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 CLE Division of the South Carolina Bar.

LEAPP is a four-part program that is held multiple times each year. LEAPP is a comprehensive exploration of the fundamentals of legal ethics designed for lawyers and other legal professionals at any career stage. The faculty includes knowledgeable and experienced members of the Bar who deal with various aspects of matters involving ethics, professional discipline, and legal malpractice.

LEAPP **Ethics School** is a (5.75 hours) program in which the faculty reviews 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. Participatory discussion focuses hypotheticals based on actual disciplinary cases.

LEAPP **Trust Account School** is a (4.0 hours) program covering mandatory accounting and recordkeeping requirements for client trust accounts. Participants and faculty discuss tools, techniques, and law office policies that can help the practitioner effectively avoid mistakes, misappropriation, and discipline. At the end of the program, participants have the opportunity to work through a monthly trust account reconciliation to test their knowledge.

LEAPP **Advertising School** is a (4.0 hours) program outlining the restrictions and requirements of attorney advertising and solicitation, with a particular focus on new media.

LEAPP Ethics School
Monday, March 18, 2024

9:00 a.m.
Scope of Representation, Fees, Termination
Ericka M. Williams, Deputy Disciplinary Counsel, Office of Disciplinary Counsel
Phylicia Coleman, Assistant Disciplinary Counsel, Office of Disciplinary Counsel
Hon. Heath Taylor, Circuit Court Judge
Almand Barron, Shea and Barron

9:55 a.m.
Communication & Diligence
Ericka M. Williams, Deputy Disciplinary Counsel, Office of Disciplinary Counsel
Phylicia Coleman, Assistant Disciplinary Counsel, Office of Disciplinary Counsel
Hon. Heath Taylor, Circuit Court Judge
Almand Barron, Shea and Barron

10:45 a.m.
Break

11:00 a.m.
Litigation Conduct & Ex Parte Communication
Hon. Letitia H. Verdin, South Carolina Court of Appeals

12:00 p.m.
Lunch Break

1:00 p.m.
Conflicts of Interest
William O. Higgins, Graybill, Lansche, & Vinzani

2:15 p.m.
Break

2:30 p.m.
Conflicts of Interest, Con't.
William O. Higgins, Graybill, Lansche, & Vinzani

3:45 p.m.
Confidentiality
William M. Blitch, Jr., Disciplinary Counsel, Office of Disciplinary Counsel

4:15 p.m.
Adjourn

ETHICS PANEL: LAWYER-CLIENT RELATIONS

Ericka M. Williams
Deputy Disciplinary Counsel

Phylicia Coleman
Assistant Disciplinary Counsel

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Office of Disciplinary Counsel
Supreme Court of South Carolina

Guest Panelist:

The Honorable Heath P. Taylor, First Judicial Circuit Court Judge
Almand Barron, The Law Offices of Shea and Barron

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- Court of Appeals Holds Special Session in Florence (06-11-2019)
- Amendments to South Carolina Appellate Court Rules (06-05-2019)
- Amendments to South Carolina Appellate Court Rules (06-05-2019)
- Honeycutt to Lead Access to Justice Commission (05-31-2019)
- Charleston Housing Court Pilot Project (05-28-2019)
- ...more

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Charleston County Courthouse

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SCJB Contact Numbers

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Beginning and Ending the Lawyer-Client Relationship

Beginning and Ending the Lawyer-Client Relationship

- Scope of Representation
- Setting the Fee and Collecting the Bill
- Fee Sharing and Fee Splitting
- Resolving Fee Disputes
- Termination of Representation

Determining the Scope of Representation

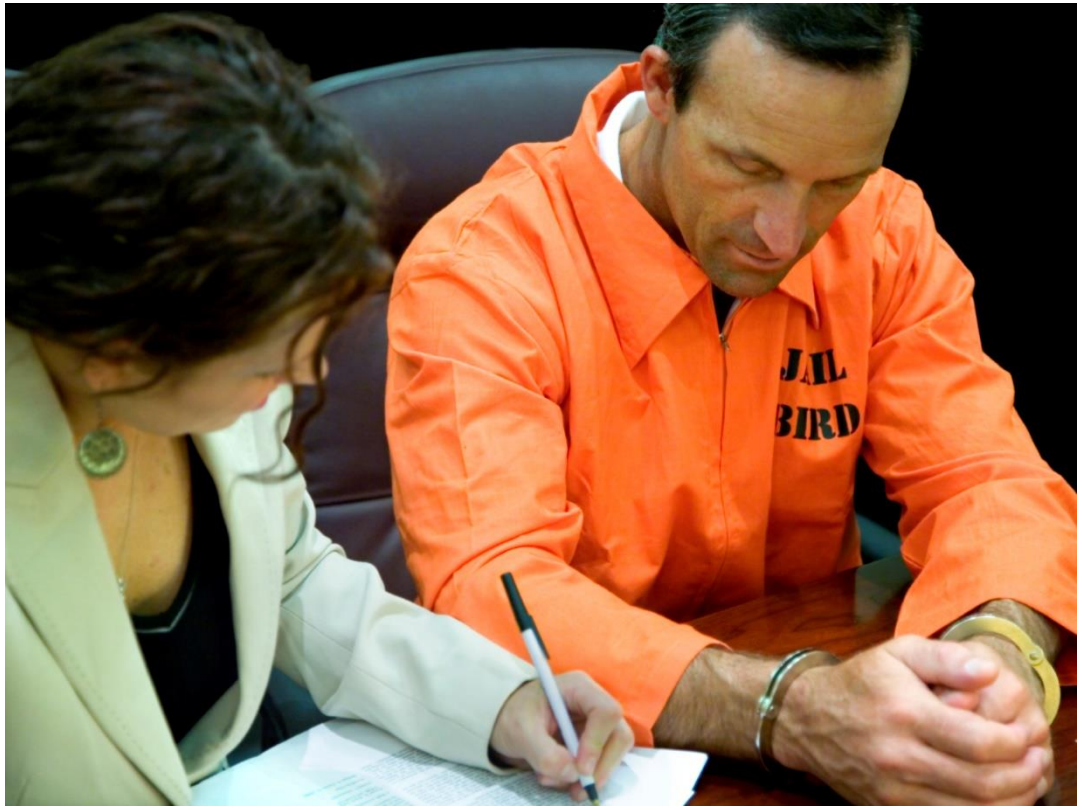
RULE 1.2(a): ALLOCATION OF AUTHORITY BETWEEN CLIENT & LAWYER

- Lawyer shall abide by Client's decisions concerning the objectives of representation and shall consult with Client as to the means by which they are to be pursued.
- Lawyer may take such action on behalf of Client as is impliedly authorized to carry out the representation.

