DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

FUNDAMENTALS OF LAWYER-CLIENT RELATIONS 2023

LIVE SEMINAR AT DSBA

SPONSORED BY THE YOUNG LAWYERS SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

THURSDAY, MAY 11, 2023 | 8:00 A.M. – 4:30 P.M.

7.0 Hours of CLE credit in Enhanced Ethics for Delaware and Pennsylvania Attorneys

PROGRAM HIGHLIGHTS

- What Is a Conflict of Interest?
- Avoiding Disciplinary Complaints
- Working with the Difficult Client
- Lawyers Assistance Program and Professional Guidance Committee
- The Bounds of Zealous Advocacy
- Your Client and Ethical Considerations in Alternative Dispute Resolution
- Attorney Recordkeeping and Timekeeping
- Fee Disputes: How to Avoid Them and How to Address Those That Arise
- The Delaware Way
- Pro Bono Aspiration

Visit https://www.dsba.org/event/fundamentals-of-lawyer-client-relations-2023/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

DELAWARE STATE BAR ASSOCIATION

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FUNDAMENTALS OF LAWYER-CLIENT RELATIONS 2023

Moderators

Emily A. Bryant-Álvarez, Esquire
Quinn Emanuel Urquhart & Sullivan, LLP
Co-Chair of the Young Lawyers Section

Jeffrey J. Lyons, Esquire
Baker & Hostetler LLP
Co-Chair of the Young Lawyers Section

8:00 a.m. – 8:30 a.m.
Registration and Check-in

8:30 a.m. – 9:15 a.m.
What Is a Conflict of Interest?
Daniel A. Griffith, Esquire
Whiteford, Taylor & Preston LLC
Lauren C. McConnell, Esquire
Wharton Levin Ehrmantraut & Klein, P.A.

9:15 a.m. – 10:00 a.m.
Avoiding Disciplinary Complaints
Charles "Chip" Slanina, Esquire
Finger & Slanina, LLC
Jessica L. Tyler, Esquire
Office of Disciplinary Counsel

10:00 a.m. – 10:15 a.m. | Break

10:15 a.m. – 11:00 a.m.
Working with the Difficult Client
Kevin J. O'Connell, Esquire
Office of Defense Services
Josiah R. Wolcott, Esquire
Connolly Gallagher LLP

11:00 a.m. – 11:45 a.m.
Lawyers Assistance Program and Professional Guidance Committee
R. Judson Scaggs Jr., Esquire
Morris Nichols Arsht & Tunnell LLP
Candace E. Holmes
Schmittinger & Rodriguez, P.A.
Scott Godshall, Esquire
Delaware Lawyers Assistance Program

11:45 a.m. – 12:15 p.m.
The Bounds of Zealous Advocacy
The Honorable Maryellen Noreika
U.S District Court for the District of Delaware
The Honorable Morgan T. Zurn
Court of Chancery of the State of Delaware

12:15 p.m. – 12:45 p.m. | Lunch (on your own)

12:45 p.m. – 1:30 p.m.
Your Client and Ethical Considerations in Alternative Dispute Resolution
Bernard G. Conaway, Esquire
Conaway-Legal LLC
G. Kevin Fasic, Esquire
Offit Kurman P.A.
Jessica Tyler, Esquire
Office of Disciplinary Counsel

1:30 p.m. – 2:15 p.m.
Attorney Recordkeeping and Timekeeping
John A. Macconi Jr., Esquire
John A. Macconi, Jr. LLC

2:15 p.m. – 3:00 p.m.
Fee Disputes: How to Avoid Them and How to Address Those That Arise
Matthew F. Boyer, Esquire
Connolly Gallagher LP
Ian Connor Bifferato, Esquire
The Bifferato Firm P.A.

3:00 p.m. – 3:15 p.m. | Break

3:15 p.m. – 4:00 p.m.
The Delaware Way
Charles J. Durante, Esquire
Connolly Gallagher LLP
President of the Delaware State Bar Association

4:00 p.m. – 4:30 p.m.
Pro Bono Aspiration
John M. Bloxom IV, Esquire
Morris James LLP
John J. Schreppler II, Esquire
Fredric Marro & Associates PC

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What Is a Conflict of Interest?

Daniel A. Griffith, Esquire
Whiteford Taylor Preston LLC

Lauren C. McConnell, Esquire
Wharton Levin Ehrmantraut & Klein, P.A.

Dan Griffith BIO

Dan Griffith the Managing Partner of Whiteford Taylor & Preston's Delaware office and co-chairs the firm's Tort and Insurance Litigation Section. He handles professional liability matters, class action and multi-district litigation, business disputes, complex insurance issues, civil rights matters and a wide range of other litigation. In addition to representing professionals (attorneys, insurance professionals, private and public employers, and police officers) in litigated matters, he represents commercial and personal insurance carriers, multi-national corporations, municipal entities and state governments.

He has frequently presented on ethical issues regarding the practice of law, including presentations concerning: MANAGING ETHICAL ISSUES IN YOUR DAY-TO-DAY PRACTICE IN DELAWARE, LEGAL ETHICS IN DELAWARE: SOLUTIONS TO THE MOST COMMON ETHICAL CHALLENGES and HOW TO AVOID BEING THE TARGET OF A LEGAL MALPRACTICE CLAIM IN DELAWARE. He is an annual presenter for the Delaware State Bar Association on the topic of WHAT IS A COFLICT OF INTEREST.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 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 affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in

paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt 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. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will

be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] 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 the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the 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 the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal

interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot

reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the 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 client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). 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 might 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. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The 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. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; 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. Factors relevant in determining whether the clients need to be advised of the risk 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 lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be

assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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

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

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

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

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

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

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement~~,~~; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

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

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the

lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the

requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a client in a matter in which that lawyer is disqualified under Rule 1.9 unless:

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

(2) written notice is promptly given to the affected former client.

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

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

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in 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. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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

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

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

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

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

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

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

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

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

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental

employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

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

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

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

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) 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.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, 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 under

paragraph (a). Similarly, 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 paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and ~~(c)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.13 ORGANIZATION AS CLIENT

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, 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.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer 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. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] 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.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. 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. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Avoiding Disciplinary Complaints

Charles "Chip" Slanina, Esquire
Finger & Slanina, LLC

Jessica L. Tyler, Esquire
Office of Disciplinary Counsel

Charles Slanina
Finger & Slanina, LLC

Charles Slanina, a native Delawarean, graduated from the University of Delaware and Catholic University School of Law. He is admitted to the Bars of the Supreme Court of the State of Delaware, the United States District Court for the District of Delaware, the United States Court of Appeal for the Third Circuit, and the United States Supreme Court.

Upon graduation from law school, Mr. Slanina was the sole law clerk for the Delaware Family Court statewide.

He then joined the Delaware Department of Justice. During his eight-year tenure as a Deputy Attorney General, he headed civil and criminal trial units, including the Family Court, Medicaid Fraud and Patient Abuse Unit, and represented state administrative agencies while prosecuting high profile criminal cases.

Mr. Slanina next spent four years at the Office of Disciplinary Counsel as the Chief Disciplinary Counsel, investigating and prosecuting violations of the Rules of Professional Conduct as well as Unauthorized Practice of Law matters.

He has been in private practice since 1993. That practice has included plaintiffs' tort, insurance and toxic tort defense, civil litigation and family law. He has also defended high profile criminal cases, including matters drawing international media attention.

His practice currently focuses on professional responsibility counseling and defense. Mr. Slanina provides ethics advisory opinions for many Delaware, national and international firms and testifies as an expert in professional responsibility matters in Delaware, Pennsylvania and New Jersey courts. In addition, he has served as a special prosecutor for the New Castle County Ethics Commission.

Mr. Slanina is a frequent speaker on legal ethics and professional responsibility topics at seminars and conferences sponsored by the Delaware State Bar Association, Delaware Trial Lawyers Association, University of Delaware Academy of Lifelong Learning, Superior Court Trial Practice Forum, Delaware Supreme Court Pre-Admission Conference and has also been an adjunct professor at Widener University School of Law.

He is the author of "Ethically Speaking," a monthly column discussing legal ethics issues, published in *The Journal*, the magazine of the Delaware State Bar Association. Mr. Slanina is a member of the American Bar Association, the Delaware Bar Association, the Association of Professional Responsibility Lawyers and the Rodney Inns of Court, where he has served as President. Martindale-Hubbard has rated Mr. Slanina as AV for legal ability and ethical standard based on peer review and in 2004, was named one of Delaware's "Top Power Attorneys" in *Delaware Today* magazine.

JESSICA L. TYLER

Jessica Tyler is currently Deputy Disciplinary Counsel for the Supreme Court of the State of Delaware. Prior to that appointment, Ms. Tyler spent 10 years in private practice where she represented individuals and businesses in the defense of civil litigation involving automobile accidents, premises liability, general liability, and products liability. Prior to private practice, Ms. Tyler served as a judicial law clerk for Judges Buckworth and Conner in the Family Court of the State of Delaware. She previously was a member of the Delaware Civil Clinic where she worked with Delaware Volunteer Legal Services to assist clients with obtaining Protection from Abuse Orders and custody of their children. Ms. Tyler also interned with the Camden County Prosecutor's Office and the Pennsylvania Attorney General's Office, Bureau of Consumer Protection. Ms. Tyler is a graduate of Arcadia University and Delaware Law School.

Avoiding Disciplinary Complaints

DSBA's Fundamentals of Lawyer-Client Relations

May 11, 2023

Presented by:

Charles "Chip" Slanina, Esq.
Finger & Slanina, LLC

Jessica L. Tyler, Esq.
Office of Disciplinary Counsel

What is the nature of our profession?

Preamble to the Rules

[1] A lawyer, as a member of the legal profession, is:

- ✓ a representative of clients,
- ✓ an officer of the legal system
- ✓ and a public citizen having special responsibility for the quality of justice.

How are we regulated?

- The Supreme Court has the inherent and exclusive authority for admitting and disciplining persons with regard to the practice of law in Delaware

How are we regulated?

- [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Office of Disciplinary Counsel

- The Office of Disciplinary Counsel ("ODC") assists the Delaware Supreme Court with the Court's regulation of the practice of law in the state of Delaware.
- Lawyers are expected to comply with the professional standards established by the Supreme Court in the Delaware Lawyers' Rules of Professional Conduct ("Rules").
- ODC evaluates and investigates disciplinary complaints alleging lawyers violated the Rules. If warranted, ODC may seek to initiate formal disciplinary proceedings against lawyers.
- ODC also investigates claims regarding the unauthorized practice of law in Delaware according to the Rules of the Unauthorized Practice of Law Subcommittee of the Board on Professional Responsibility ("UPL Rules").

ODC Complaint Process

- Types:
  - Telephone Complaints
  - Written Complaints
- Sources
  - Clients
  - Judicial Referrals
  - Opposing Counsel
  - Self-reports
  - Banks
  - Law Enforcement Agencies
  - LFCP Referrals

ODC Evaluations & Investigations

- Initial Screening after Complaint Received
  - Jurisdiction?
  - If facts alleged are true, is the conduct a violation of the Delaware Lawyers' Rules of Professional Responsibility?
- Complaint
  - 9(a) Response requested
    ODC requests a narrative of the case & analysis of facts under Rules
- 9(b) Investigation

To whom do we owe obligations?

- Clients
- Third Parties
- The Court

Obligations to Clients:

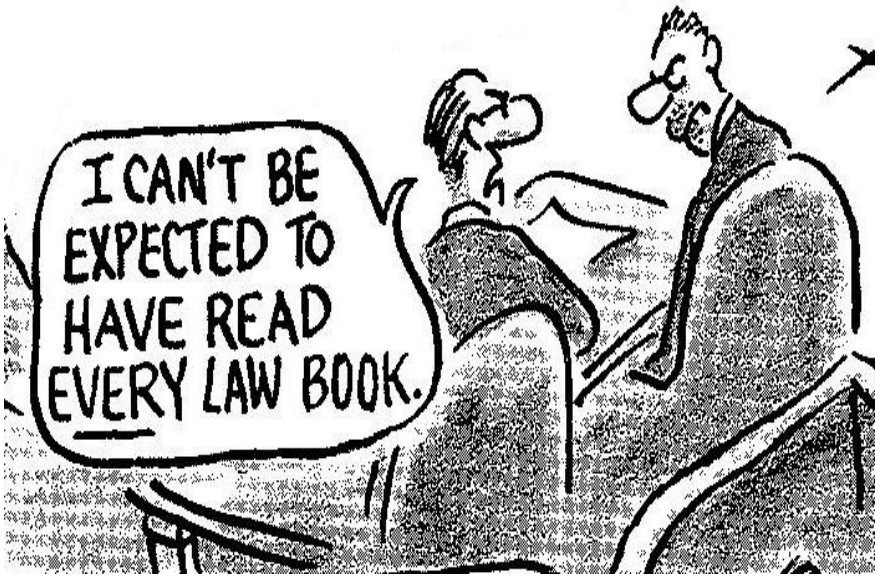
- Competency
- Diligence
- Communication
- Trust & Loyalty
- Honesty

Common Complaints from Clients

- My attorney isn't following my directives…
- My attorney won't respond to my texts, emails, letters, phone calls…
- My attorney did not keep me informed about the status of my case…
- My attorney lied to me…
- My attorney is colluding with the other side…
- My attorney is ineffective, and I want a new lawyer…
- My attorney charged me too much (or I didn't agree to pay that amount)…
- My lawyer won't refund what I paid…
- My lawyer won't return my file…

Make sure you have (or acquire) competency in the subject matter.

- Rule 1.1 requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.



Stay on top of your cases.

- Rule 1.3 (Diligence) requires a lawyer to act with reasonable diligence and promptness in representing a client.

