



With Experience Comes Vision

BASIC ETHICS FOR LAWYERS

(NOT AN OXYMORON)



**McLaughlin
& Stern**

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RULE 1.1: COMPETENCE

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

A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

A lawyer shall not intentionally:

- (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
- (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Discussion:

Does the lawyer have the requisite knowledge and skill in a particular matter. Factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter.

Talk about Negligence Attorney

A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Do you Bill for Learning Experience

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

A lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) A lawyer shall abide by a client's decisions concerning the objectives or 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 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, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Discussion:

The client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law.

- (1) Settle a case
- (2) Litigate
- (3) Business transactions

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.

In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent;
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

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

(2) to prevent the client from committing a crime;

(3) withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; and

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employee, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Discussion:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.

The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes.

A lawyer is prohibited from knowingly revealing confidential information.

The Rule protects all factual information gained during or relating to the representation of a client, "but not information obtained before a representation begins or after it ends.

The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

The confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings.

The lawyer's exercise of discretion conferred by the Rule requires consideration of a wide range of factors and should therefore be given great weight. The lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances.

A governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client.

Disclosure should only be made to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in the Rule. Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure.

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct the lawyer must withdraw. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by the Rule.

The Rule requires a lawyer to exercise reasonable care to prevent disclosure or information related to the representation by employees, associates and others whose services are utilized in connection with the representation.

Need to get confidential information in order to properly service clients.

Facebook

Employee Access

Retainer Letters

Don't use public WiFi

Phones and Devices should all be password protected

Insurance

Downloading

- Windows 10

Cyber Risk

- Protect client information
- Set up proper protective program to the extent possible
- Encryption

Share Information

- Government requirement, get client consent in writing
- Reporting to government breeches

Cloud Computing

- Client information must be protected
- Get client consent
- Read contract fully

Cloud Computing

A lawyer may use an online “cloud” computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. “Reasonable Care” to protect a client’s confidential information against unauthorized disclosure may include consideration of the following steps:

- Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with processed requiring the production of client information;
- Investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stores; and/or
- Investigating the storage provider’s ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

- Law firm that handles particularly sensitive data – such as data involving a celebrity or that might be of interest to a government – might choose not to share those files in the cloud. Most cloud providers have adequate security for consumers, but that is not always true for legal use.
- Bankruptcy of cloud – What happens?

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) The representation will involve the lawyer in representing differing interests: or
 - (2) There is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
- (b) Notwithstanding the existence of a concurrent conflict or 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.

Discussion:

Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests.

Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients. (ii) determine whether a conflict of interest exists. (iii) decide whether the representation may be undertaken despite the existence of a conflict; and if so (iv) consult with the clients affected obtain their informed consent, confirmed in writing.

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.

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 .

Ordinarily, clients may consent to representation notwithstanding a conflict, however, some conflicts are nonconsentable .

Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires.

The informed consent of the client must be in writing.

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 a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in the Rule. The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts.

The Rule 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 co-plaintiffs or codefendants, is a risk.

NY Cases – NY Law Journal

If in civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients.

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

The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client.

Not a good idea to have sex with a client.

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.

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 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.

A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.

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 at the outset or may arise during the representation.

Retainer Letter

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.

Conflict Searches

Adverse Parties

RULE 1.8: CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client. unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing 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:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or an individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

Attorney as Manager or Agent

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to this subject matter or the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client 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;

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

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
- (3) the client's confidential information 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, absent court approval, 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 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; 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 matter subject to Rule 1.5(d) or other law or court rule.

(j) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Discussion:

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.

An exchange of securities for legal services will also trigger the requirements of the Rule if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client.

If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing.

A lawyer must also consider whether accepting securities in a client as payment for legal services constitutes charging or collecting an unreasonable or excessive fee.

A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, the Rule does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances.

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.

Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, 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). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client.

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.

RULE 5.3: LAWYER'S RESPONSIBILITY FOR CONDUCT OF NON LAWYERS

A Law firm shall ensure that the work of non lawyers who work for the firm is adequately experienced as appropriate.

Discussion:

Proper supervision is required. The kind and amount will depend on the nature of the work.
Client information access is an issue.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not hereafter 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) Unless the former client gives informed consent, confirmed in writing, 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 or paragraph (c) of this Rule that is material to the matter.

(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 confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Discussion:

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 these Rules.

RULE 1.13: ORGANIZATION AS CLIENT

- (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholder's or other constituents, and it appears that the organization's interest may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. 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 reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to an 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 they can act in 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 in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may reign in accordance with Rule 1.16.

(d) 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 concurrent 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.

RULE 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300.

Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

RETAINERS

May an attorney keep a retainer in an Escrow account before it is earned? Yes, in an operating account. Yes, Ethics Opinion 983.

Discussion:

Bank must be prepared to provide notice of uncollected funds to state :

Identify bank to parties

Keep Records

Failure to comply subject to Disciplinary Action

RULE 1.5: ALTERNATIVE FEE ARRANGEMENTS

(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 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 performing the services;
and
- (8) whether the fee is fixed or contingent.

- (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 a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement; including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

Discussion:

Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive.

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 change any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.

The Rule permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing.

In Retainer Letter

In some cases, we will provide an estimate of the expected total fee. The estimate is based on our experience in completing comparable work for other clients. As the work progresses, however, we often find that our initial estimate is not accurate. For example, if we are required to spend considerably more time than anticipated on telephone calls or in meetings or have to make substantial revisions to draft documents, our final fee may exceed our initial estimate. Our estimates will be based on our best, good faith approximation of the amount of time typically required to complete the requested work. In submitting our final bill, however, we will not be limited to the amount of the estimate. With respect both to fee billings and related expense items incurred, let me assure you of our commitment to completing your work in the most efficient manner possible consistent with maintaining a high quality of legal service.

FIXED FEES

Variations on fee structure

The bagel fee arrangement as example.

GIFTS

Stock or other interest in clients business.

Corporation

Real Estate

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

- (a) A Lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:
 - (1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or
 - (2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

- (b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

- (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of Law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
 - (3) the lawyer is discharged; or
 - (4) the lawyer knows or reasonably should know that the client is bringing the legal action; conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
- (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

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

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

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

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal or existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicated that the best interest of the client likely will be served by withdrawal;

- (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
- (10) the client knowingly and freely assents to termination of the employment;
- (11) withdrawal is permitted under Rule 1.13(c) or other law;
- (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; and
- (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

- (e) even the withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Discussion:

After withdrawal you must take reasonable steps not to prejudice client

RULE 1.17: SALE OF LAW PRACTICE

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

- (1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.
- (2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

- (i) concerning the identity of the client, except as provided in paragraph (b)(6);
 - (ii) concerning the status and general nature of the matter;
 - (iii) available in public court files; and
 - (iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.
- (3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may take the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review

the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

- (4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.
- (5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.
- (6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

- (1) the client's right to retain other counsel or to take possession of the file;
 - (2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
 - (3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;
 - (4) proposed fee increases, if any, permitted under paragraph (e); and
 - (5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.
- (d) When the buyer's representation of a client of the seller would give rise to waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

- (e) The fee charged a client by the Seller shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

PAYMENT OF FEES BY CREDIT CARD

Client Confidentiality

One of the main tenets of attorney/client privilege is that attorneys should not reveal the existence of a relationship with a client. However, the existence of a relationship, including the client's name and address, must necessarily be revealed to a third-party processor to process a credit card or online payments. Thus, it is imperative that all firms that wish to use credit card processors obtain their clients' consent to sharing such confidential information with a third party. For sensitive cases or matters, it is perhaps best to avoid credit card processing altogether. The best way to obtain consent is through the inclusion of a credit card payment provision in the attorney engagement letter and the use of a credit card payment authorization form. A sample engagement letter with provisions addressing these issues as well as a sample payment authorization form are included in this article.

Commingling of Operating Account and Trust Funds

ABA Model Rule 1.15, N.Y. Rules of Professional Conduct, Rule 1.15 (N.Y. Rules), and N.Y. Judiciary Law §497 prohibit firms from commingling operating funds and client funds. For firms that accept credit card payments only for fees or expenses earned, no ethical problems generally arise related to conversion of client property held in trust.

However, for firms that wish to accept retainers using credit cards, special attention must be paid.

N.Y. Rule 1.15(a) provides:

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

Thus, attorneys wishing to accept retainers or payments for unearned funds must be diligent about ensuring that all transactions are deposited into the correct account and that any and all fees associated with payments, such as services fees or chargeback fees, are taken from the firm's operating account and not its trust account.

The Pre-authorized Credit Card Payment Plan

You, or the person or persons providing the credit card authorization below, authorize and direct to pay to our law firm the total invoice amount contained in each account that is rendered immediately upon the account being rendered or at a time after. This procedure will continue until the file is completed, or until you have notified us in writing to discontinue the same. At that point, you may decide to change over to the retainer plan or to discontinue all requirements for legal services. In the event that you notify us to discontinue the use of the pre-authorized credit card payment plan, you authorize and direct us to render a final account utilizing that plan and to pay the same forthwith, and then we will discuss alternative arrangements for the payment of future billings, if any.