Determining the Scope of Representation

RULE 1.2(a): ALLOCATION OF AUTHORITY BETWEEN CLIENT & LAWYER

- Lawyer shall abide by Client's decision whether to make or accept an offer of settlement of a matter.



- In a criminal case, Lawyer shall abide by Client's decision, after consultation with Lawyer, as to a plea to be entered, whether to waive jury trial and whether Client will testify.

Limiting the Scope of Representation

RULE 1.2(c): SCOPE OF REPRESENTATION

A lawyer may limit the scope of representation if:

- Limitation is reasonable under the circumstances and
- Client gives informed consent.

What is “Informed Consent”?

Informed Consent

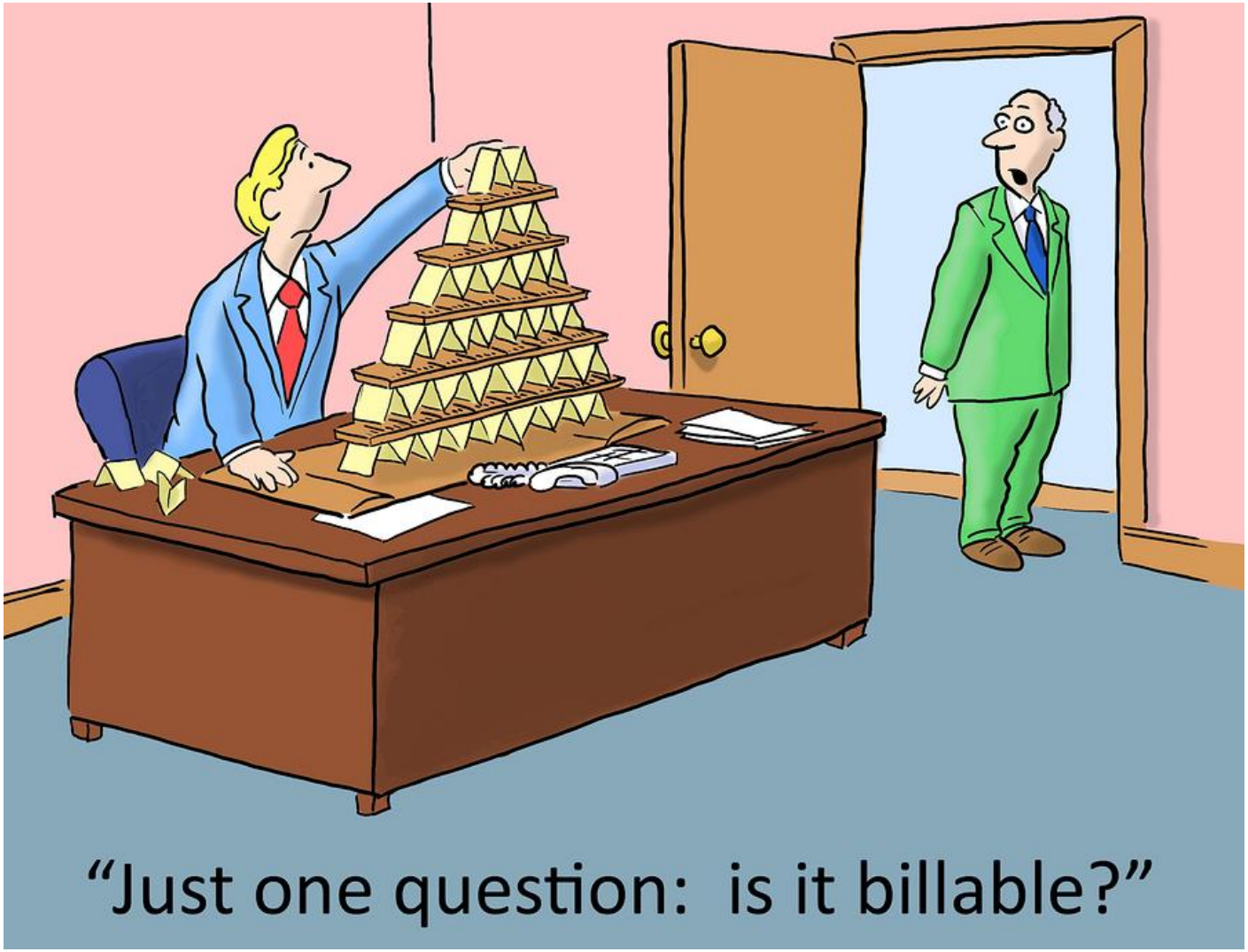
Rule 1.0(g): The agreement by a person to a proposed course of conduct after Lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Determining the Scope of Representation

RULE 1.2(d):

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

Setting the Fee and Collecting the Bill



Setting the Fee and Collecting the Bill

RULE 1.5(a): A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

Setting the Fee and Collecting the Bill

Factors to be considered in determining reasonableness:

(1) time and labor required; novelty and difficulty; skill requisite to perform the service properly;

(2) likelihood that acceptance of the particular employment will preclude other employment by the lawyer;

(3) fee customarily charged in the locality for similar services;

(4) amount involved and results obtained;

(5) time limitations imposed by the client or the circumstances;

(6) nature and length of professional relationship with the client;

(7) experience, reputation, and ability of the lawyer; and,

(8) whether the fee is fixed or contingent.