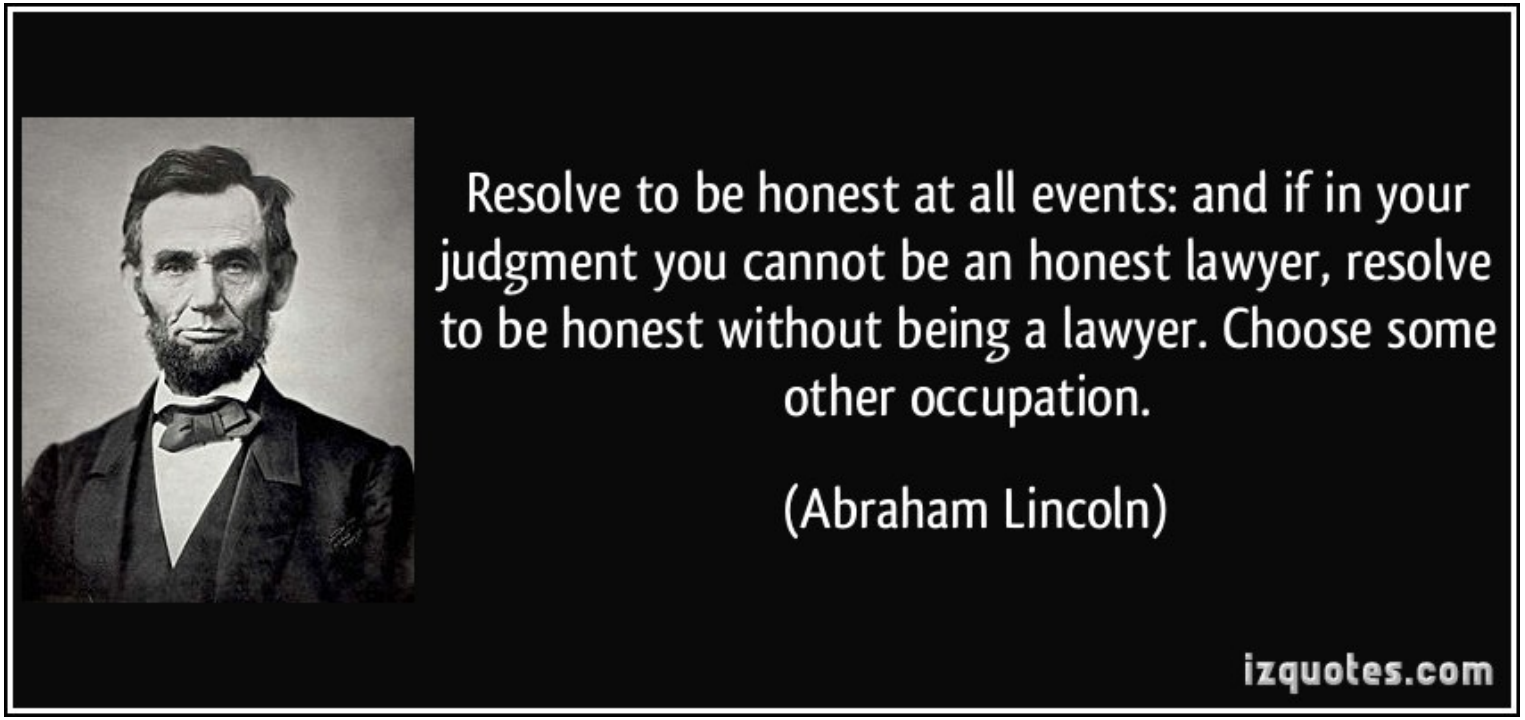
Keep the client informed.

Rule 1.4 (Communication) requires a lawyer:

- Promptly inform the client of any decision or circumstance which requires the client's informed consent;
- **Reasonably** consult with the client about the means by which the client's objectives are to be accomplished
- Keep the client reasonably informed about the matter; and
- Promptly comply with reasonable requests for information.

Be honest with your client.

- "Cushion" the blow, but don't give false hope.
- Be sympathetic and non-judgmental, but avoid giving the appearance the supportiveness is fake.



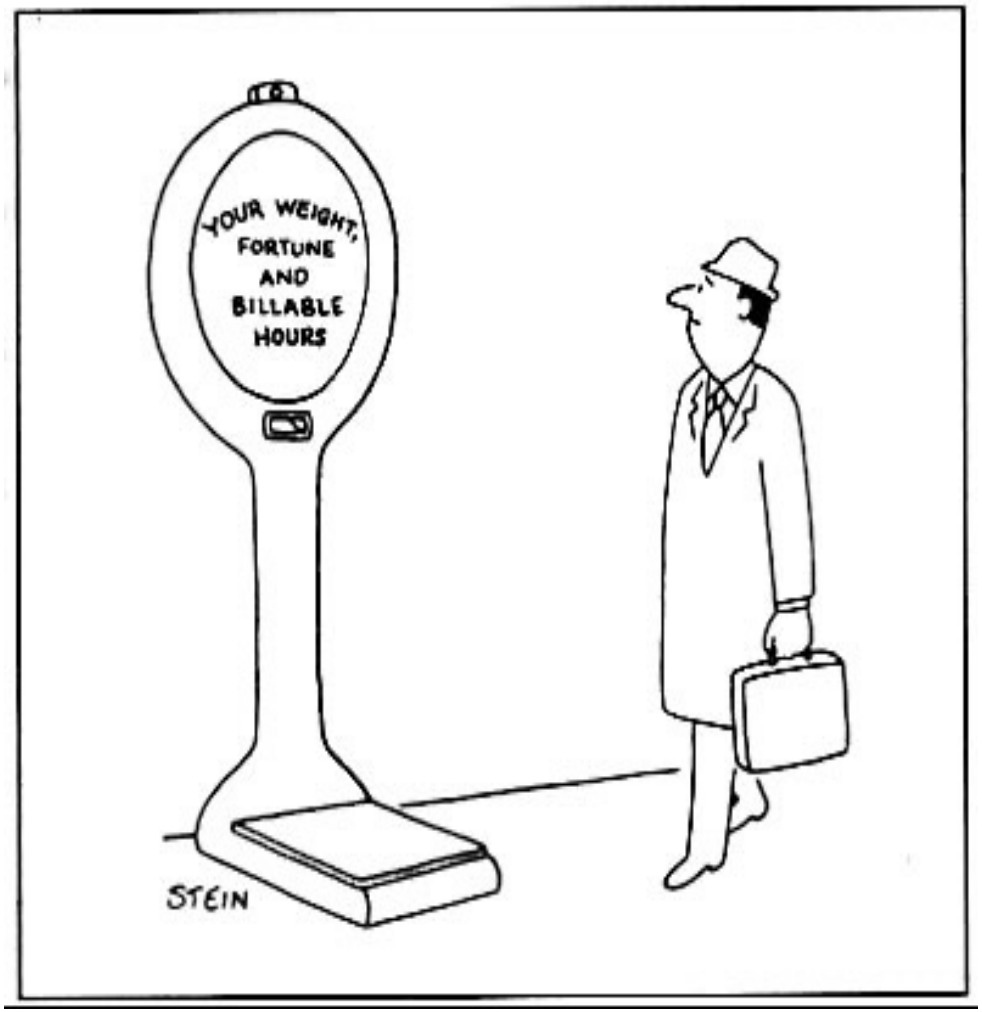
Take control…and stay in control.

- Establish ground rules, including decision-making
- Communicate, communicate, communicate
- Document, document, document
- Provide status reports

Doing it versus being able to prove you did it.

Limit confusion and surprises…

- Clearly define the scope of the representation utilizing a well-drafted fee agreement or engagement letter
- Provide fee statements
- Be honest and don't make promises you can't keep.



Keep the client's confidences.

Delaware Rule 1.6(a): Confidentiality of Information

- 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).

A *LIMITED EXCEPTION* to the duty of confidentiality

- Rule 1.6(b) A lawyer ***may reveal*** information … to the extent the lawyer reasonably believes necessary:
  - To prevent certain death or substantial bodily harm
  - 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 **OR** to prevent, mitigate, or rectify this injury where such fraud or crime has already occurred
  - 1.6(b)(5) – A lawyer may reveal information protected from to the extent the lawyer *reasonably believes necessary to . . . respond* to allegations in any proceeding concerning the lawyer's representation of the client…

The duty of confidentiality continues…

- This duty continues after the termination of the lawyer-client relationship. Rule 1.6, Comment 18.
- The duty to retain client confidences survives the representation and even the client's death. *Swidler & Berlin v. U.S.*, 524 U.S. 399, 410 (1998).

OK, but how do I Avoid Complaints?

- **Manage your Clients**
- **Manage your Cases**
- **Manage your Office**

Screen for problem clients

"I understand it's a Category 5 divorce."

Clients to avoid:

- Mean people
- Conspiracy Theorists
- "It's ***NOT*** the money"
- It ***IS*** the money
- It ***IS*** ABOUT SOMETHING ELSE…
- Clients with multiple prior counsel
- Bullies/controlling people
- The unrealistic client
- Friends/Family

NEVER SAY MAYBE- SEND A NON-ENGAGEMENT LETTER

Screening for Problem Clients

Don't be the "I KNEW that I shouldn't take that client/case" attorney.

- Turn down a case/client and regret it for the rest of the day…
- Take a case/client you know you shouldn't and regret it until the SOL on malpractice claims run but…
- No SOL/laches/estoppel for disciplinary complaints

Problem clients may lead to: disciplinary complaints, malpractice claims, non-payment, harassment of your staff and diminution in your quality of life.

Don't let the client drive the bus.

Rule 1.2(a) - Subject to paragraphs (c) and (d), a *lawyer shall abide by a client's decisions concerning the objectives of the representation* and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued…

BUT…

Don't do EVERYTHING your client asks.

The authority to manage the day-to-day conduct of the trial generally rests with the attorney. *Taylor v. State*, 28 A.3d 399, 405-406 (Del. 2011)(citations omitted). "To be sure, the attorney's duty to consult with the defendant regarding "important decisions" – including questions of over arching defense strategy – does not require counsel to obtain defendant's consent to "every tactical decision." *Id*. (citations omitted)

And… there are ethical limitations on lawyer's obligation to abide by a client's decisions

- Rule 1.2(d) – Criminal or Fraudulent Conduct
- Rule 3.1 Meritorious claims and contentions
- Rule 3.3 – Candor towards tribunal
- Rule 3.4(b) - Fairness to Opposing Party & Counsel

Rule 1.2(d) says…

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

Can I withdraw from the case?

- Rule 1.16, Cmt. [3] …Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.* Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Rule 3.1 Meritorious claims and contentions

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

How to Avoid Issues

- Manage your Clients
- Manage your Cases
- Manage your Office

Screen the Case

Screen potential cases for:

- Value
- Clients who can pay
- Jurisdiction
- Statute of limitations
- Difficulty

Rule 1.16: When MUST You Decline or Terminate Representation?

(a) [A]lawyer shall not represent a client or…***shall*** withdraw from the representation of a client if:

(1) the representation will result in *violation of the rules of professional conduct or other law;*

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

Rule 1.16: When MAY You Decline or Terminate Representation?

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

(1) *withdrawal can be accomplished without material adverse effect on the interests of the client*;

(2) the *client persists in a course of action* involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a *crime or fraud*;

(4) the client insists upon taking action that the lawyer considers *repugnant or with which the lawyer has a fundamental disagreement*.

Rule 1.16: When MAY You Decline or Terminate Representation?

(5) the client *fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services* and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an *unreasonable financial burden on the lawyer* or *has been rendered unreasonably difficult by the client*; or

(7) *other good cause* for withdrawal exists.

Rule 1.16(c): BUT…It's up to the Court…

- (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) Continuing Obligations to the Client Post-Termination

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to ***protect a client's interests***, such as …surrendering papers…to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

- Comment 9: *Even if* the lawyer has been *unfairly discharged* by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

How to Avoid Issues with Termination of Representation

- Non-Engagement Letters
- Disengagement Letters
- Maintain confidentiality
- Take steps to avoid foreseeable prejudice to the client
- Turn over files to new counsel
- Return Unearned Fees

Golden Rules to Avoid Issues

- Manage your Clients
- Manage your Cases
- Manage Your Relationship with the Court
- Manage your Office

Other special obligations that come with the choice to be a lawyer?

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.

A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect forthe legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 3.4(c) – Comply with Court Orders and Discovery Requests

A lawyer shall not:

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

(d) In pre-trial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.

Keep your composure

- DON'T BE:
  - Nasty
  - Haughty
  - Offensive
  - Pushy
  - Arrogant
  - Dismissive
  - Or you may have a Rule 3.5(d) or 4.4(a) problem
- Always do it with class.
- Do not use sneaky tactics.

Omit inflammatory language

- "[(Referring to opposing counsel)] You could gag a maggot off a meat wagon."
- "[(Addressing opposing counsel)] Come here and sit on my lap…"
- "([Writing opposing counsel)] So now you are trying to persuade me with logic? You are outmanned and outgunned. I am a Catholic. You are not. You're a young Jewish man I suspect…[Y]ou ought to be a goat herder in Lebanon."
- "The written decision creates an *imaginary, make-believe* set of reasons for the [opposing party's] findings."
- "*Laughably*, the County found that the violation was not resolved based on an *illogical and irrational dissertation."*
- "The [opposing party's] argument … constitutes *pure sophistry."*
- "[(Referring to the Superior Court)] Never one to miss an opportunity to deny a party the right to a fair and impartial hearing on the merits…"
- "Otherwise the County would be permitted to *appoint a group of monkeys* to the [Board], and simply *allow the attorney to interpret the grunts and groans of the ape members and reach whatever conclusion the attorney wished* from the documents of record."

