who elects to destroy files shall do so in a manner which protects client confidentiality.

Rule 1.15(i), RPC.

The suggested method of file destruction in the Comment to Rule 1.15(i) is shredding. Lawyers should take care in selecting a document shredding contractor for destruction of client files. The service provider should have written policies regarding confidentiality, security, and the ultimate depository of the shredded material.

Remember, however, that this provision is subject to the retention rules for information found in Rule 1 of Rule 417, RPC (financial recordkeeping). Furthermore, there is no statute of limitations for disciplinary complaints, and if the file has been destroyed, the lawyer may find it difficult to respond to the complaint sufficiently. Retention of electronic copies is advisable.

Lastly, the limitations periods for legal malpractice claims are subject to the discovery rule, and claims for ineffective assistance of counsel in post-conviction relief matters may arise beyond six years following termination. Without a copy of the file, defending either of these matters may prove difficult. The careful lawyer will consider these things when deciding whether to fully destroy a client file.

Staff Supervision

Lawyers who employ and supervise nonlawyer staff must be particularly concerned with confidentiality. The Comments to Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants" (the rule that makes the lawyer responsible for the unethical conduct of his staff) specifically warn lawyers about the nonlawyer's obligation to maintain client confidences: "A lawyer should give legal assistants appropriate instruction and supervision concerning the ethical aspects of their employment *particularly regarding the obligation not to disclose information relating to the representation of the client*." (emphasis added). Client confidentiality is the only ethical obligation specifically pointed out in the comments to Rule 5.3, which should alert the practitioner to its significance.

It is incumbent upon the lawyer-employer to discuss confidentiality issues with legal assistants and staff both at the time they are hired and then periodically, throughout the course of the employment. It should not be presumed that even the educated or experienced paralegal has a complete grasp of confidentiality issues.

To further emphasize the importance of these issues, employees should be required to sign a statement of understanding of the confidential nature of the work both at the time they are hired and when this issue is reviewed. Written policies and procedures about the handling of confidential matters and communication regarding clients and their files are essential to ensure compliance.

Practical Tips for Protecting Client Confidences

As tempting as it may be to talk about work with colleagues, friends, and family, client confidences must not be revealed, even hypothetically, without the client's informed consent. With regard to communications outside the office, members of the legal team should never discuss clients or cases at home or in social settings. Additionally, discussing clients or cases with co-workers outside the office should be avoided in the event such conversations could be overheard.

Everyone on the legal team should be cognizant of his or her surroundings when communicating with clients, even in the office. Even brief in-person conversations with clients should be conducted in a conference room or office with the door closed, not in the lobby or the hallway. When speaking with or about a client or a case by phone, the door to the office should be closed and the use of the speaker phone should be avoided. A call from or about a client should certainly not be taken with another client or third party present. A meeting with a client should take place in a closed area, and any non-clients or non-employees should be asked to leave.

Individual offices should be arranged so as to avoid opportunities for visitors to inadvertently or intentionally observe or obtain confidential client information. Files on the desk or other furniture should be kept closed. Computer monitors should be positioned so they are not in the line of vision of visitors in the office or passers-by. Password-protected screen savers prevent others from viewing client information in the user's absence. Mail should be kept in a closed folder, not open on the desk or within view. Individual offices and work areas should be separated from the lobby and conference room areas by a closed door.

Again, it cannot be assumed that members of the legal team will already know how to handle client information. Addressing these issues in advance is much more pleasant that explaining inadvertent lapses in security to the client or violations of confidentiality to the Court. As with all ethical considerations, client confidentiality should be approached with thoughtfulness and common sense. When considering habits and policies regarding client communications and client files, lawyers should err on the side of caution and even take extra steps to maintain confidentiality.

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