Setting the Fee

RULE 1.5(b): The scope of the representation and the basis or rate of the fee and expenses for which Client will be responsible shall be communicated to Client, **preferably in writing**, before or within a reasonable time after, commencing the representation, except when Lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to Client, **preferably in writing**.

Rule 1.5: Contingency Fees

Contingent Fee Agreements

- Contingent fee agreement shall be in a writing signed by the client.
- Contingent fee agreement shall state:
  - the percentage(s) that accrue for settlement, trial, or appeal;
  - expenses to be deducted from the recovery; and,
  - whether expenses will be deducted before or after the fee is calculated.
- Agreement must clearly give notice of any expenses the client will be expected to pay.
- At the end of the case, the lawyer shall provide a written statement of the outcome and (if there is a recovery) the remittance to the client and the method of determination.

Rule 1.5: Contingency Fees

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

(1) any fee in a domestic relations matter contingent upon securing a divorce or upon the amount of alimony, support, or property settlement (a fee may be contingent upon collection of past due alimony/support);

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

Division of Fees Between Lawyers

RULE 1.5(e): A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement (including the share each lawyer will receive) and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Fee Sharing vs. Referral Fees

Rule 7.2(c) Referral Fees Prohibited:

A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of RPC; and

(3) pay for a law practice in accordance with Rule 1.17.

Fee Sharing vs. Fee Splitting

Rule 5.4(a): A lawyer shall not share legal fees with a nonlawyer, except that:

(1) A law firm, partner, or associate may pay money to a lawyer's estate or beneficiary;

(2) A lawyer who completes unfinished work of a deceased lawyer may pay the estate a proportion of the total compensation fairly representing the services rendered by the deceased lawyer;

(3) A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may pay the estate or other representative the agreed-upon purchase price;

(4) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based on a profit-sharing arrangement.

Rule 1.5(f): “Advance Fees”

A lawyer may charge an advance fee, which may be paid in whole or in part in advance of the lawyer providing those services, and treat the fee as immediately earned, if the lawyer and client agree in advance in a written fee agreement which notifies 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.

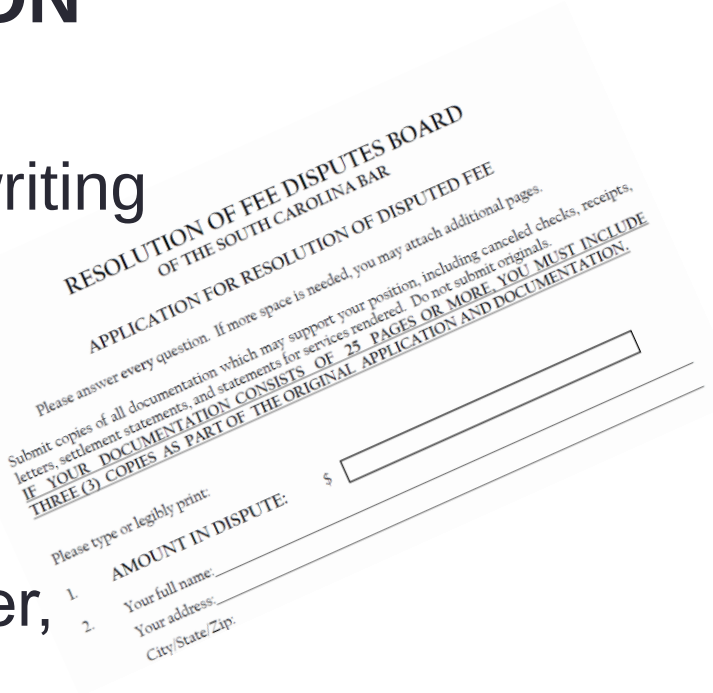
Rule 416, SCACR: Resolving Fee Disputes

RULE 9. RULE EXCLUSIVE UPON CONSENT

(a) Client-applicant must consent in writing to be bound by RFDB decision. Thereafter, lawyer is also bound.

(b) Lawyer's application will not be accepted unless accompanied by Client's written consent. Thereafter, both parties are bound.

(c) Upon consent of Client-applicant to be bound, exclusive jurisdiction over the fee dispute vests in RFDB.


RESOLUTION OF FEE DISPUTES BOARD
OF THE SOUTH CAROLINA BAR

APPLICATION FOR RESOLUTION OF DISPUTED FEE

Please answer every question. If more space is needed, you may attach additional pages.

Submit copies of all documentation which may support your position, including canceled checks, receipts, letters, settlement statements, and statements for services rendered. Do not submit originals.
IF YOUR DOCUMENTATION CONSISTS OF 25 PAGES OR MORE, YOU MUST INCLUDE THREE (3) COPIES AS PART OF THE ORIGINAL APPLICATION AND DOCUMENTATION.

Please type or legibly print.

1. AMOUNT IN DISPUTE: $
2. Your full name:
   Your address:
   City/State/Zip:

Rule 416, SCACR: Resolving Fee Disputes

RULE 19. COMPLIANCE

- Decision of RFDB shall be final and binding upon the parties.
- Decision shall be enforceable in any court of competent jurisdiction.
- Parties shall comply with the decision within 30 days.
- If the lawyer does not comply, a Certificate of Non-Compliance will be forwarded to the Commission on Lawyer Conduct under Rule 8.3 and may be entered as a judgment under Rule 58(a), SCRCP.

Rule 413, SCACR: Resolving Fee Disputes

Rule 7(a) Grounds for Discipline. It shall be a ground for discipline for a lawyer to:

(1) violate or attempt to violate the Rules of Professional Conduct or <u>any other rules</u> of this jurisdiction regarding professional conduct of lawyers; or

(10) willfully fail to comply with a final decision of the Resolution of Fee Disputes Board.