Candor, False Statements and Misrepresentations

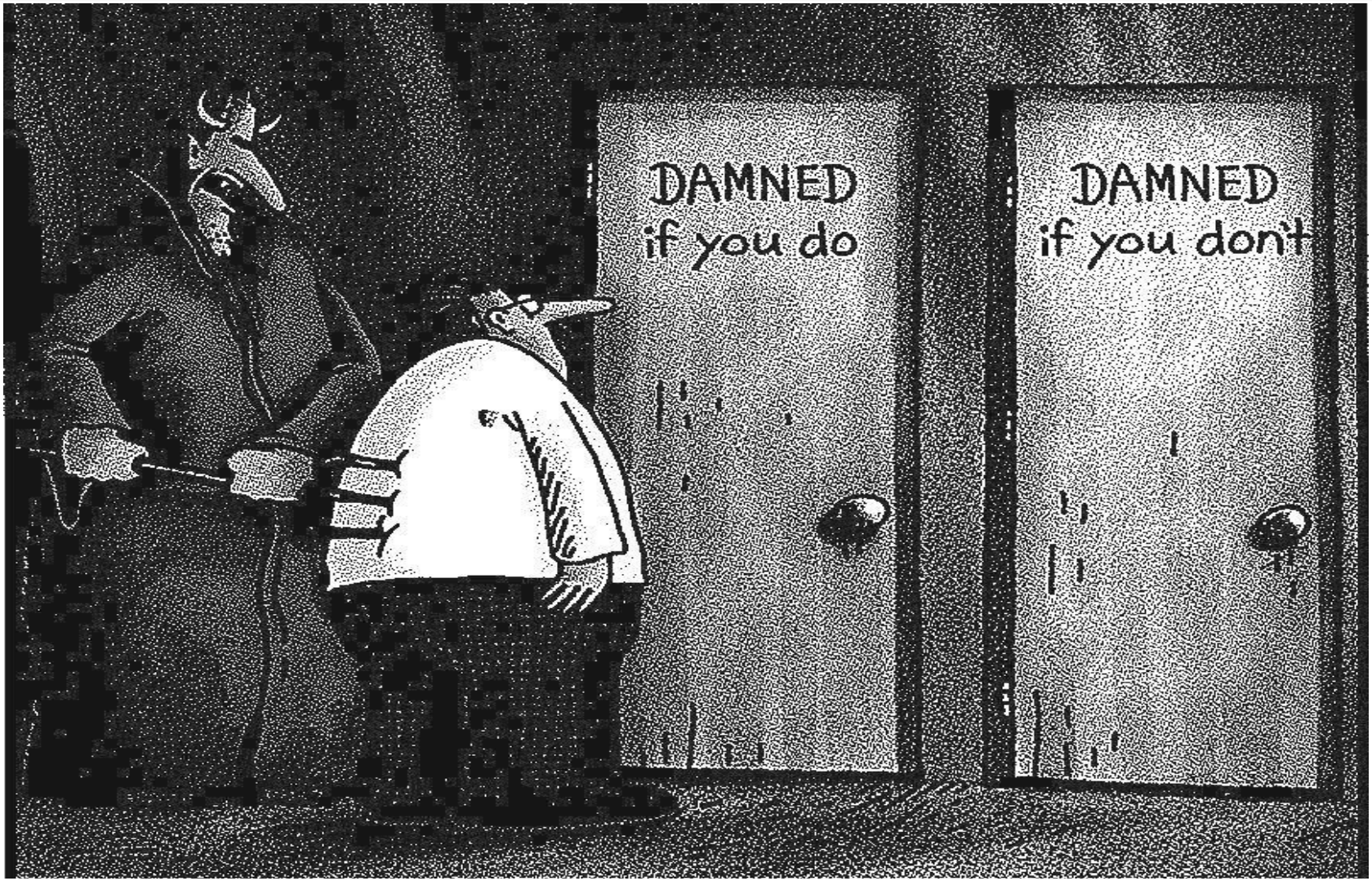
"Before we begin, I just want to change a few facts in my story."

Misrepresentations/False Statements

To Whom?

- To Courts
- To Clients
- To Opposing Counsel/Others
- To State Bar

What do I say if my client is lying, but revealing same would require me to reveal a client confidence?



Some guidance…

If the Court asks a question, answer it - completely.

Rule 3.3 Candor to the Court:

(a)(1) A lawyer *shall not* knowingly: make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by a lawyer; *(THIS INCLUDES OMISSIONS).*

(c) The duties stated in paragraph (a) … continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

*** The Duty of Candor to the Court trumps the Duty of Confidentiality.**

How about opposing counsel…it depends

Rule 3.4(b) Fairness to Opposing Parties and Counsel

A lawyer shall not:

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

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence

Telling a partial-truth may also be construed as a violation of Rule 8.4

It is professional misconduct for a lawyer to:

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

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

Manage Your Office

- Duty to supervise subordinate attorneys
- Duty to supervise non-lawyer staff
- Mishandling Fees & Trust Accounts

Manage Your Office: Rule. 5.3 Responsibilities regarding non-lawyer assistants

- With respect to a non-lawyer employed or retained or associated with a lawyer:

  (a) a [lawyer with *managerial authority*] shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

  (b) A [*supervising lawyer*] shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Duty to Comply with Rules includes:

- Failure to file Annual Registration Statements & Certificates of Compliance
- Failure to respond to CLE Commission
- Failure to respond to ODC – R. 8.1(b)

Mishandling Trust Accounts

- **Rule 1.15 – Safekeeping of Property**
  - Your non-delegable fiduciary duty – review your accounts
  - Commingling
  - Misappropriation
  - Failure to maintain books & records
  - Failure to promptly pay out funds
- **Rule 1.15A – Trust Account Overdraft Notification**

Rule 1.5 – Fee Agreements

- Fee must be "reasonable"
- The scope of the representation and the basis or rate of the fee and the expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.
- Limitations on contingent fee arrangements

Rule 1.5 – Advance Fees

- A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:
  - The lawyer SHALL provide the client with a written statement that the fee is refundable if not earned,
  - The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, AND
  - All unearned fees SHALL be retained in the lawyer's trust account, with a statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

Are there any pressure associated with law practice?

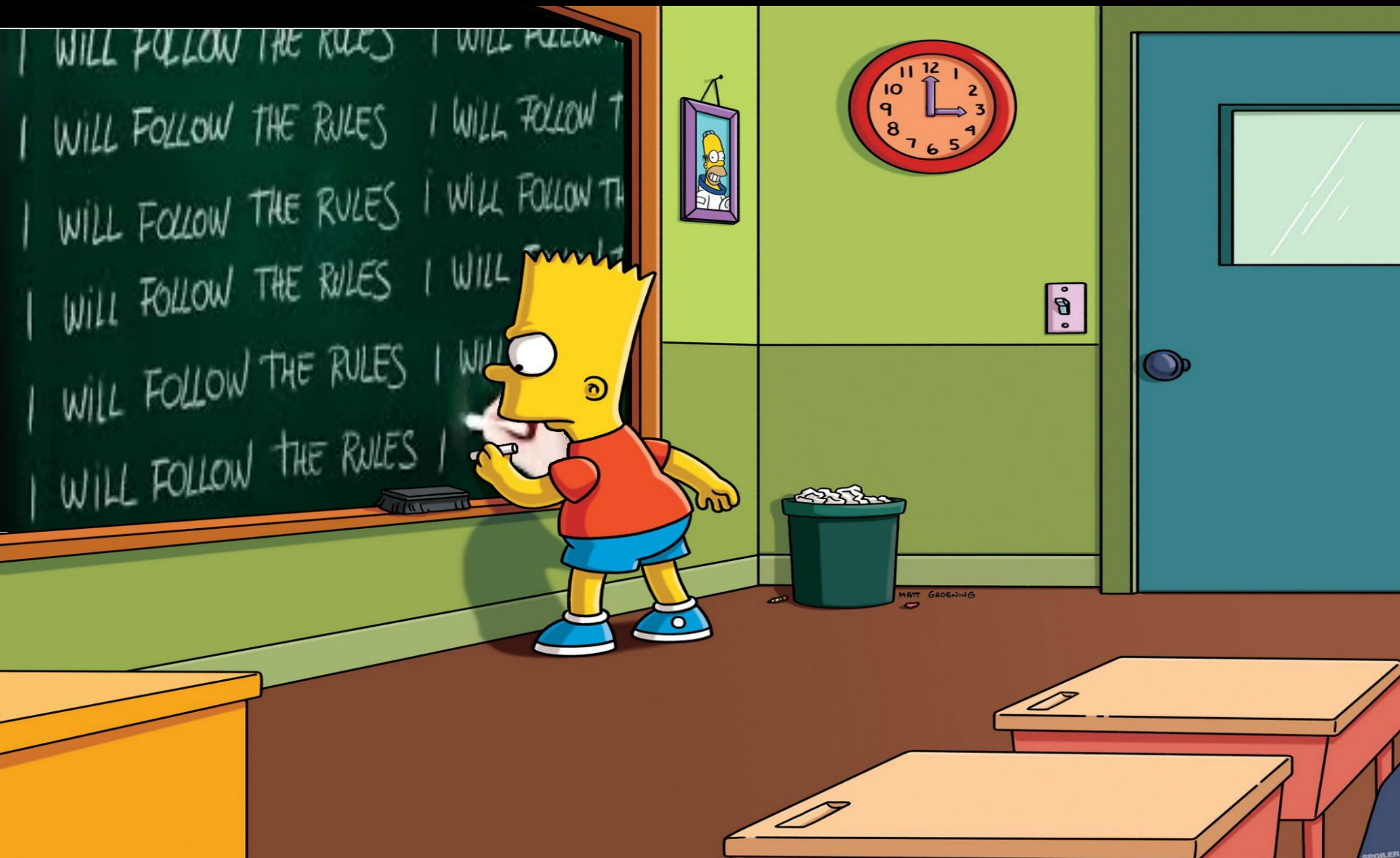
- Yourselves
- Your clients
- Your colleagues, partners, and bosses
- The tribunal before whom you are appearing
- Your (or your family's) desire to attain/sustain a certain lifestyle
- Obligation to meet payroll of your staff
- May be your friends or family members
- And as we know other factors (that are not human)
  - Anxiety and depression
  - Alcohol and drugs

Other Resources for Delaware Bar Members

- **DSBA Professional Guidance Committee ("PGC")**

- **Delaware Lawyers Assistance Program (DE-LAP)**
  Scott Godshall, Executive Director
  Phone: (302) 777-0124 or (877) 24-DELAP
  Web: www.de-lap.org
  - Confidentiality assured unless an attorney specifically waives confidentiality to have their participation considered as a mitigating factor in their disciplinary matters
  - Assist attorneys with chemical dependency, compulsive behaviors, and emotional distress

Questions?


I WILL FOLLOW THE RULES
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I WILL FOLLOW THE RULES
MATT GROENING

Working with the Difficult Client

Kevin J. O'Connell, Esquire
Office of Defense Services

Josiah R. Wolcott, Esquire
Connolly Gallagher LLP

Communication – DLRPC Rule 1.4

- 1.4 (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The client who wants to lie on the stand or present witness testimony that is false

- See The Delaware Lawyers' Rules of Professional Conduct, Rule 3.3(a)(3)
- "[A] defendant has no right to suborn perjury from a witness at his or her trial." *Fuller v. State*, 860 A.2d 324, 333 (Del. 2004)
- "If a client insists on giving false testimony, a lawyer may ask leave to withdraw. Rule 1.16(b)" *Shockley v. State*, 565 A.2d 1373, 1378 (Del. 1989)
- "[W]e conclude that an attorney should have knowledge "beyond a reasonable doubt" before he can determine under Rule 3.3 that his client has committed or is going to commit perjury." *Id.*
- "[W]e conclude that [counsel's] resort to the narrative as a means of refusing to be a participant with Shockley in perjury was not unreasonable under the circumstances" *Id.* at 1377.

Jones v. Barnes, 463 U.S. 745 (1983)

- "… the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,". However, an indigent defendant has no constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. It was for counsel to decide which claims were strong enough to be presented consistent with this strategy.

Hypothetical

- In a homicide prosecution, there is an abundance of evidence from credible, independent witnesses that your client killed the victim in self-defense. You inform the client that you intend to pursue a justification defense at trial. Client instead insists on your presentation of an alibi defense through one witness – his crack-addicted, felony and crimes of dishonesty convicted girlfriend, whom you believe to be lying.
- Who gets their way on this call and what is the best way to handle it?

Forfeiting the right to appointed counsel

- *Bultron v. State*, 897 A.2d 758 (Del. 2006)

Bultron waived or forfeited his right to counsel by his serious misconduct involving ongoing abuse of his attorney that was just short of violence.

Lawyers Assistance Program and Professional Guidance Committee

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R. Judson Scaggs Jr., Esquire
Morris Nichols Arsht & Tunnell LLP

Candace E. Holmes
Schmittinger & Rodriguez, P.A.

Scott Godshall, Esquire
Delaware Lawyers Assistance Program

R. Judson Scaggs Jr. Bio

R.J. is a partner at Morris, Nichols, Arsht & Tunnell LLP, where he is a member of the Corporate and Business Litigation Group. During his 25 years at the firm, he has concentrated his practice on the litigation of corporate law issues and business disputes. R.J. is a member and former chairman of the Delaware State Bar Association's Lawyer Assistance Committee, which assists Delaware lawyers affected by substance abuse, mental illness or other life issues. He earned a B.A. degree from Washington and Lee University and his law degree from the College of William and Mary. He has been married over 30 years to his loving wife, Colette, and has three daughters and seven grandchildren, whom he adores.

CANDACE E. HOLMES, ESQ.

Candace E. Holmes is a highly skilled attorney with years of experience focused primarily on family law. Raised in Delaware, she is a true local with a deep connection to her community. She is dedicated to providing quality legal representation to her clients. Her passion for justice has been the driving force behind her career.

Ms. Holmes obtained her Bachelor of Arts in Criminal Justice from the University of Delaware in 2004. She then pursued her Juris Doctor degree at the University of the District of Columbia – David A. Clarke School of Law, graduating Summa Cum Laude in 2016. While in law school, Ms. Holmes served on the UDC Law Review as an Associate and Senior Editor. Her academic achievements are a testament to her dedication and hard work, and she has continued to excel in her legal career.

Ms. Holmes was admitted to the Delaware State Bar in 2016 and began her legal career as a Judicial Law Clerk for the Honorable Felice G. Kerr and the Honorable Natalie J. Haskins at the New Castle County Family Court. During her tenure, she gained valuable perspective on the judicial process. Her clerkship provided the opportunity for extensive research on complex matters, and drafting of opinions, all of which she has since used to the benefit of her clients.