Rule 1.16: Duties Related to Termination of Representation

Rule 1.16(a): Duties Related to Termination of Representation

A lawyer shall withdraw from representing a client if:

(1) The representation will result in a violation of the Rules of Professional Conduct;
(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
(3) The lawyer is discharged.

Rule 1.16: Duties Related to Termination of Representation

A lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on Client's interests;
(2) Client persists in a course of action Lawyer reasonably believes criminal or fraudulent;
(3) Client has used Lawyer's services to perpetrate a crime or fraud;
(4) Client insists upon taking action Lawyer considers repugnant or fundamentally disagrees with;

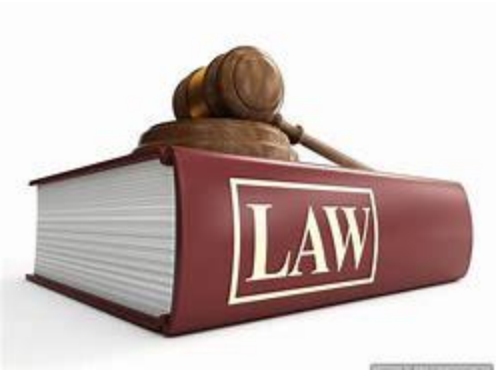
Rule 1.16: Duties Related to Termination of Representation

A lawyer may withdraw from representing a client if:

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the services or payment and has been given reasonable warning;
(6) the representation is an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

Rule 1.16: Duties Related to Termination of Representation

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.



Rule 1.16(d): Duties Related to Termination of Representation

Upon termination, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as:

- giving reasonable notice to the client,
- allowing time for employment of other counsel,
- surrendering papers/property to the client, and
- refunding any advance payment of fee or expense that has not been earned or incurred.

Retaining Liens

RPC Rule 1.16: A lawyer may retain papers relating to the client to the extent permitted by other law.

Retaining Liens

"Other Law" – Anonymous (1985), Tillman (1995), White (1997):

The 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 lawyer must consider the following factors:

- the financial situation of the client;
- the sophistication of the client in dealing with lawyers;
- whether the fee is reasonable;
- whether the client clearly understood/agreed to pay the amount owed;
- whether the lien would prejudice important rights/interests of the client, other parties, the court, or the public;
- whether failure to impose the lien would result in fraud/gross imposition by the client; and,
- whether there are less stringent means by which the matter can be resolved or by which the amount owing can be secured.

“Nonrefundable” Fees

Rule 1.16(d): A lawyer may retain a reasonable nonrefundable retainer.

Comment: When permitted, a nonrefundable retainer still must comply with Rule 1.5 and not be unreasonable.

End Result: No fee is truly nonrefundable. All fees are subject to refund.

COMMUNICATION & DILIGENCE

Rule 1.1 Competence

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

Rule 1.3: Diligence

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

RULE 1.3: DILIGENCE

Comment [3]: Perhaps no professional shortcoming is more widely resented than procrastination. Client's interests often can be adversely affected by the passage of time or the change of conditions. Even when Client's interests are not affected, however, delay can cause Client needless anxiety and undermine confidence in Lawyer's trustworthiness.

RULE 1.4(a): COMMUNICATION

A lawyer shall:

(1) promptly inform Client of any decision or circumstance which requires Client's informed consent;

(2) reasonably consult with Client about the means by which Client's objectives are to be accomplished;

(3) keep Client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and,

(5) consult with Client about any relevant limitation on Lawyer's conduct when Lawyer knows that Client expects assistance not permitted by the RPC or other law.

RULE 1.4(b): COMMUNICATION

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

RULE 1.4: COMMUNICATION

Rules Worth Mentioning

Rule 8.1	Bar Admission & Disciplinary Matters
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 402(h)(3)	Lawyer’s Oath (Civility)

Rule 8.1: Bar Admission & Disciplinary Matters

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

(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the mater, or knowingly fail to respond to a lawful demand for information form an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.3: Reporting Professional Misconduct

Rule 8.3 Reporting Professional Misconduct

(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.
(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.

Rule 8.4: Misconduct

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.

Lawyer's Oath (Civility)

Rule 402(h)(3)