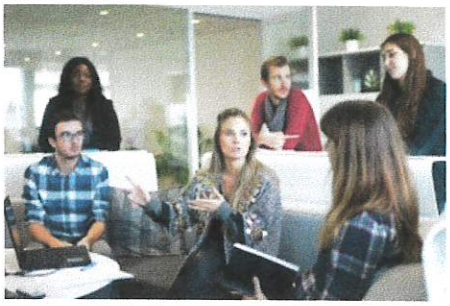
Ms. Holmes took her first law firm position in 2017 at Schmittinger and Rodriguez. Three years later she took the opportunity to join the Delaware Department of Justice as a Deputy Attorney General, where her work focused on representing the Division of Family Services in cases involving dependent, neglected, and/or abused children.

In 2023, Ms. Holmes returned to Schmittinger and Rodriguez to pursue her passion for family law, her primary practice area at the firm. She provides legal representation in all family matters including divorce, child custody, child support, and guardianship. Her experience as a family law attorney has given her a deep understanding of the emotional and legal challenges that families face in challenging times. Ms. Holmes is committed to providing compassionate and effective representation to her clients.

Ms. Holmes is a member of several legal organizations, including the Delaware State Bar Association, the Kent County Bar Association (Secretary), the American Bar Association, and the Terry-Carey Inn of Court (Membership Chair). Ms. Holmes is also a board member of the Academy of Dover Charter School and Delaware Lawyer Magazine, and serves as the co-chair for DSBA's Professional Guidance Committee. These organizations provide her with the opportunity to stay current with changes in the law and to collaborate with other legal professionals.

Scott Godshall

Scott is the Executive Director for the Delaware Lawyer Assistance Program. He is a former volunteer Board Chair for the Greater Philadelphia Chapter of the American Foundation for Suicide Prevention, as well as the former volunteer and Vice-President of the Lawyers Concerned For Lawyers – PA. He is a member of the Pennsylvania Bar, and a former criminal defense and family law practitioner. Scott is also a worldly renowned movie star, a five-time Olympic gold medal winner (women's volleyball) and a close friend of the King of England.



Originally The Delaware Lawyers Assistance Committee was established to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve as lawyers. Today, the Delaware Lawyers Assistance Committee has expanded their scope to include, but not be limited to, issues of substance abuse/dependence, depression, gambling addiction, and other illnesses. This long-standing Committee remains the backbone of the Delaware Lawyers Assistance (DE-LAP) Program. It is a network of over 20 Delaware attorneys who have volunteered to help fellow Delaware attorneys.

The attorneys who are members of the Committee represent a diverse group of lawyers in every sense of the word. The attorneys have a wide range of practice areas drawn from all three counties. The Committee has regular quarterly meetings where advocacy, policy, and strategic issues are discussed. These meetings are held in all three counties and are hosted by Committee members of each particular county.

Some of the attorneys who are Committee members are practicing attorneys who, at some points, were pulled back from their abyss through the efforts of the Lawyers Assistance Committee. These Committee members have personally experienced and recovered from the unmanageability of problems that affected their quality of life. Other members have not experienced substance abuse or emotional problems themselves but have witnessed the consequences of these problems on family, friends, or fellow attorneys and have decided to volunteer their time because of their desire to assist their fellow attorneys.

For more information, call Victoria Sweeney, phone: 302-577-8890 or Scott Godshall, phone: 302-777-0124 or email SGodshall@de-lap.org.

Click here to apply to be a volunteer of the Lawyers Assistance Committee.

An attorney with a personal or medical problem may, in some cases, need specific assistance to meet law practice demands during a difficult time.
A new lawyer may be faced with problems that he/she cannot solve.
A seasoned lawyer has moved from a large firm setting to a small office or opened a solo practice, and he/she needs mentoring or guidance.
These are examples of how the Committee on Professional Guidance can help.
The Committee on Professional Guidance provides peer counseling and support to lawyers overburdened by personal or practice-related problems. It offers help to lawyers who, during difficult times, may need assistance in meeting law practice demands.
The members of this committee, individually or as a team, will help with the time and energy needed to keep a law practice operating smoothly and protect clients—the Professional Guidance Committee and The Lawyers Assistance Committee work under confidentiality Rule 8.3.
Call a member if you or someone you know needs assistance or go to The Delaware State Bar Association's website www.dsba.org and click "sections and committees" then click sections to Professional Guidance Committee or call the Committee Chair, Candace Holmes, Schmittinger & Rodriguez, phone: 302-674-0140.
Click here to apply to volunteer for the Professional Guidance Committee.

The Archbishop's Suggestion

Disturbing reports of lawyer survey data continue to find their way into our email boxes. Our friends in the New Jersey State Bar Association provide the most recent figures. Last November, NJSBA conducted a wellness survey of New Jersey attorneys, consisting of 90 questions and 1,643 New Jersey lawyers responded. NJSBA released its survey report on April 13. NJSBA President Jeralyn L. Lawrence, and the engine behind the survey decision, summarized its results with one sentence: "It's clear that we are a profession in crisis."[1]

A crisis indeed:

- 68 percent reported feeling anxious in the past two weeks;
- 56 percent reported a high prevalence of alcohol misuse;
- 49 percent of lawyers reported moderate to high levels of burnout;
- 49 percent reported feelings of isolation;
- 23 percent reported a high prevalence of depressive symptoms;
- 28 percent of attorneys considered leaving the profession as a result of mental health, burnout, or stress; and
- 10 percent reported thoughts of suicidal ideation.[2]

This portrait of a collapsing bar might distress the courts and certainly alarm a Bar Association President. It certainly aroused President Jeralyn Lawrence, and it should certainly arouse us: "When you hear 28 percent are thinking about leaving the profession, red flags are going up around us."[3]

New Jersey's study of this frightened portrait does not stand alone. The largest unified bar in the United Sates, the District of Columbia Bar,[4] joined with the California Lawyers Association in 2020 to fund a survey which examined the following:

> Using a random sample of approximately 2000 practicing lawyers from California and Washington D.C., the latest research examined the relationship between thoughts of suicide and various factors that negatively and disproportionately affect lawyers including perceived stress, loneliness, work overcommitment, work-family conflict, alcohol use, and prior mental health diagnosis.[5]

"It's clear that we are a profession in crisis."

The CLA/D.C. Bar team released their report in February 2023. Their "key findings":

- Lawyers were twice as likely as the general population to experience suicidal ideation.
- Perceived stress was the number one predictor of suicidality; compared to lawyers with low stress, those with high stress were a remarkable 22 times more likely to experience suicidal thoughts, and lawyers with intermediate levels of stress were 5.5 times more likely.
- Lonely lawyers were nearly three times more likely to have suicidal thoughts, and those who are highly over-committed to work more than twice as likely.

- Male lawyers were twice as likely to contemplate suicide, a notable difference from the general population where women experience higher levels of suicidal ideation. Prior mental health diagnosis also increased risk of suicidal ideation.
- A significantly greater proportion of lawyers who contemplated suicide indicated that working in the legal profession was detrimental to their mental health and contributed to their substance use and feelings of burnout.
- The profile of a lawyer with the highest risk for suicide was a lonely or socially isolated male with a high level of unmanageable stress, who was overly committed to their work, and may have a history of mental health problems. The heightened risk of suicidal ideation extends well beyond this specific profile.[6]

In addressing the mental health problems faced by lawyers, the reports focus intensely, appropriately, and on the problems that appear once law school ends and law practice begins: unmanageable stress, anxiety, 24-hour work schedules,[7] "high levels" of burnout, isolation, high prevalence of depressive symptoms, alcohol misuse, and suicide ideation. Each of these issues can be, and was, addressed in Wellness studies.[8] Are there trails we can track, trails that focus on issues that troubled lawyers brought with them when they took their first law school class? Jeralyn L. Lawrence thought so.

Getting Upstream

We need to stop just pulling people out of the river.

We need to go upstream and find out why they are falling in.

NJSBA President Jeralyn L. Lawrence put Archbishop Desmond Tutu's assertion in bold on the first page of her Introduction to the Survey Results.[9] It opens the door to a variety of mental health issues that we can address in the hope of helping our colleagues. Where do we start?

One place to start: childhood trauma leading to adult symptoms trauma. A definition:

> While trauma has many definitions, typically in psychology it refers to an experience of serious adversity or terror — or the emotional or psychological response to that experience. Trauma-informed care or services are characterized by an understanding that problematic behaviors may need to be treated as a result of the ACES (Adverse Childhood Experiences) or other traumatic experiences someone has had, as opposed to addressing them as simply willful and/or punishable actions.[10]

CONTINUED >

SIDE BAR

THE CONSEQUENCES OF TRAUMA

According to the Center for Substance Abuse Treatment's publication *Trauma-Informed Care in Behavioral Health Services*, the following are potential consequences of childhood trauma that may be experienced during adulthood:[13]

Delayed Emotional Reactions
Irritability and/or hostility; Depression; Mood swings, Instability; Anxiety (*e.g.*, phobia, generalized anxiety); Fear of trauma recurrence; Grief reactions; Shame; Feelings of fragility and/or vulnerability; Emotional detachment from anything that requires emotional reactions (*e.g.*, significant and/or family relationships, conversations about self, discussion of traumatic events or reactions to them).

Delayed Physical Reactions
Sleep disturbances, nightmares; Somatization (*e.g.*, increased focus on and worry about body aches and pains); Appetite and digestive changes; Lowered resistance to colds and infection; Persistent fatigue; Elevated cortisol levels; Hyperarousal; Long-term health effects including heart, liver, autoimmune, and chronic obstructive pulmonary disease.[14]

Delayed Cognitive Reactions
Intrusive memories or flashbacks; Reactivation of previous traumatic events; Self-blame; Preoccupation with event; Difficulty making decisions; Magical thinking: belief that certain behaviors, including avoidant behavior, will protect against future trauma; Belief that feelings or memories are dangerous; Generalization of triggers (*e.g.*, a person who experiences a home invasion during the daytime may avoid being alone during the day); Suicidal thinking.

Delayed Behavioral Reactions
Avoidance of event reminders; Social relationship disturbances; Decreased activity level; Engagement in high-risk behaviors; Increased use of alcohol and drugs; Withdrawal.

Delayed Existential Reactions
Questioning (*e.g.*, "Why me?"); Increased cynicism, disillusionment; Increased self-confidence (*e.g.*, "If I can survive this, I can survive anything"); Loss of purpose; Renewed faith; Hopelessness; Reestablishing priorities; Redefining meaning and importance of life; Reworking life's assumptions to accommodate the trauma (*e.g.*, taking a self-defense class to reestablish a sense of safety).

The point here is to alert lawyers facing difficulties to dig into earlier problems and to seek help where necessary.

The breadth of trauma experience:

According to the Substance Abuse and Mental Health Services Administration, 61 percent of men and 51 percent of women report at last one traumatic event in their lifetimes. This would put mental trauma at the top of the list of most-common psychological health conditions.[11]

Many individuals experience trauma during their lifetimes. Although many people exposed to trauma demonstrate few or no lingering symptoms, those individuals who have experienced repeated, chronic, or multiple traumas are more likely to exhibit pronounced symptoms and consequences, include substance abuse, mental illness, and health problems. Subsequently, trauma can significantly affect how an individual engages in major life areas as well as treatment.[12]

The point here is not to terrify and is not to mark lawyers as exceedingly ill. The percentage of individuals struggling as a result of trauma in their early years is small. The point here is to alert lawyers facing difficulties to dig into earlier problems and to seek help where necessary. Are the reactions listed above familiar to you? Several are familiar to me; I am still working on them. Are they interfering with your with your wellbeing? With your law practice? If so, have your reached out to a therapist? Attending law school and practicing law are mighty difficult as it is. The time has come to address your issues and to address them fully.

If you need help or would like more information, call DE-LAP at (302) 777-0124 or email sgodshall@de-lap.org. All correspondence is confidential.

Scott Godshall is the Executive Director of the Delaware Lawyers Assistance Program and can be reached at sgodshall@de-lap.org.

Notes:

1. Survey On NJ Attys' Mental Health Finds "Profession in Crisis," Law360, 4/13/2023. *See* NJSBA Report Recommends Path to Ease Areas of Stress in the Legal Profession, News and Events, http:/tcms.njsba.com. Hats off to Richard Forsten for finding the NJ report and passing it along.
2. Law 360, 4/13/2023 issue.
3. *Id.*
4. The D.C Bar has more than 111,000 members in all 50 states and more than 80 countries and territories. *See* www.dcbar.org.
5. Foley, Brian. "Lawyers with High Stress 22 Times More Likely to Contemplate Suicide than Those with Low Stress." California Lawyers Association, February 13, 2023. https://calawyers.org/california-lawyers-associatin/lawyers-high-stress-contemplate-suicide/.
6. *Id.*
7. Smith, Patrick."'You Are Online 24/7': Why a Paul Hastings Presentation Went Viral and What It Says about Law Firm Culture." The American Lawyer, April 5, 2023. https://www.law.com/americanlawyer/2023/04/05/you-are-online-247-why-a-paul-hastings-presentation-went-viral-and-what-it-says-about-law-firm-culture/?slreturn=20230318135055.
8. One example: Anna Levine, Esquire, NJLAP's Director, programmed five-day webinars during NJLAP's Week In Law (May 1-5):
   Monday: Physical Well-Being
   Tuesday: Spiritual Well-Being
   Wednesday: Career & Intellectual Well-Being
   Thursday: Social Well-Being
   Friday: Emotional Well-Being.
9. "Putting Lawyers First Task Force: An Excerpt of the Report and Recommendations on Improving the Legal Profession for Lawyers." Pg. 3. New Jersey Bar Association, March 2023. https://tcms.njsba.com/PersonifyEbusiness/default.aspx.
10. "What Are ACEs? and How Do They Relate to Toxic Stress?" Center on the Developing Child at Harvard University, October 30, 2020. https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/.
11. "Statistics for Mental Trauma: How Common Is IT & Who It Affects." FHE Health – Addiction & Mental Health Care. Accessed April 18, 2023. https://fherehab.com/trauma/statistics.
12. *Trauma-Informed Care in Behavioral Health Services, Treatment Improvement Protocol (TIP) Series*, No. 57, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Report No.: (SMA) 14-4816, 2014 (Italic added).
13. *Id.*, Exhibit 1.3-1, Immediate and Delayed Reactions to Trauma.
14. *See* "Child Abuse & Neglect," Volume 76, February 2018, pp. 138-148.

The Bounds of Zealous Advocacy

The Honorable Maryellen Noreika
U.S District Court for the District of Delaware

The Honorable Morgan T. Zurn
Court of Chancery of the State of Delaware

Your Client and Ethical Considerations in Alternative Dispute Resolution

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Bernard G. Conaway, Esquire
Conaway-Legal LLC

G. Kevin Fasic, Esquire
Offit Kurman P.A.

Jessica Tyler, Esquire
Office of Disciplinary Counsel

BERNARD G. CONAWAY *is the founding member of Conaway-Legal LLC. Over the course of his 30 year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, was appointed and served for 10 years on the Superior Court of Delaware as a Special Mater in Complex Litigation, and was a partner in very large and small law firms.*

His practice focuses on ADR, bankruptcy, practice before the Delaware Court of Chancery, corporate and alternate entity governance under Delaware law and complex civil litigation. In thirty years of practice, Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Mr. Conaway frequently appears in Delaware's Court of Chancery on matters involving director/officer indemnification and advancement pursuant to Section 145 of the Delaware General Corporate Law, for books and records demands under Section 220, served as corporate custodian under authority of Section 226, Section 275/276 regarding dissolutions, director and officer demands for indemnification and advancement, injunctive relief, specific performance, quiet title actions, guardianship, trust and estate litigation and other equitable claims. In his bankruptcy practice. Mr. Conaway has served as lead and local counsel on every side of the bankruptcy process including representing creditors, debtors, directors against preference and insider claims, landlords, and other parties seeking to lift the automatic stay.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then he has successfully mediated thousands of cases, including hundreds of large complex, multi-party, multi-level insurance,

construction, bankruptcy, environmental, and commercial cases. He has mediated law firm break-ups, intra-company disputes, governance and financial disputes between alternate entity members and personal injury claims. Mr. Conaway has served for over sixteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.
Mr. Conaway volunteers his time to a number of boards and committees. Over the past eighteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney Guardian Ad Litem for Delaware children and has continuously done so since 2003.

EVENTS

- *Ethical Considerations in Alternative Dispute Resolution*
- *"Expert" Advise From Successful Arbitrators*
- *ADR in Practice: A Lawyer Round Table*

EXPERIENCE

- *Represented a corporate client opposing a director's 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.*
- *Appointed and/or selected to serve as a Special Discovery Master in complex civil cases involving insurance coverage, products liability, construction, mass tort, and environmental cases.*
- *Settled a multi-million dollar bankruptcy preference claim asserted against one of the world's largest aluminum suppliers. The case was complicated by the interplay between US and INCO maritime conventions as well as US, UK and Bahrain law.*

• Successfully secured liquidation of a client's LLC interest in the face of vigorous opposition involving protracted discovery, trial, and appeal to the Supreme Court of Delaware.
• Following a year long effort, successfully mediated all of the pending state court abuse claims brought against multiple religious order entities affiliated/working with the Diocese of Wilmington. The mediation was complicated by the number of claims, multiple insurers' reservations of rights, unresolved and novel legal questions, funding issues, and the Diocese's then pending bankruptcy.
• Served as local counsel for an ad hoc consortium of preferred security holders in the Chapter 11 of Washington Mutual, Inc.
• Served as local counsel to an indentured trustee and an Ad Hoc Committee of bondholders in an expedited Delaware Chancery Court trial and successfully appealed the matter to the Supreme Court of Delaware resolving a dispute over Calpine's use of $700 million subject to lien indenture restrictions.
• Served as local counsel to bondholders holding $2 billion in Countrywide Series B May 2007 bonds in an action seeking a determination whether the acquisition of Countrywide constituted a "change of control" and therefore triggered bondholder put rights. The matter was settled and the bondholders were paid nearly $2 billion (i.e., close to par) for their bonds.
• Successfully defended the former CEO of a major imaging company against preference, fraudulent transfer, and insider trading claims.
• Frequently draft LLC and Series LLC organizational documents for Delaware real estate investors including completion of client tailored limited liability agreements.
• Often represent pro bono, minor children in actions where the state is seeking to terminate parental rights.

Kevin Fasic Bio

PRACTICE FOCUS

Kevin Fasic is the Managing Principal of Offit Kurman's Wilmington office. With over 25 years of legal experience in employment and construction law, Kevin's practice is primarily management-based and includes discrimination claims, wage and hour issues, Davis Bacon/ Prevailing Wage claims, employment agreements (including restrictive covenant issues and severance agreements), hiring and firing guidance, unemployment claims, mechanics' lien claims, general construction disputes, and legislative affairs. As a former investigator for the Delaware Department of Labor, Kevin's experience informs his approach as he appears before various administrative boards, agencies, and private dispute resolution forums.

Additionally, Kevin has extensive experience practicing before all of Delaware's state and federal trial and appellate courts. He is also certified by the Delaware Superior Court as both a Mediator and an Arbitrator that can serve in either capacity for labor/ employment and construction law disputes.

With a growing reputation as an engaging legal thought leader, Kevin frequently speaks on employment and construction law topics for various professional and trade organizations. He also publishes articles for these organizations on various employment law topics and recent developments in the law.

Kevin was born in Philadelphia, Pennsylvania, in 1965. He received his bachelor's degree from Lehigh University in 1988 and his law degree from the Widener University School of Law in 1995.

ACTIVITIES

- Board of Governors for the Delaware State Chamber of Commerce: 2014-Present
- Board of Managers, Small Business Alliance for the Delaware State Chamber of Commerce: 2008-Present; Co-Chair 2016-2017
- Joint Military Affairs Committee, Delaware State Chamber of Commerce: 2015-Present; Chair 2020-2021
- Employer Advocacy and Education Committee, Delaware State Chamber of Commerce: 2000-Present; Co-Chair 2003-2013

- National Legislative Committee, Associated Builders and Contractors: 2014-2020
- Legislative & Legal Affairs Committee, Associated Builders and Contractors – Delaware Chapter: 2007- Present
- Board of Directors, Associated Builders and Contractors – Delaware Chapter: 2009-2014
- Labor and Employment Law Section, Delaware State Bar Association: 1997-Present; Chair 2003-2004; Secretary 2002-2003
- Alternative Dispute Resolution Section, Delaware State Bar Association: 2018-Present
- Government Affairs Committee, New Castle County Chamber of Commerce: 2018-Present
- Government Affairs Committee, Delaware Contractor's Association (AGC Affiliate): 2020-Present
- Active in legislative affairs for various business groups and trade associations and a frequent advocate for their interests before the Delaware General Assembly and other legislative forums

JESSICA L. TYLER

Jessica Tyler is currently Deputy Disciplinary Counsel for the Supreme Court of the State of Delaware. Prior to that appointment, Ms. Tyler spent 10 years in private practice where she represented individuals and businesses in the defense of civil litigation involving automobile accidents, premises liability, general liability, and products liability. Prior to private practice, Ms. Tyler served as a judicial law clerk for Judges Buckworth and Conner in the Family Court of the State of Delaware. She previously was a member of the Delaware Civil Clinic where she worked with Delaware Volunteer Legal Services to assist clients with obtaining Protection from Abuse Orders and custody of their children. Ms. Tyler also interned with the Camden County Prosecutor's Office and the Pennsylvania Attorney General's Office, Bureau of Consumer Protection. Ms. Tyler is a graduate of Arcadia University and Delaware Law School.

Fundamentals of Lawyer-Client Relations 2023: Your Client and Ethical Considerations in Alternative Dispute Resolution

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Materials, Parts One to Five

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PART ONE: In the Soup - As a Mediator

Complaints about mediators for mediation services face consequences from four basic sources:

1. Civil Liability
2. Criminal Liability
3. Association Imposed Conduct Standards
4. Referral Source Conduct Standards

PART ONE: In the Soup - As a Mediator

1. Civil Liability – Like every profession, a mediator can engage in conduct that gives rise to personal,

civil liability., i.e., paying damages to a mediating party for tort or contract injuries caused by mediator

misconduct. Examples of such conduct follow:

a. Fraudulent misrepresentations

b. Duress

c. Blown confidentiality

d. Conflicts of interest

PART ONE: In the Soup - As a Mediator

2. Criminal Liability – Mediators are not immune from criminal liability. Criminal liability for mediators is rarely reported. Those criminal acts are generally known to most people. The Mediator can, however, find themselves in unfamiliar territory. For example, most states have imposed an affirmative

obligation to report child sexual abuse and neglect. Be aware that mediation agreements often recite applicable law. Serving as a mediator applying/using law that you are unfamiliar with can impose unappreciated risk, including criminal liability.

a. Criminally fraudulent conduct

b. Failure to report certain conduct

c. Murder

PART ONE: In the Soup - As a Mediator

3. Association Imposed Conduct Standards – It is common for mediators to belong to voluntary associations. Many of those associations impose principles or conduct standards. Moreover, those associations respond, in varying ways, to complaints made by third parties. Those responses can range

from seriously consequential to otherwise consequential. Think about breaches of the *Delaware Lawyers' Rule of Professional Conduct*, or ADR/mediation-centric associations such as JAMS.

a. Removal from association

b. Required to make a public apology

c. Defending against formal ethics investigations/charges.

A violation of voluntary association conduct standards, generally, does not result in civil or criminal liability. Caution, however, if the mediation agreement or the mediator's advertising references an association's conduct standards, then those conduct standards may be imputed/implied into the mediation agreement and consequently creating a basis for legal action.

PART ONE: In the Soup - As a Mediator

4. Referral Source Conduct Standards – A prime example here being court-annexed mediation programs. While court related programs, such as Delaware's, provide quasi-judicial or qualified immunity, that immunity has limits.

A mediator who fails to uphold the standards of most referral programs risks sanctions that could range from reprimands to disqualification from future service in the program to the imposition of the costs of the proceeding in which the misconduct took place. Ironically, most circumstances giving rise to mediator liability are, frankly, well within the mediator's control. For example, the failure to disclose a conflict of interest is the most common problem faced by mediators. The remedy for this

problem, even accounting for incomplete information provided by the parties, is to over disclose.

PART ONE: In the Soup - As a Mediator

Example:

Subject to the general disclosure that, over the course of my career, I have litigated, arbitrated

and/or mediated cases with all counsel and/or with other members of their respective firms, and, just as likely socialized professionally with the same, the conflict check revealed no issues. I do not believe that these prior interactions constitute a prohibited conflict of interest but will, of course, defer to counsel.

In Delaware, this type of broad-based – "I know everyone" - disclosure is almost essential. This disclosure coupled with offer inviting the parties to assert a conflict puts the onus on the parties to conflicts of interest are considered.

PART ONE: In the Soup - As a Mediator

Finally, some mediation agreements declare that the mediation will be conducted according to the law of a specific jurisdiction or set of rules. If you find yourself in such a situation, inform yourself or suffer the consequences. Notable example, in most states communications with a mediator

are deemed confidential. As of 2016, in New York there is no statutory privilege in New York mediations. Moreover, New York courts do not automatically mediation made statements as confidential as a matter of public policy. Parties that fail to account for the lack of confidentiality may find those statements used as evidence against them in a subsequent proceeding. *See Hauzinger v. Hauzinger,* 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007)*, aff'd,* 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E.2d 849 (2008).

PART TWO: In the Soup – Lawyer Mediating a Claim

In Delaware, complaints against mediators that give rise to liability - of any type - are uncommon. Conversely, client complaints against lawyers for mediation-related conduct are more common. One fundamental reason for this is lawyer-client relationship.* This relationship, set out in the *Delaware Lawyers' Rule of Professional Conduct*, underlies every interaction between the client and lawyer. In addition, even without a client complaint, the DLRPC rules are enforced.

* *See Delaware Lawyers' Rule of Professional Conduct, Preamble, Comment [3],* stating:

> In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.,* Rules 1.12 and 2.4.

An acknowledgement that the DLRPC do not apply, in some circumstances, to those serving in non-representational roles as third-party neutrals.

PART TWO: In the Soup – Lawyer Mediating a Claim

1. Settlement Authority: This comes up in several ADR contexts. (1) some retention agreements include

a provision that allows a lawyer to settle a case if the client fails to maintain contact with the lawyer; (2) the client cannot, or will not, attend a mediation; or (3) the client voluntarily relinquishes settlement authority to the lawyer.

2. Limits on Settlement: Mediating, or even proposing, a settlement that precludes you from representing clients in future litigation against another party. Any agreement not to represent other clients denies members of the public access to the lawyer whose experience and background render him/her best suited to represent them and creates a conflict for the lawyer who is asked to give up future representation in the interest of the current client. These public policy considerations and RULE

5.6 require attorneys neither to suggest nor to enter into such an agreement. *See* RESTATEMENT

PART TWO: In the Soup – Lawyer Mediating a Claim

3. Limiting Information or Work Product: Mediating a settlement that limits an attorney's use of information gathered in the matter, or limit dissemination of related work-product likewise violates RULE 5.6. Like limitations on an attorney's ability to represent subsequent clients, settlement terms that limit the use of work product have

been deemed a violation of RULE 5.6. See *MD State Bar Association, Comm. on Ethics, Docket No. 2021-03*.

4. Protecting Client Confidentiality: Covid changed the legal profession. One of the most consequential changes involved a growing reliance upon video technology for fact finding, general communications, court proceedings, and confidential communications. Prior to covid, video teleconferencing was a rarely used. The DRPC rules have evolved to keep pace with technology. Review Comment 8 to RULE 1.1 regarding competency: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with

all continuing legal education requirements to which the lawyer is subject.

PART TWO: In the Soup – Lawyer Mediating a Claim

The takeaway here is that your competency as a lawyer is, among other things, measured by your understanding of technology that you use, and, more importantly, the competency to balance the

risks of that technology against your obligations to maintain client confidences or protect against unauthorized access. How much do you really know about Zoom/Go to Meeting/ Microsoft Teams? Is the communication encrypted end-to-end? Is the videoconference being recorded? Who else is participating off-camera? *See, e.g.*, ZOOM SECURITY ISSUES: WHAT'S GONE WRONG AND WHAT'S BEEN FIXED, TOM'S GUIDE, *https://www.tomsguide.com/news/zoom-security-privacywoes* (last checked 1/27/2023).