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

Annual Report Of Lawyer Discipline In South Carolina 2022-2023

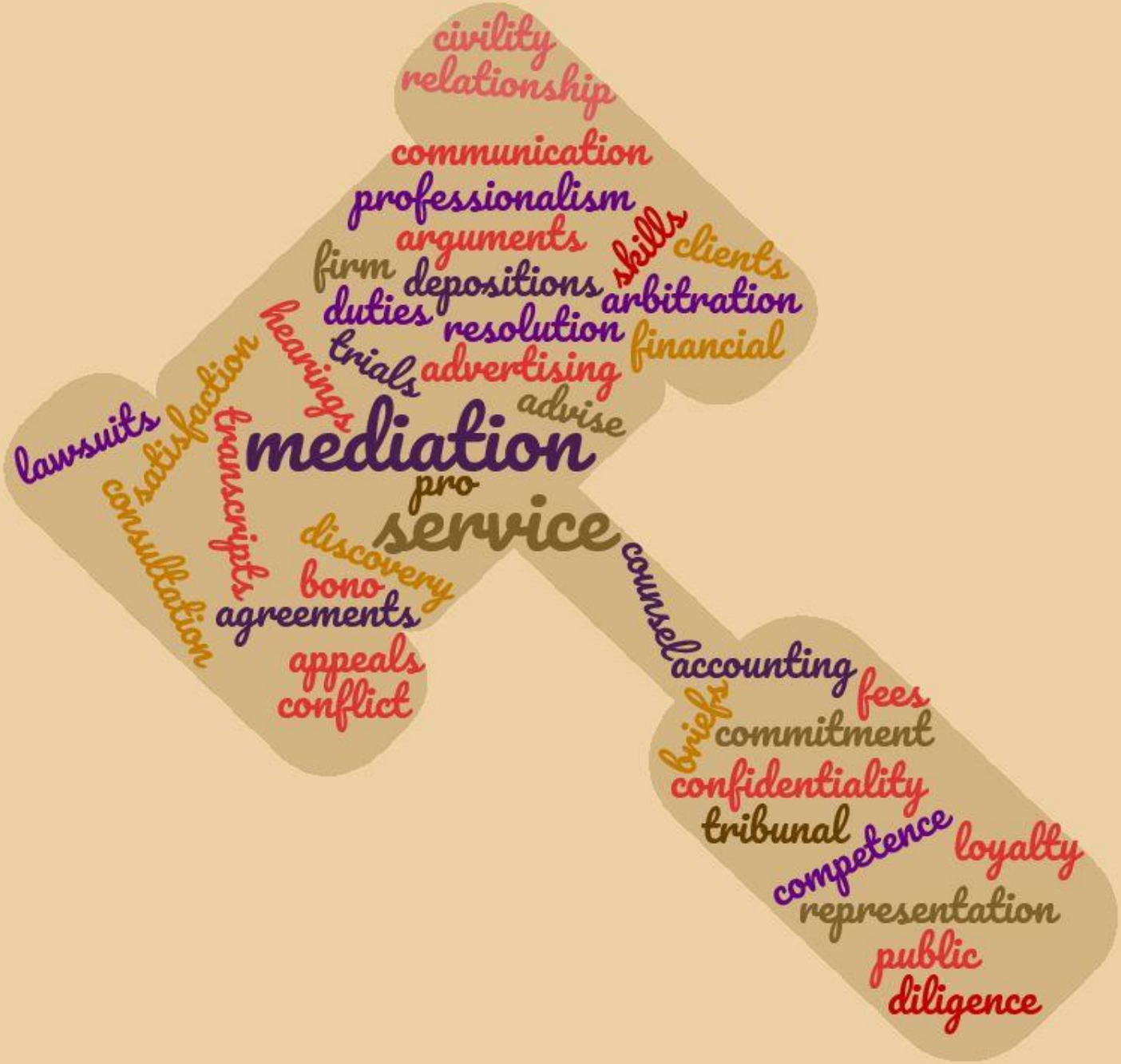
Complaints Pending June 30, 2022	1263
Complaints Received July 1, 2022 - June 30, 2023	**1836**
Total Dismissed July 1, 2022 – June 30, 2023	1089
Total Not Dismissed	121
Total Complaints Resolved	1210
Total Complaints Pending as of June 30, 2023	1889

Annual Report Of Lawyer Discipline In South Carolina 2022-2023

Source of Complaints	
Client	49.92%
Opposing Party	25.21%
Family/Friend of Client	4.96%
Citizen	2.98%
Attorney	2.40%
Bank	1.40% …

Alleged Misconduct	
Dishonesty/Deceit/Misrepresentation	22.07%
Neglect/Lack of Diligence	16.78%
Inadequate Communication	16.36%
Legal Issues only	9.42%
Lack of Competence	4.55%
Civility	3.22%
Trust Account Conduct	2.64%
Other Litigation Misconduct	2.64%
Fees	2.64% …

55.21%


civility
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competence
loyalty
representation
public
diligence

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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."

Direct Conflicts:

Multiple Representation in Civil Litigation. 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.

Organizational Clients. 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.

General Considerations in Common Representation.

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.

Rule 1.8(m) Sex with Clients: 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.

Rule 1.9(b) Duties to the Clients of Former Firm. 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."

Rule 1.9(c) Protection of Information Acquired from Former Clients. 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."

Electronic Storage of Client Data

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.

Confidentiality and Closed Files

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.

LEGAL ETHICS AND PRACTICE PROGRAM
ETHICS SCHOOL

MARCH 18, 2024

CONFLICTS OF INTEREST

WILLIAM O. HIGGINS, ESQUIRE
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CONFLICTS OF INTEREST POP QUIZ

TRUE/FALSE

1. The South Carolina Rules of Professional Conduct ("RPC") found in Supreme Court Rule 407 are rules of reason.

2. The RPC are designed to be a basis for civil liability.

3. The first step in resolving a potential concurrent conflict of interest is to clearly identify the client or clients.

4. A concurrent conflict of interest can always be waived by way of the informed consent of the affected clients.

5. “Informed Consent” is a defined term under the RPC.

6. There are two (2) different types of concurrent conflicts of interest identified by Rule 1.7.

7. A client who has given informed consent may subsequently revoke that consent.

8. A lawyer may enter into a business transaction with a client as long as the client is separately represented by independent legal counsel.

9. With respect to conflicts of interest, a lawyer's duty to a former client is limited to preserving the former client's confidential information.

10. If one lawyer in a firm is “conflicted out,” then all lawyers in the firm are conflicted out.

11. A lawyer who is a former government employee is not prohibited from representing a client in connection with a matter in which the lawyer participated personally and substantially while an employee unless the matter is adverse to the government agency.

12. A former government lawyer's conflict under Rule 1.11(a) is imputed to other members of her firm pursuant to Rule 1.10(a).

13. A lawyer who is a former judge is prohibited from representing anyone in connection with a matter in which the lawyer participated personally and substantially as a judge unless all parties to the proceeding give informed consent, confirmed in writing.

14. A former judge's conflict under Rule 1.12(a) is not imputed to the other members of her firm.

15. A lawyer representing an organization may also represent that organization's officers, directors, members, or shareholders.

16. A lawyer has no conflicts of interest responsibilities to a prospective client who never becomes an actual client.

I. INTRODUCTION AND OVERVIEW

A. Applicable Rules of Professional Conduct
   1. Rule 1.7
   2. Rule 1.8
   3. Rule 1.9
   4. Rule 1.10
   5. Rule 1.11
   6. Rule 1.12
   7. Rule 1.13
   8. Rule 1.18(c) and (d)

B. The comments to the Rules of Professional Conduct

C. Rule 1.0 – terminology

D. Client categories

“INFORMED CONSENT”

Rule 1.0(g):

> “Informed consent” denotes the agreement by a person to a proposed course of conduct 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.

See Comments 6 and 7 to Rule 1.0.

See Comments 16-20 to Rule 1.7.

II. RULE 1.7 – "CONFLICT OF INTEREST: CURRENT CLIENTS"

A. Primary conflict rule – deals with "concurrent conflicts of interest"

B. Establishes two types of "concurrent" conflicts
   1. "Direct Adversity" – Rule 1.7(a)(1)
   2. "Material Limitation" – Rule 1.7(a)(2)

C. Includes the mechanism for analyzing and pursuing client consent to a concurrent conflict – Rule 1.7(b)
   1. Lawyer's "reasonable belief" threshold – Rule 1.7(b)(1)
   2. Non-consentable conflicts – Rule 1.7(b)(2) and (3)
   3. Clients' "informed consent" – Rule 1.7(b)(4) and Rule 1.0(g)

III. RULE 1.8 – "CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES"

A. Covers a potpourri of situations

B. Rule 1.8(a)

1. Business transactions with clients

2. Includes a four-prong requirement in order to overcome the basic prohibition

(a) The transaction must be "fair and reasonable" to the client – Rule 1.8(a)(1)

(b) Full disclosure and written transmittal that the client can understand – Rule 1.8(a)(1)

(c) Written advice to client to seek the advice of independent legal counsel and a reasonable opportunity to do so – Rule 1.8(a)(2)

(d) “Super” informed consent from client

  (i) Must be signed by the client

  (ii) Must be to the “essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.”

C. Rule 1.8(b) – Lawyer's use of information relating to the representation to the client's disadvantage
D. Rule 1.8(c) – Gifts from clients
E. Rule 1.8(d) – Literary or media rights
F. Rule 1.8(e) – Financial assistance in litigation
G. Rule 1.8(f) – Receiving compensation from one other than the client
H. Rule 1.8(g) – Aggregate settlements and agreements
I. Rule 1.8(h) – Prospective limitation on lawyers' liability for malpractice

J. Rule 1.8(i) – Acquiring a proprietary interest in the client's cause of action or subject matter of litigation
K. Rule 1.8(j) – Imputation
L. Rule 1.8(k) – Related lawyer conflicts
M. Rule 1.8(l) – Serving as an advocate and advisor in an adversarial proceeding
N. Rule 1.8(m) – Sex with a client

IV. RULE 1.9 – "DUTIES TO FORMER CLIENTS"

A. Basic conflict rule as to former clients
B. Rule 1.9(a)
    1. "Same or substantially related matter" test
    2. Material adversity
    3. Informed consent
C. Rule 1.9(b) – Effect of lawyer's former law firm association
D. Rule 1.9(c) – Former client's information relating to the representation

V. RULE 1.10 – "IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE"

General Rule:

A conflict under Rules 1.7, 1.8(c), or 1.9 is imputed to all of the other lawyers in the prohibited lawyer's firm, unless:

1. the prohibition is based on a personal interest of the prohibited lawyer; and
2. the conflict does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

“FIRM” OR “LAW FIRM”

Rule 1.0(e)

> “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.

See Comments 2, 3, and 4 to Rule 1.0.

"SCREENED"

Rule 1.0(n)

> "Screened" denotes the 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 obligated to protect under these Rules or other law.

See Comments 8, 9, and 10 to Rule 1.0.
See Comment 7 to Rule 1.11.

VI. RULE 1.11 – "SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES"

A. Establishes that a lawyer who is a former public officer or government employee is subject to Rule 1.9(c) and creates the prohibition on representing a client "in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee" without the informed consent, confirmed in writing, of the appropriate government agency. Rule 1.11(a).

B. Creates a separate imputation rule, which allows for screening to overcome the disqualification—Rule 11.1(b).

C. Creates a special rule regarding the use of "confidential government information"—Rule 1.11(c).

D. Confirms that a lawyer currently serving as a public officer or employee is subject to Rules 1.7 and 1.9 and creates two additional prohibitions—Rule 1.11(d).

E. Rule 1.11(e) describes the term "matter."

VII. RULE 1.12 – "FORMER JUDGE," ETC.

A judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral who "personally and substantially" participated in that capacity in a matter cannot:

- represent anyone in connection with that matter without the informed consent of all parties, confirmed in writing
- negotiate for employment with any person who is involved as a party or as a lawyer for a party in the matter.

Rule 1.12 contains its own imputation rule, which allows for screening to overcome the disqualification – Rule 1.12(c).

VIII. RULE 1.13 – "ORGANIZATION AS CLIENT"

Rule 1.13 (b):

"…the lawyer shall refer the matter to higher authority in the organization…."

Rule 1.13 (f):

lawyer's duty to explain the identity of the client.

Rule 1.13(g):

dual representation of organization and constituent.

IX. RULE 1.18 – "DUTIES TO PROSPECTIVE CLIENT"

Rule 1.18(c) creates a similar standard to the Rule 1.9 standard for former clients (material adversity in the same or a substantially related matter), but the conflict only applies "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter."

Includes its own imputation rule, and conflict can be waived by informed consent of both the affected client and the prospective client, confirmed in writing.

“TIPS FOR DOCUMENTING CONFLICT WAIVERS”

X. HYPOTHETICALS

For each hypothetical, choose the *best* answer from the options provided.

#6. Three friends (X, Y, and Z), each a sophisticated businessperson, decide to go into business together. In order to reduce costs, they agree that they should engage one lawyer to represent them in connection with the formation and governance documents for their new entity. They schedule a meeting with Lawyer A to discuss choice of entity and entity governance. They are unsure as to how to handle the management of the new entity and whether they each need written employment agreements with the new entity. Additionally, they anticipate being equal owners of the new entity, but their initial capital contributions may vary so they are unsure as to whether voting rights should be equal.

May Lawyer A ethically undertake the joint representation of X, Y, and Z?