PART THREE – How to Avoid Being Sued Mediating

1. Failure to Disclose a Conflict of Interest/Witnesses - This is the most common failure of mediators/

arbitrators and lawyers is a disclosure failure. The problem has many causes but the most common occurs at the very outset of engaging an ADR professional. When an ADR professional is engaged, that engagement typically starts off with a conflict check. That check is based upon information provided by the lawyers. That conflict check is only as good as the information provided. With respect to arbitration know that the *Federal Arbitration Act*, 9 USC § 10, and *Delaware Uniform Arbitration Act*, 10 Del. C. § 5714 both permit an award to be set aside based upon an arbitrator's conflict of interest. Problem areas: corporate conglomerates, foreign corporate structures, trust/estate matters – any place where the identity of related entities is obscured.

PART THREE – How to Avoid Being Sued Mediating

2. Breach a Specific Contractual Promise Regarding Structure or Outcome - Both the lawyer promising their client a specific litigation result and a mediator promising a resolution end up in the same trouble.

3. Breach of Confidentiality - Generally, three ways to breach confidentiality:

(1) externally by communicating with third parties about the mediation.

(2) internally by revealing confidential information to party not entitled to that information.

(3) maintaining confidentiality when obligated by law or rule to report. Child sexual abuse, imminent threats of harm.

4. Commit Fraud - Misrepresenting facts or party positions, or misrepresenting the law, or overstating.

PART FOUR – Avoiding Suit, Being a Successful Arbitrator

1. A Deep Abiding Appreciation of Due Process and what it Means, i.e., Being Fair, Balanced, Knowledgeable, Informed, and Impartial - Can't over emphasize enough the need to be independent/ impartial and perceived that way. Every step you take will be evaluated, at a minimum, in retrospect. Be self-aware of how your actions could be viewed.

Independence and impartiality are generally considered to be two different concepts: independence is the objective absence of any substantial link to any of the parties as that may alter the

freedom of judgment of the arbitrator; impartiality is the subjective will not to favor any of the parties.

Due process contemplates more than independence and impartiality. Understanding how to conduct yourself in a manner conveys both qualities. Running an arb iteration. Understanding how to handle a hearing. How to establish pre-hearing process.

PART FOUR – Avoiding Suit, Being a Successful Arbitrator

2. Always ask for the Arbitration Agreement if one exists - Distinguish this from high/low or other types of agreements. Some terms of an arbitration agreement the parties may not want you to know. Some agreements are very basic. Some very complicated. For example, you should understand what your final decision should look like – a reasoned decision of nothing more than a conclusory award.

A reasoned decision is professionally and personally rewarding but it also the serves as the perfect foundation for overturning the award. Be very careful when writing a decision. Flip remarks, bad math, an overhyped critical focus on a single fact/circumstance set the foundation for a reversal argument. A powerful reasoned decision precisely identifies those facts, that testimony, and credibility

that reinforce the outcome.

PART FOUR – Avoiding Suit, Being a Successful Arbitrator

3. When in Doubt, Confirm Your Authority to Act - If you are unsure that you have certain authority as an arbitrator,

then ask the parties to confirm that you do. Literally, a simple question can add immeasurable clarity.

4. Respond Promptly and Completely - Remember that arbitration is selected because it is quicker and less expensive. Taking too long to respond undermines that objective. Additionally, some arbitration agreements impose a time frame for completion. Exceeding or ignoring that time frame may result in a loss of authority.

5. Understand the Allegations – Ask as Many Questions as it takes - The single best way to lose credibility is to fail

to grasp the issues. It's far better to make the "wrong decision" because you disagreed with a party's position, then

to make the wrong decision because you didn't understand the facts, legal issues, or arguments.

PART FOUR – Avoiding Suit, Being a Successful Arbitrator

6. Be Overly Inclusive Regarding Your Conflict Check - Likewise, your disclosure to the parties should be

broad. Example: indicating that you've served as an arbitrator involving an insurance carrier or a

specific attorney, or that others in your firm may have/had some relationship with one of the litigants.

7. Understand that Everyone is Trying to Manipulate You. Thus, it is vitally important to know yourself. For example, are you conceptual, openminded, equity-oriented person or a rule-oriented, no-nonsense, by-the-numbers strict constructionist. To be successful you need to understand your own psychology and understand how your mindset might be influenced by counsel. Know that the lawyers selected you and already have their own insight into your psychology. Example: strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case.

PART FOUR – Avoiding Suit, Being a Successful Arbitrator

8. Humiliate No One Especially the Referring Attorneys. This ought to be obvious.

9. Know the Rules and Law for Which You Are Accountable. Ask the parties especially if there is no written arbitration agreement. An important corollary to this rule is knowing the *Federal Arbitration Act* and *the Delaware Arbitration Act,* especially the provisions relating to vacating and modifying awards. For example, the *Delaware Rapid Arbitration Act*, 10 DEL. C. § 5801, *et seq*., imposes other time and process obligations upon the arbitration. The failure to know the controlling statutes or rules

is a recipe for disaster.

PART FIVE – Authorities (FAA and DUAA)

Vacating an Award:

9 U.S.C.A. § 10	10 *Del. C.* § 5714

Modification/Correction of Award:

9 U.S.C.A. § 11	10 *Del. C.* § 5715

PART SIX – Recent Case Law & Authorities

Diamond Materials v. Tutor Perini Corp., 2021 WL 1716969 (Del.Super. 4-30-2021)

- Clause: claims arising from acts/omissions of DelDOT are arbitrable; Contractor (TPC) decides

which claims fall into this subset

- DE law: (1) parties have substantial freedom to contract; (2) strong presumption in favor of arbitration, doubts to be resolved in favor of arbitration
- Arbitrability for judicial determination unless: (1) clause provides for arbitration of "all disputes"; and (2) contract incorporates rules allowing arbitrator to decide
- Even where contract provides unfettered discretion to one party (deciding which claims to arbitrate), court will not re-write the contract

PART SIX – Recent Case Law & Authorities

Ending Forced Arbitration of Sexual Assault/Sexual Harassment Act of 2021

- Effective March 3, 2022; Amends Federal Arbitration Act
- Invalidates pre-dispute arbitration agreements for sexual assault or harassment claims – no arbitration agreement entered into prior to the dispute shall be valid or enforceable with respect to a case filed under federal, tribal, or state law – what about cases filed pursuant to the DE Uniform Arbitration Act?
- Court determines whether claims are subject to a previous arbitration agreement (not the arbitrator)
- Only disputes or claims arising on or after 3/3/2022 – plain reading of the statute: "any dispute or claim that arises or accrues on or after the date of enactment"

PART SIX – Recent Case Law & Authorities

Ending Forced Arbitration of Sexual Assault/Sexual Harassment Act of 2021 (con't.)

- Forum for dispute resolution at the election of the person or named class representative
- Arbitration remains an option if agreed to after the claim is raised, but only at the option of the claimant/class; Employee(s) may wish to maintain privacy of the claims, details; do not mislead the

Employee and stress that "it is your choice"

- What about claims involving more than one cause of action?
- Is retaliatory conduct on-going harassment, or separate?
- Employers should modify future agreements to exclude sexual assault and harassment claims
- Expect increase in litigation and public exposure; PR nightmare; update and train employees and supervisors on sexual harassment policies and procedures (mandated by DE Law)

PART SIX – Recent Case Law & Authorities

Crystal Point Condo Ass'n. v. Kinsale Ins. Co., 2022 N.J. LEXIS 657 (July 18, 2022)

- Judgment creditor tried to sue judgment debtor's insurer but balked at mandatory arbitration
- NJ Supreme Court held that judgment creditor was bound to Arb. Clause in the policy – statutory claim under Direct Action statute, not a common law claim
- Not enforcing the clause would give judgment creditor greater rights than the insured
- Non-signatory party must take the good with the bad; cannot pick and choose between rights and obligations under the policy

PART SIX – Recent Case Law & Authorities

Jones Day v. Orrick, 42 F.4th 1131 (9th Cir. 2022)

- Arbitration subpoenas in the US have nationwide scope
- Subpoena issued for Orrick Chairman/MP to appear, produce docs
- Arbitration in D.C., Orrick HQ in CA; Orrick argued that enforcement could only occur in D.C. (not CA) and that there was no basis for personal jurisdiction in D.C.
- Arb. Subpoena issued pursuant to FAA can be issued nationwide and enforced under general venue provisions of 28 USC 1391(a)
- Gives arb. subpoenas big advantage over court subpoenas

Attorney Recordkeeping and Timekeeping

John A. Macconi, Jr., Esquire
John A. Macconi, Jr. LLC

John A. Macconi, Jr. LLC was opened in June 2012 by attorney John A. Macconi, Jr. The firm strives every day to provide an exceptional quality of legal services to clients in various practice areas while keeping those clients informed of the progress and status of their cases. A focus is put on each and every client and matter to deliver knowledgeable representation that also demonstrates the highest levels of integrity, advocacy, and responsiveness to their needs.

To achieve successful results in the law, you need more than just the facts on your side. Representation by an attorney with the background and skills to evaluate an issue, construct a plan, and then implement it, who is also detail-oriented and has years of courtroom experience, is invaluable.

Areas of Practice

Family Law (/family-law/)

Personal Injury (/personal-injury/)

Civil Litigation (/civil-litigation/)

Wills & Estates (/wills-estates/)

Criminal Defense (/criminal-defense/)

John A. Macconi, Jr.

John A. Macconi, Jr. earned his Juris Doctor (J.D.) degree from Widener University School of Law in 2003, consistently appearing on the Dean's List. Following law school he was a judicial law clerk to The Honorable Fred S. Silverman of the Superior Court of Delaware, and then spent nearly eight years in private practice before opening his own practice.

Mr. Macconi is a member of the following Bars:

Delaware, 2003;

Federal District Court of the District of Delaware, 2004;

Pennsylvania, 2004; and

New Jersey, 2004.

Prior to law school Mr. Macconi attended the University of Delaware where he received a Bachelor's Degree in Finance and also consistently appeared on the Dean's List.

Fundamentals of Lawyer-Client Relations

Attorney Recordkeeping and Timekeeping

1:30 – 2:15 pm

1. Issues & concerns – big firm v. small firm/solo practice

2. Document, document, document

3. Accuracy and thoroughness

4. Efficient accessibility to files/file retention

5. Programs/systems for capturing time

6. Adherence to Rules of Professional Conduct (non-exhaustive)
   - 1.2: Scope of representation
   - 1.4: Communication
   - 1.5: Fees
   - 1.6: Confidentiality of information
   - 1.7: Conflict of interest: Current clients.
   - 1.8: Conflict of interest: Current clients: Specific rules
   - 1.15: Safekeeping property
   - 1.16: Declining or terminating representation
   - 1.18: Duties to prospective client
   - 4.2: Communication with person represented by counsel
   - 4.3: Dealing with unrepresented person

Rule 1.2. Scope of representation

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

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

COMMENT

Allocation of authority between client and lawyer. -- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] *Independence from client's views or activities.* -- Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] *Agreements limiting scope of representation.* -- The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and

client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

[9] *Criminal, fraudulent and prohibited transactions.* -- Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Rule 1.4. Communication

(a) A lawyer shall:

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

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

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

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

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

[2] *Communicating with client.* -- If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

[5] *Explaining matters.* -- The client should have sufficient information to participate intelligently indecisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often

impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[7] *Withholding information.* -- In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

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

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

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

(1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

COMMENT

[1] *Reasonableness of fee and expenses.* -- Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] *Basis or rate of fee.* -- When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] *Terms of payment.* -- A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money maybe subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] *Prohibited contingent fees.* -- Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

[7] *Division of fee.* -- A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee without regard to whether the division is in proportion to the services each lawyer renders or whether each lawyer assumes responsibility for the representation as a whole, so long as the client is advised in writing and does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed

by the client and must otherwise comply with paragraph (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

[9] *Advance fees.* -- A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] Some smaller fees--such as those less than $2500.00--may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter or the attorney's appearance on the record. However, a fee considered to be "earned upon commencement of the attorney's work on the matter" is not the same as a fee "earned upon receipt." The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee--such as a fee under $2500.00--may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). Nevertheless, all fees must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[11] As a general rule, larger advance fees--such as those over $2500.00--will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner's hearing, pre-trial conference, and judge's hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney's initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client's creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter--in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

[14] *Disputes over fees.* -- If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 1.6. Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

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

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

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

COMMENT

[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(e) for the definition of informed consent. This 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. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[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 Conductor other law. See also Scope.

[4] 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.

[5] *Authorized disclosure.* -- 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.

[6] *Disclosure adverse to client.* -- 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. Paragraph (b)(1) 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.

[7] Paragraph (b)(2) 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 a fraud, as defined in Rule 1.0(d), 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)(2) 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. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) 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. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] 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)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] 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)(5) 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.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

[12] 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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., *29 DEL. CODE ANN. § 9007A(c)* (which provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the "duty of confidentiality to the child unless the disclosure is necessary to protect the child's best interests").

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims 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)(6) permits the lawyer to comply with the court's order.

[14] 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.

[15] 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)(6). 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).

[16] *Acting competently to preserve confidentiality.* -- A lawyer must act competently to safeguard information relating to the representation of a client 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.

[17] 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.

[18] *Former client.* -- 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.

Rule 1.7. Conflict of interest: Current clients

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

(1) the representation of one client will be directly adverse to another client; or

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

[1] *General Principles.* -- Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 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 affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt 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. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[6] *Identifying conflicts of interest: Directly adverse.* -- Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an

advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] *Identifying Conflicts of Interest: Material Limitation.* -- 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 the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the 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 the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] *Lawyer's Responsibilities to Former Clients and Other Third Persons.* -- In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] *Personal Interest Conflicts.* -- The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10(personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

[13] *Interest of Person Paying for a Lawyer's Service.* -- A lawyer may be paid from a source other than the client, including a coclient, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[14] *Prohibited Representations.* -- Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[18] *Informed Consent.* -- Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31](effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] *Consent Confirmed in Writing.* -- Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[21] *Revoking Consent.* -- A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the 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 client and whether material detriment to the other clients or the lawyer would result.

[22] *Consent to Future Conflict.* -- Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). 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 might 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. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[23] *Conflicts in Litigation.* -- Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The 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. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; 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. Factors relevant in determining whether the clients need to be advised of the risk 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 lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of there presentations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] *Nonlitigation Conflicts.* -- Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incur-

ring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[29] *Special Considerations in Common Representation.* -- In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *Organizational Clients.* -- A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations

might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8. Conflict of interest: Current clients: Specific rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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

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

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

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigations, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

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

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

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

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

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

COMMENT

[1] *Business transactions between client and lawyer.* -- A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

[5] *Use of Information Related to Representation.* -- Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.

The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] *Gifts to Lawyers.* -- A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[9] *Literary Right.* -- An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

[10] *Financial Assistance.* -- Lawyers may not subsidize law suits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] *Person Paying for a Lawyer's Services.* -- Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

[13] *Aggregate Settlements.* -- Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking there presentation, as part of the process of obtaining the clients' informed consent. In ad-

dition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[14] *Limiting Liability and Settling Malpractice Claims.* -- Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[16] *Acquiring Proprietary Interest in Litigation.* -- Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

[17] *Client-Lawyer Sexual Relationships.* -- The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[20] *Imputation of Prohibitions.* -- Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Rule 1.9. Duties to former clients

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

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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

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

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

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

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

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also 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. Nor could a lawyer who has represented multiple clients in a matter 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. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client 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. Similar considerations can apply to there assignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the

and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.15. Safekeeping property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated solely for funds held in connection with the practice of law in this jurisdiction. Such funds shall be maintained in the state in which the lawyer's office is situated, or elsewhere with the consent of the client or third person. Funds of the lawyer that are reasonably sufficient to pay bank charges may be deposited therein; however, such amount may not exceed $1,000 and must be separately stated and accounted for in the same manner as clients' funds deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the completion of the events that they record.

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

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer engaged in the private practice of law must maintain financial books and records on a current basis, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

(1) All bank statements, cancelled checks (or images and/or copies thereof as provided by the bank), **records of electronic transfers,** and duplicate deposit slips relating to fiduciary and non-fiduciary accounts must be preserved. **Records of all electronic transfers from fiduciary accounts shall include the name of the person authorizing transfer, the date of transfer, the name of recipient and confirmation from the banking institution confirming the number of the fiduciary account from which the funds are withdrawn and the date and time the request for transfer was completed.**

(2) Bank accounts maintained for fiduciary funds must be specifically designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," and must be used only for funds held in a fiduciary capacity. A designation of the account as a "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," must appear in the account title on the bank statement. Other related statements, checks, deposit slips, and other documents maintained for fiduciary funds, must contain, at a minimum, a designation of the account as "Attorney Trust Account" or "Attorney Escrow Account."

(3) Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as "Attorney Business Account" or "Attorney Operating Account," and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-

fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer's personal or other accounts.

(4) All records relating to property other than cash received by a lawyer in a fiduciary capacity shall be maintained and preserved. The records must describe with specificity the identity and location of such property.

(5) All billing records reflecting fees charged and other billings to clients or other parties must be maintained and preserved.

(6) Cash receipts and cash disbursement journals must be maintained and preserved for each bank account for the purpose of recording fiduciary and non-fiduciary transactions. A lawyer using a manual system for such purposes must total and balance the transaction columns on a monthly basis.

(7) A monthly reconciliation for each bank account, matching totals from the cash receipts and cash disbursement journals with the ending check register balance, must be performed. The reconciliation procedures, however, shall not be required for lawyers using a computer accounting system or a general ledger.

(8) The check register balance for each bank account must be reconciled monthly to the bank statement balance.

(9) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

(C) No funds disbursed for a client or third party must be in excess of funds received from that client or third party. If, however, through error funds disbursed for a client or third party exceed funds received from that client or third party, the lawyer shall transfer funds from the non-fiduciary account in a timely manner to cover the excess disbursement.

(D) The reconciled total cash balance must agree with the total of the client or third party balance listing. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

(E) If a check has been issued in an attempt to disburse funds, but remains outstanding (that is, the check has not cleared the trust or escrow bank account) six months or more from the date it was issued, a lawyer shall promptly take steps to contact the payee to determine the reason the check was not deposited by the payee, and shall issue a replacement check, as necessary and appropriate. With regard to abandoned or unclaimed trust funds, a lawyer shall comply with requirements of Supreme Court Rule 73.

(F) No funds of the lawyer shall be placed in or left in the account except as provided in Rule 1.15(a).

(G) No funds which should have been disbursed shall remain in the account, including, but not limited to, earned legal fees, which must be transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned.

(H) When a separate real estate bank account is maintained for settlement transactions, and when client or third party funds are received but not yet disbursed, a listing must be prepared on a monthly basis showing the name of the client or third party, the balance due to each client or third party, and the total of all such balances. The total must agree with the reconciled cash balance.

(10) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and/or cause to be created each month an electronic backup of these documents to be stored in such a manner as to make them accessible for review by the lawyer and/or the auditor for the Lawyers' Fund for Client Protection.

(e) A lawyer's financial books and records must be subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of a certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69. The examination must be conducted so as to preserve, insofar as is consistent with these Rules, the confidential nature of the lawyer's books and records. If the lawyer's books and records are not located in Delaware, the lawyer may have the option either to produce the books and records at the lawyer's office in Delaware or to produce the books and records at the location outside of Delaware where they are ordinarily located. If the produc-

tion occurs outside of Delaware, the lawyer shall pay any additional expenses incurred by the auditor for the purposes of an examination.

(f) A lawyer holding client funds must initially and reasonably determine whether the funds should or should not be placed in an interest-bearing depository account for the benefit of the client. In making such a determination, the lawyer must consider the financial interests of the client, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, whether the funds are of a nominal amount, and whether the funds are expected to be held by the lawyer for a short period of time. A lawyer must at reasonable intervals consider whether changed circumstances would warrant a different determination with respect to the deposit of client funds. Except as provided in these Rules, interest earned on client funds placed into an interest-bearing depository account for the benefit of the client (less any deductions for service charges or other fees of the depository institution) shall belong to the client whose funds are deposited, and the lawyer shall have no right or claim to such interest.

(g) A lawyer holding client funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest-bearing depository account for the benefit of the client must maintain a pooled interest-bearing depository account for the deposit of the funds; provided, however, that this requirement shall not apply to a lawyer who either has obtained inactive status pursuant to Supreme Court Rule 69(d), or has obtained a Certificate of Retirement pursuant to Supreme Court Rule 69(f), or has formally elected to opt out of this requirement in accordance with the procedure set forth below in subparagraph (k).

(h) A lawyer who maintains such a pooled account shall comply with the following:

(1) The account shall include only client's funds which are nominal amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) Lawyers or law firms depositing client funds in a pooled interest-bearing account under this paragraph (h) [(g)] shall direct the depository institution:

(a) To remit interest, net any service charges or fees, as computed in accordance with the institution's standard accounting practice, at least quarterly, to the Delaware Bar Foundation; and

(b) To transmit with each remittance to the Delaware Bar Foundation a statement showing the name of the lawyer or law firm on whose accounting remittance is sent and the rate of interest applied; with a copy of statement to be transmitted to the lawyer or law firm by the Delaware Bar Foundation.

(i) The funds transmitted to the Delaware Bar Foundation shall be available for distribution for the following purposes:

(1) To improve the administration of justice;

(2) To provide and to enhance the delivery of legal services to the poor;

(3) To support law related education;

(4) For each other purposes that serve the public interest.

The Delaware Bar Foundation shall recommend for the approval of the Supreme Court of the State of Delaware, such distributions as it may deem appropriate. Distributions shall be made only upon the Court's approval.

(j) Lawyers or law firms, depositing client funds in a pooled interest-bearing depository account under this paragraph shall not be required to advise the client of such deposit or of the purposes to which the interest accumulated by reason of such deposits is to be directed.

(k) The procedure available for opting out of the requirement to maintain pooled interest-bearing accounts are as follows:

(1) Prior to December 15, 1983, a lawyer wishing to decline to maintain a pooled interest-bearing account[s] described in this paragraph for any calendar year may do so by submitting a Notice of Declination in writing to the Clerk of the Supreme Court *ab initio* or before December 15 of the preceding calendar year. Any such submission shall remain effective, unless revoked and need not be renewed for any ensuing year.

(2) Any lawyer who has not filed a Notice of Declination on or before December 15, 1983, may elect not to maintain a pooled interest-bearing depository account for client funds as required and instead to maintain a pooled depository account for such funds that does not bear interest or that bears interest solely for the benefit of the clients who deposited the funds by certifying that the lawyer or law firm opts out of the obligation to comply with the requirements by timely submission of the Annual Registration Statement required by Supreme Court Rule 69(b)(i). Any such certification shall release the lawyer or law firm submitting it from participation effective as of the date that the certification is submitted and it shall remain effective until revoked as set forth below without need for renewal for any ensuing year.

(3) Notwithstanding the foregoing provisions of this subparagraph, any lawyer or law firm may petition the Court at any time and, for good cause shown, may be granted leave to opt out of the obligation to comply with the mandatory requirements of this paragraph.

(l) An election to opt out of the obligation to comply with paragraph (h) hereof may be revoked at any time upon the opening by a non-participating lawyer or law firm of a pooled interest-bearing account as previously described and due notification thereof to the Court Administrator of the Supreme Court pursuant to Supreme Court Rule 69(g).

(m) A lawyer shall not disburse fiduciary funds from a bank account unless the funds deposited in the lawyer's fiduciary account to be disbursed, or the funds which are in the lawyer's unrestricted possession and control and are or will be timely deposited, are good funds as hereinafter defined. "Good funds" shall mean:

(1) cash;

(2) electronic fund ("wire") transfer;

(3) certified check;

(4) bank cashier's check or treasurer's check;

(5) U.S. Treasury or State of Delaware Treasury check;

(6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;

(7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;

(8) Check in an amount no greater than $ 10,000.00;

(9) Check greater than $ 10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;

(10) Check drawn on an escrow account of a real estate broker licensed by the state of Delaware up to the limit of guarantee provided per transaction by statute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] The extensive provisions contained in Rule 1.15(d) represent the financial recordkeeping requirements that lawyers must follow when engaged in the private practice of law in this jurisdiction. These provisions are also reflected in a certificate of compliance that is included in each lawyer's registration statement, filed annually pursuant to Delaware Supreme Court Rule 69.

[6] Compliance with these provisions provides the necessary level of control to safeguard client and third party funds, as well as the lawyer's operating funds. When these recordkeeping procedures are not performed on a prompt and timely basis, there will be a loss of control by the lawyer, resulting in insufficient safeguards over client and other property.

[7] Some of the essential financial recordkeeping issues for lawyers under this Rule include the following:

(a) Segregation of funds. Improper commingling occurs when the lawyer's funds are deposited in an account intended for the holding of client and third party funds, or when client funds are deposited in an account intended for the holding of the lawyer's funds. The only exception is found in Rule 1.15(a), which allows a lawyer to maintain $500 of the lawyer's funds in the fiduciary account in order to cover possible bank service charges. Keeping an accurate account of each client's funds is more difficult if client funds are combined with the lawyer's own funds. The requirement of separate bank accounts for lawyer funds and non-lawyer funds, with separate bookkeeping procedures for each, is intended to avoid commingling.

(b) Deposits of legal fees. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

(c) Identity of property. The identity and location of client funds and other property must be maintained at all times. Accordingly, every cash receipt and disbursement transaction in the fiduciary account must be specifically identified by the name of the client or third party. If financial books and records are maintained in the manner, the resultant control should ensure that there are no unidentified funds in the lawyer's possession.

(d) Disbursement of funds. Funds due to clients or third parties must be disbursed without unnecessary delay. The monthly listing of client funds in the fiduciary account should therefore be reviewed carefully in order to determine whether any balances due to clients or third parties remain in the account.

(e) Negative balances. The disbursement of client or third party funds in an amount greater than the amount being held for such client or third party results in a negative balance in the fiduciary account. This should never occur when the proper controls are in place. However, if a negative balance occurs by mistake or oversight, the lawyer must make a timely transfer of funds from the operating account to the fiduciary account in order to cover the excess disbursement and cure the negative balance. Such mistakes can be avoided by making certain that the client balance sufficiently covers a potential disbursement prior to making the actual disbursement.

(f) Reconciliations. Reconciled cash balances in the fiduciary accounts must agree with the totals of client balances held. Only by performing a reconciliation procedure will the lawyer be assured that the cash balance in the fiduciary account exactly covers the balance of client and third party funds that the lawyer is holding.

(g) Real estate accounts. Bank accounts used exclusively for real estate settlement transactions are fiduciary accounts, and are therefore subject to the same recordkeeping requirements as other such accounts, except that cash receipts and cash disbursements journals are not required.

[8] Illustrations of some of the accounting terms that lawyers need to be aware of, as used in this Rule, include the following:

(a) Financial books and records include all paper documents or computer files in which fiduciary and non-fiduciary transactions are individually recorded, balanced, reconciled, and totalled. Such records include cash receipts and cash disbursements journals, general and subsidiary journals, periodic reports, monthly reconciliations, listings, and so on.

(b) The cash receipts journal is a monthly listing of all deposits made during the month and identified by date, source name, and amount, and in distribution columns, the nature of the funds received, such as "fee income" or "advance from client," and so on. Such a journal is maintained for each bank account.

(c) The cash disbursements journal is a listing of all check payments made during the month and identified by date, payee name, check number, and amount, and in distribution columns, the nature of funds disbursed, such as "rent" or "payroll," and so on. Such a journal is maintained for each bank account. Cash receipts and cash disbursement records may be maintained in one consolidated journal.

(d) Totals and balances refer to the procedures that the lawyer needs to perform when using a manual system for accounting purposes, in order to ensure that the totals in the monthly cash receipts and cash disbursements journal are correct. The cash and distribution columns must be added up for each month, then the total cash received or disbursed must be compared with the total of all of the distribution columns.

(e) The ending check register balance is the accumulated net cash balance of all deposits, check payments, and adjustments for each bank account. This balance will not normally agree with the bank balance appearing on the end-of-month bank statement because deposits and checks may not clear with the bank until the next statement period. This is why a reconciliation is necessary.