1. Yes, if it is clear that he can resolve all of the outstanding issues without conflict, and if X, Y, and Z give their informed consent confirmed in writing.
2. No, because this scenario presents a concurrent conflict of interest among X, Y, and Z which cannot be consented to.
3. Yes, if he reasonably believes he can provide competent and diligent representation to X, Y, and Z, and if all three give their informed consent confirmed in writing.
4. No, unless X, Y, and Z agree that the entity structure will include equal management and control rights, as well as equal compensation among X, Y, and Z.

FURTHER ASSUMPTIONS AND VARIATIONS:

- Assume that X is an existing client of Lawyer A. Does that matter?
- Assume that X and Y are husband and wife. Does that matter?
- Assume that only Z will be actively involved in the day-to-day operations of the new entity. Does that matter?
- Assume that X is 75 years old, Y is 55 years old, and Z is 35 years old. Does that matter?

- Assume that the new entity will be limited to the passive ownership of investment real estate that is managed by an independent property management company. Does that matter?
- Assume that X will contribute 90% of the initial capital required for the deal and believes he should receive a first priority return on that capital. Does that matter?

#7. Lawyer A handled the defense of a copyright infringement suit against her client, Corporation X. That lawsuit lasted for more than three years and included voluminous discovery related to Corporation X's financial status, internal governance, and regulatory compliance. The lawsuit was settled prior to trial. Since that settlement, Lawyer A has done no work for Corporation X, and Corporation X has been using Lawyer B for all of its outside counsel needs for more than three years.

Lawyer A is approached by Corporation Y to represent Corporation Y in connection with the acquisition of a portion of the operating assets of Corporation X used in a line of business that Corporation X is looking to divest itself of.

May Lawyer A ethically undertake the representation of Corporation Y?

1. Yes, Corporation X is a former client, and the matter on behalf of Corporation Y is not the same or substantially related to the copyright infringement suit that Lawyer A handled for Corporation X.

2. No, unless Corporation X gives its informed consent confirmed in writing.
3. Yes, but only if Lawyer A agrees not to use or disclose any information about Corporation X learned or obtained in the copyright infringement case.
4. No, the representation of Corporation Y by Lawyer A would constitute a prohibited concurrent conflict of interest.

FURTHER ASSUMPTIONS AND VARIATIONS:

- Assume that the previous litigation settled shortly after Lawyer A became involved such that Lawyer A was not exposed to information about Corporation X's financial status, internal governance, and regulatory compliance. Does that matter?
- Assume that the previous litigation settled six months ago. Does that matter?

#9. Lawyer was consulted by Client A concerning a property dispute which resulted from a tax sale of Client A's property. Client A paid Lawyer a retainer of approximately $175. Thereafter, Lawyer investigated the tax sale and reported his findings to Client A. The representation ended at that point. The hearing on the property dispute was scheduled for trial before the master-in-equity. Meanwhile, Client A retained a new attorney for the hearing who obtained the contents of Client A's file from Lawyer. When the case came before the master-in-equity, Lawyer appeared as attorney for the opposing party.

Thank You!

GRAYBILL, LANSCHE & VINZANI, LLC

UNDERSTANDING THE SCOPE OF YOUR CONFIDENTIALITY OBLIGATIONS

Phylicia Coleman

Assistant Disciplinary Counsel

1

UNDERSTANDING THE SCOPE OF YOUR CONFIDENTIALITY OBLIGATIONS

What is Client Confidentiality?

When Can You Disclose Client Information?

How Can You Protect Client Information?

2

RULE 1.6(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 an exception applies.

3

IT'S *ALL* CONFIDENTIAL

Rule 1.6(a) begins with a prohibition:

A lawyer shall not reveal information relating to the representation of a client unless …

PERMITTED!

4

COMMENT [1]

Other rules implicated:

- Rule 1.18 – Duties with respect to information provided to the lawyer by a prospective client
- Rule 1.9(c)(2) – Duty not to reveal information relating to prior representation of a client
- Rules 1.8(b) and 1.9(c)(1) – Duties with respect to the use of such information to the disadvantage of clients and former clients

5

CONFIDENTIALITY VS. PRIVILEGED

Attorney-Client (A/C) Privilege:

- A/C privilege is an **evidentiary rule**
- Applies only to client secrets
- Applies where lawyer may be called to produce evidence

Rule 1.6, Comment [3]

6

CONFIDENTIALITY VS. PRIVILEGED

Client Confidentiality:

- Client Confidentiality is an ethical rule
- Applies to all information relating to the representation of the client

Rule 1.6, Comment [3]

7

ASK THE RIGHT QUESTION:

- Do Not Ask: "Is it confidential?"
- Instead Ask: "Can I reveal it?"

8

MAY I REVEAL CLIENT INFORMATION?

9

RULE 1.6(a) SHALL NOT REVEAL UNLESS…

- Disclosure is impliedly authorized in order to carry out the representation; OR
- The client gives "informed consent" (defined); OR
- A rule-based exception applies

10

SHALL NOT REVEAL WITHOUT INFORMED CONSENT

- Even if it's a matter of public record
- Even if it's a matter of public knowledge
- Even if the client has died
- Even if it was a long time ago
- Particularly not in lawyer advertising (Comment [7])
- Even if in response to negative comment on social media
- Even in a CLE presentation
- Even in a blog or podcast
- Even on a Listserv

11

RULE 1.6(b) – COMMENT [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.

Adopted June 5, 2019

12

RULE 1.6(b) – NEW COMMENT [7]

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.

Adopted June 5, 2019

13

RULE 1.6(b) – COMMENT [7]

This restriction applies regardless of whether the information is contained in court filings or has become generally known. See Comment [3].

Adopted June 5, 2019

14

RULE 1.6(b) – NEW COMMENT [7]

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).

Adopted June 5, 2019

15

RULE 1.6(b) – NEW COMMENT [7]

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.

Adopted June 5, 2019

16

RULE 1.6(b) – NEW COMMENT [7]

General, open-ended consent is not sufficient.