(f) The reconciled monthly cash balance is the bank balance conformed to the check register balance by taking into account the items recorded in the check register which have not cleared the bank. For example:

Account balance, per bank statement	$2,000.00	
Add -- deposits in transit (deposits in check register that do not appear on bank statement)		$1,500.00
Less -- outstanding checks (checks entered in check register that do not appear on bank statement)		(1,800.00)
Reconciled cash balance		$1,700.00

(g) The general ledger is a yearly record in which all of a lawyer's transactions are recorded and grouped by type, such as cash received, cash disbursed, fee income, funds due to clients, and so on. Each type of transaction recorded in the general ledger is also summarized as an aggregate balance. For example, the ledger shows cash balances for each bank account which represent the accumulation of the beginning balance, all of the deposits in the period, and all of the checks issued in the period.

(h) The subsidiary ledger is the list of transactions shown by each individual client or third party, with the individual balances of each (as contrasted to the general ledger, which lists the total balances in an aggregate amount "due to clients"). The total of all of the individual client and third party balances in the subsidiary ledger should agree with the total account balance in the general ledger.

(i) A variance occurs in a reconciliation procedure when two figures which should agree do not in fact agree. For example, a variance occurs when the reconciled cash balance in a fiduciary account does not agree with the total of client and third party funds that the lawyer is actually holding.

[9] Accrued interest on client and other funds in a lawyer's possession is not the property of the lawyer, but is generally considered to be the property of the owner of the principal. An exception to this legal principle relates to nominal amounts of interest on principal. A lawyer must reasonably determine if the transactional or other costs of tracking and transferring such interest to the owners of the principal are greater than the amount of the interest itself. The lawyer's proper determination along these lines will result in the lawyer's depositing of fiduciary funds into an interest-bearing account for the benefit of the owners of the principal, or into a pooled interest-bearing account. If funds are deposited into a pooled account, the interest is to be transferred (with some exception) to the Delaware Bar Foundation pursuant to the Delaware Supreme Court's Interest On Lawyer Trust Accounts Program ("IOLTA").

[10] Implicit in the principles underlying Rule 1.15 is the strict prohibition against the misappropriation of client or third party funds. Misappropriation of fiduciary funds is clearly a violation of the lawyer's obligation to safeguard client and other funds. Moreover, intentional or knowing misappropriation may also be a violation Rule 8.4(b) (criminal conduct in the form of theft) and Rule 8.4(c) (general dishonest or deceptive conduct). Intentional or knowing misappropriation is considered to be one of the most serious acts of professional misconduct in which a lawyer can engage, and typically results in severe disciplinary sanctions.

[11] Misappropriation includes any unauthorized taking by a lawyer of client or other property, even for benign reasons or where there is an intent to replenish such funds. Although misappropriation by mistake, neglect, or recklessness is not as serious as intentional or knowing misappropriation, it can nevertheless result in severe disciplinary sanctions. See, e.g. *Matter of Figliola, Del. Supr., 652 A.2d 1071, 1076-78 (1995).*

Rule 1.16. Declining or terminating representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

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

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(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.

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

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

[2] *Mandatory Withdrawal.* -- A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

[4] *Discharge.* -- A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

[7] *Optional Withdrawal.* -- A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

[9] *Assisting the Client upon Withdrawal.* -- Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

INTERPRETIVE GUIDELINE.
Re: Residential real estate transactions.

The following statements of principles are promulgated as interpretive guidelines in the application to residential real estate transactions in The Delaware Lawyers' Rules of Professional Conduct:

(a) Before accepting representation of a buyer or mortgagor of residential property (including condominiums under the Unit Property Act of the State of Delaware), upon referral by the seller, lender, real estate agent, or other person having an interest in the transaction, it is the ethical duty of a lawyer to inform the buyer or mortgagor in writing at the earliest practicable time:

(1) That the buyer or mortgagor has the absolute right (regardless of any preference that the seller, real estate agent, lender, or other person may have and regardless of who is to pay attorney's fees) to retain a lawyer of his own choice to represent him throughout the transaction, including the examination and certification of title, the preparation of documents, and the holding of settlement; and

(2) As to the identity of any other party having an interest in the transaction whom the lawyer may represent, including a statement that such other representation may be possibly conflicting and may adversely affect the exercise of the lawyer's professional judgment on behalf of the buyer or mortgagor in case of a dispute between the parties. For the purpose of this Guideline, a lawyer shall be deemed to have a "possibly conflicting" representation if he represents the seller or has represented the seller on a continuing basis in the past; or if he represents the real estate agent or has represented the real estate agent on a continuing basis in the past; or if he represents the lender or has represented the lender on a continuing basis in the past.

(b) Unless a lawyer has been freely and voluntarily selected by the buyer or mortgagor after he has made to the buyer or mortgagor the statements and disclosures hereinabove required, the lawyer may not ethically:

(1) Certify, report, or represent for any purpose that the buyer or mortgagor is his client, or that the buyer or mortgagor is or was obligated for any legal service rendered by him in the transaction; or

(2) Participate in causing the buyer or mortgagor, directly or indirectly, to bear any charge for his legal service; except that the lawyer for a lender may receive from the buyer or mortgagor, directly or indirectly, payment of the lender's reasonable and necessary legal expenses for preparation of documents at the request of the buyer's or mortgagor's lawyer, for attendance at settlement, and for title insurance properly specified by the lender (within the provisions of *18 Del. C. § 2305(a)(1)*) but unobtainable by the buyer's or mortgagor's lawyer, provided that the buyer's or mortgagor's obligation to pay each such legal expense is particularized as a term and condition of the loan; or

(3) Participate as the buyer's or mortgagor's lawyer in any transaction in which his representation of the buyer or mortgagor has been made a term or condition of the transaction, directly or indirectly.

(c) The information supplied to the buyer or mortgagor in writing shall contain a description of the attorney's interest or interests sufficient to enable the buyer or mortgagor to determine whether he should obtain a different attorney.

Rule 1.18. Duties to prospective client

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

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

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

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

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 2.1. Advisor

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

COMMENT

[1] *Scope of Advice.* -- A client is entitled to straight forward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] *Offering Advice.* -- In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 4.2. Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3. Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4. Respect for rights of third persons

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

(b) 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

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether 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. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so,

Fee Disputes: How to Avoid Them and How to Address Those That Arise

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Attorney Profile

Matthew F. Boyer

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- Delaware Business, Commercial and Corporate Litigation (https://www.connollygallagher.com/areas-of-practice/delaware-

As co-chair of the firm's labor and employment group, Matt provides legal counsel and representation in litigation on a broad range of employment law issues. His practice includes employment discrimination litigation, compliance counseling, drafting and enforcement of employment agreements and restrictive covenants, internal investigations, and employment-related mediations. Since 2011, Matt has been selected for inclusion in *The Best Lawyers in*

business-commercial-and-corporate-litigation/)

- Government Law (https://www.connollygallagher.com/areas-of-practice/government-law/)
- Labor and Employment Law (https://www.connollygallagher.com/areas-of-practice/employment-law/)

Education

- University of Virginia School of Law (J.D., 1986)
- Harvard College (B.A., 1980)
  Major: English and American Literature and Language
  Honors: cum laude
- Newark High School, Newark, Delaware (1975)

Bar Admissions

- Delaware, 1987
- United States District Court District of Delaware, 1987
- United States Supreme Court, 1994
- United States Court of Appeals Federal Circuit, 2002

America® for employment law. For 2023, he was selected as *Best Lawyers*® "Lawyer of the Year" for Wilmington, Delaware in Employment Law – Management, and was also included in *Best Lawyers*® for Employment Law – Individuals.

In addition, Matt collaborates with attorneys in the firm's Corporate Litigation and Government Law groups in representing clients in complex, high-profile litigation. Most recently, he participated in Court of Chancery litigation involving Elon Musk and helped the State of Delaware prevail in two expedited cases challenging its vote-by-mail statute. He also was part of a team that successfully defended the State of Delaware before the United States Supreme Court in an original jurisdiction action brought by New Jersey challenging Delaware's sovereignty over the Delaware River within its historic Twelve-Mile Circle. *New Jersey v. Delaware*, 552 U.S. 597 (2008).

Drawing on his prior service with the Delaware Supreme Court's Office of Disciplinary Counsel and the Board of Bar Examiners, Matt also represents attorneys, physicians, nurses, and other professionals in regulatory and disciplinary proceedings. He provides advice on legal ethics issues and is a frequent speaker at continuing legal education programs on professional responsibility. By appointment of the Delaware Superior Court, Matt has served as a special master in dozens of cases. In 2019, Matt was presented with the Delaware State Bar Association's Daniel L. Herrmann Professional Conduct Award.

News >

- United States Court of Appeals 3rd Circuit, 2003

Clerkships

- Law Clerk to The Honorable Chief Justice Andrew D. Christie, Delaware Supreme Court (1986 – 1987)

Honors

- The Best Lawyers in America® – Employment Law - Management, Employment Law - Individuals, Ethics and Professional Responsibility Law
- Delaware Today Top Lawyers - Employment-Labor Law, Employee

Professional/Community Associations

- Delaware State Bar Association, Co-Chair, Committee on Professional Ethics (Present)
- Delaware State Bar Association, Labor and Employment Section (1987 – Present; Section Chair, 2005 – 2006)

- Board of Bar Examiners, Delaware Supreme Court (Member, 2007 – 10; Associate Member, 2001 – 2006)
- St. Thomas More Society of Wilmington, Delaware (Executive Committee 1995 – Present; President 2004 – 2005)
- Rodney Inn of Court (2010 – Present)
- Catholic Charities of the Diocese of Wilmington (Member, Board of Directors 2004 – 2010)

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Connor Bifferato is managing director of The Bifferato Firm. He has mediated well over 1,000 commercial disputes, including commercial bankruptcy litigation, secured lender disputes, general corporate litigation, creditors' rights issues and appellate resolution. He also frequently serves as an arbitrator for single and panel, binding and nonbinding arbitrations. He also frequently teams with out-of-state lawyers who need access to Delaware courts.

He is also University Legal Counsel to Wilmington University and has been fortunate to work with the University on the development and opening of Wilmington University School of Law. Connor provides general and specific legal advice to Wilmington University and recognizes the privilege he has been given to work with the University, its Board, Administration and faculty.

Connor serves as the co-chair of the American Bankruptcy Institute Mediation Committee, as well as on the DSBA Finance Committee, DSBA Executive Committee, DSBA CLE Committee, DSBA DEI Committee, and the Federal Bar Association ADR Section Board.

He frequently participates in CLE and certification programs for the DSBA, as well as CLE and pro bono committee presentations for other, state, local and national organizations.

The Delaware Way

Charles J. Durante, Esquire
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Chuck Durante is a founding partner of the Wilmington law firm of Connolly Gallagher LLP, where he is the senior partner in the Tax, Trusts and Estates Department.

He is President of the Delaware State Bar Association, fellow of the American College of Trust and Estate Counsel, Chair of the Board of Editors of Delaware Lawyer magazine, President of the Delaware Sports Museum and Hall of Fame, a trustee of the Delaware Historical Society and President of the Delaware Sportswriters and Broadcasters Association.

He advises fiduciaries on the administration of trusts and estates, and counsels clients in estate planning, management of nonprofit organizations, and business organizations. His litigation has included fiduciary matters and cases of significant public impact. He speaks and writes frequently about Delaware laws governing trusts, business organizations and taxation, and is called upon as an expert witness on fiduciary law. He is recognized in *The Best Lawyers in America* in tax law, in *Top Lawyers in Delaware* in trusts and estates and as a notable practitioner in private wealth law by Chambers and Partners.

He received the Haverford College Alumni Award in 1998, and the Distinguished Alumni Award of Tower Hill School in 2022.

An honors graduate of Haverford College, he received his J.D. and his LL.M. (Taxation) from Villanova Law School. He is admitted to practice in Delaware, Pennsylvania, and the U.S. Tax Court and before the Supreme Court of the United States.

A former sportswriter and columnist for *The Philadelphia Inquirer* and *The Delaware State News*, Chuck continues to cover high school cross country and track and field for *The News Journal*. He has been inducted into the Delaware Track and Field Hall of Fame.

Pro Bono Aspiration

John M. Bloxom IV, Esquire
Morris James LLP

John J. Schreppler II, Esquire
Fredric Marro & Associates PC

John M. Bloxom, IV

I am a farmer (I have a 130 acre farm down in Virginia on which I grow fruits and vegetables). I also am one of the senior-most commercial real estate attorneys at the bar. For the past 17 years I have been a partner at Morris James LLP specializing in large commercial real estate transactions. I retired from Morris James on April 30, 2023 and now limit my practice to a single large client for whom I do hourly rate work.

Prior to joining Morris James, I was a partner in six law firms. These firms were Murdoch & Walsh, Bayard, Handelman & Murdoch, The Bayard Firm, Christiana Legal Associates, Montgomery, McCracken Walker & Rhoades, and Duane Morris. My practice at these firms included large Chapter 11 reorganizations and commercial real estate transactions. I exited the Chapter 11 practice area upon the elevation of my former partner, Peter Walsh, to the Bankruptcy Bench.

I graduated from Washington & Lee University School of Law in 1983 and did my undergraduate work at the University of Virginia, graduating from there in 1980. At Washington & Lee I was published in the law review, held a seat on the Editorial Board of the law review and was admitted to the Order of the Coif.

I have been Chambers rated since 2012, Best lawyers since 2010, Lawyer of the Year for 2019 and a Delaware Today Top Lawyer from 2008 to the present.

The matter that Jack Schreppler and I will discuss on May 11, 2023 was a pro bono matter that for me, represents the most important engagement that I have had in my 40 years of practice at the Bar. The matter did not involve commercial real estate. Instead, it involved a wedding of a terminally ill woman to an incarcerated prisoner.

I look forward to meeting with you on the 11th.

John J. Schreppler II Bio

John J. Schreppler II ("Jack") is a native Delawarean who has practiced administrative and legislative law for over 40 years. Jack currently is resident Delaware counsel with Fredric Marro & Associates and its companion consulting firm, Westmont Associates, headquartered in Cherry Hill, NJ, providing regulatory counseling to the insurance industry.