Adopted June 5, 2019

17

RULE 1.6(b)
GENERAL RULE OF PERMISSION

In General, Rule 1.6(b) contains three categories of permissive disclosure of information relating to the representation:

1. Crime/Fraud Exceptions
2. Lawyer Defense Exceptions
3. "Other Law" or Court Order Exception

18

CRIME/FRAUD EXCEPTIONS:

(1) To prevent client from committing a criminal act

(2) To prevent reasonably certain death/substantial bodily harm

(3) To prevent client from committing fraud reasonably certain to result in substantial financial/property injury and in furtherance of which client has used/is using lawyer's services

19

CRIME/FRAUD EXCEPTIONS

(4) To prevent/mitigate/rectify substantial injury to financial interests/property is reasonably certain to result/has resulted from client's commission of a crime/fraud in furtherance of which the client has used the lawyer's services

20

COMMENT [9]

You may reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client's crime or fraud.

21

COMMENT [9]

The client can, of course, prevent your disclosure by refraining from the wrongful conduct.

22

COMMENT [10]

If it's too late, and the client has already committed the fraud, you 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.

23

COMMENT [11] LAWYER-DEFENSE EXCEPTIONS:

- To secure legal advice about your compliance with the Rules of Professional Conduct
- To establish your claim or defense in a controversy between you and the client
- To establish a defense to a criminal charge or civil claim against you based upon conduct in which the client was involved
- To respond to allegations in any proceeding concerning your representation of the client

24

RULE 1.6(b)(7): "OTHER LAW" EXCEPTION

A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or a court order.

25

COMMENT [16]

If disclosure appears to be required by **other law**, you must discuss the matter with the client to the extent required by Rule 1.4, RPC.

26

COMMENT [17]

If you are ordered to reveal information by a tribunal or governmental entity claiming authority pursuant to other law:

- Get informed consent of the client

OR

- Assert on behalf of the client all nonfrivolous claims that the order is not authorized or that the information is protected by the attorney-client privilege or other applicable law.

27

COMMENT [17]

If you challenge the order and get an adverse ruling:

- You must consult with the client about the possibility of appeal (Rule 1.4).
- If the client declines, you may comply with the order without violating RPC.

28

RULE 1.6(b): LIMITATION ON DISCLOSURE

IF an exception applies, the lawyer may ONLY disclose the confidential information to the extent the lawyer reasonably believes necessary.

29

Rule 1.6(b)– Comment [19] Other Rules to Consider

- 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 Rule 1.6. See 3.3(c).

30

Other Rules to Consider
3.3(a) Candor to the Tribunal

A lawyer shall not knowingly fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

31

Other Rules to Consider
3.3(a) Candor to the Tribunal

If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its **falsity**, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

32

Other Rules to Consider 3.3(b) Candor to the Tribunal

A lawyer who:

- represents a client in an adjudicative proceeding and
- 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.

33

Other Rules to Consider 3.3(c) Candor to the Tribunal

These duties apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

34

OTHER RULES TO CONSIDER

- Rule1.2(d): A lawyer shall not assist a client in conduct that the lawyer knows is criminal or fraudulent.
- Rule 4.1(b): A lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

35

OTHER RULES TO CONSIDER RULE 8.1(b)

- In connection with a disciplinary matter, a lawyer shall not fail to disclose a fact necessary to correct a misapprehension known to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from a disciplinary authority.
- This rule does not require disclosure of information otherwise protected by Rule 1.6.

36

OTHER RULES TO CONSIDER RULE 8.3(c)

- A lawyer who knows that another lawyer or a judge has committed a violation of the applicable rules of conduct that raises a substantial question as to that lawyer's or judge's honesty, trustworthiness or fitness in other respects, shall inform the appropriate professional authority.
- This Rule does not require disclosure of information otherwise protected by Rule 1.6.

37

HOW CAN YOU PROTECT CLIENT INFORMATION?

38

RULE 1.6(c) - COMMENT [20]

You must competently safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure.

Adopted November 27, 2019

39

USE STRONG PASSWORDS WHEN TRANSMITTING CLIENT INFORMATION!

Weak Passwords	Normal Passwords	Strong Passwords
accident	AcciDent	Acc!den7
susan	Susan53	:Susan53!
jellyfish	Jelly22fish	Jelly22fi$h
smellycat	Sm3llcat	$m3llyc@t
mapleleafs	MapleLeafs	M@pleL3afs
ebay!9	ebay.44	%ebay.44
creditunion	CreditUnion	Cr3d!tUni0n

Strong password	Stronger passwords
Walk2milestoday	WALK2M!LE$2day
Keepitlockeddown	K33p!tL0CK3dD0Wn
learnfromanyone	l3@rNfr0M@ny0n3

Please do not use these passwords for your personal accounts

40

COMMENT [22] CONTINUOUS DUTY

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.

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DUTY OF SUPERVISION

42

RULE 5.3(a): SUPERVISION OF NONLAWYERS

A partner or a lawyer who possesses comparable managerial authority in a law firm **shall** make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of a nonlawyer employed or associated with the lawyer is compatible with the professional obligations of the lawyer.

43

RULE 5.3 – COMMENT [1]

Give nonlawyer assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client.

44

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS (INADVERTENT DISCLOSURE)

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.

45

RULE 1.15(i) SAFEKEEPING OF PROPERTY (CONFIDENTIALITY AND FORMER CLIENTS)

Absent any legal obligation to retain a client's file, the lawyer shall securely store a client's file for a minimum of **six (6) years** after 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.

46

CONFIDENTIALITY AND FORMER CLIENTS

If the client does not request the file within **six (6) years** after completion or termination of representation, it 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.

47

Confidentiality and Former Clients

A LAWYER WHO ELECTS TO DESTROY FILES SHALL DO SO IN A MANNER THAT PROTECTS CLIENT CONFIDENTIALITY!

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QUESTIONS?

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