# CLE by the SEA 2024

## Ethics Session

**LIGHTS! ACTION! ETHICS! Ethical Issues in the Media Spotlight**

Sunday, July 7, 2024
1:00 PM - 4:45 PM

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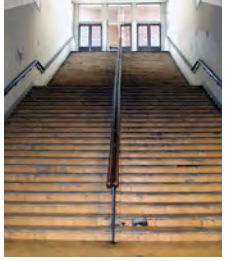
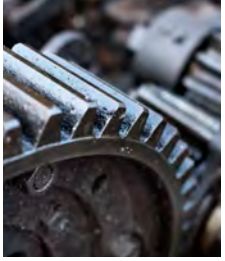
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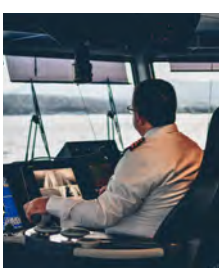
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**Lights! Action! Ethics! Ethical Issues in the Media Spotlight**

**Sunday, July 7, 2024**

**Program Chairs**
Larry J. Cohen, *Cohen Law Firm*
Roberta Tepper, *Chief Member Services Officer, State Bar of Arizona*

| | |
|---|---|
| **1:00 pm to 1:15 pm (15 min)** | **CLE by the Sea Executive Director Welcome**<br>Joel England, *CEO, State Bar of Arizona* |
| **1:15 pm to 2:45 pm (90 min)** | **Ethical Jeopardy – Round 1**<br>Honorable Ronda Fisk, *Maricopa County Superior Court*<br>Larry Cohen, *Cohen Law Firm*<br>Paul McGoldrick, *Shorall McGoldrick Zerlaut*<br>Roberta Tepper, *State Bar of Arizona* |
| **2:45 pm to 3:00 pm (15 min)** | **Afternoon Break**<br>Klinedinst ATTORNEYS<br>Ethics Break Sponsor |
| **3:00 pm to 4:30 pm (90 min)** | **Ethical Jeopardy – Round 2**<br>Honorable Ronda Fisk, *Maricopa County Superior Court*<br>Larry Cohen, *Cohen Law Firm*<br>Paul McGoldrick, *Shorall McGoldrick Zerlaut*<br>Roberta Tepper, *State Bar of Arizona* |
| **4:30 pm to 4:40 pm** | **Sponsor Prize Drawings** |
| **4:45 pm** | **Happy Hour on the Bayside Lawn** |

# Faculty Biographies

**LARRY J. COHEN**, is a certified specialist in injury and wrongful death litigation who has focused in his more than thirty-three years of law practice on serious medical injury and emotional damages cases, including especially brain injury claims. He received his J.D. from Northwestern University in 1985, and has been admitted to practice in Arizona since 1985. Mr. Cohen also has a Master's degree and a Ph.D. from Syracuse University and has participated in a post-doctoral program in clinical neuropsychology. He continues as a member of the adjunct faculty at the Sandra Day O'Connor College of Law at Arizona State University where he has taught courses in professional responsibility, pretrial practice and professional liability. He taught and did research at the University Michigan School of Law and at the University of Illinois-Chicago, and taught on the adjunct faculties of the Arizona Summit School of Law, the Arizona School of Professional Psychology, thereafter Argosy University, Midwestern University, and Norwich University. Mr. Cohen speaks nationally to groups of lawyers, other professionals, insurance companies, governmental entities, risk managers and other interest groups about litigation and trial practice matters, legal ethics, alternative dispute resolution, and issues in brain damage, law and medicine and law and psychology. He has received awards from the Maricopa County Bar Association, the State Bar of Arizona and the State Bar of New Mexico for excellence in continuing legal education. He also received a President's Award from the State Bar of Arizona for contributions in continuing legal education. He has for many years been listed by Southwest Super Lawyers and Arizona's Finest Lawyers as among the best lawyers in Arizona and has been recognized by the National Association of Distinguished Counsel as among the top one percent of lawyers in the United States. Mr. Cohen may be reached at the following addresses: Larry J. Cohen, Esq. Cohen's Counsel P.O. Box 465 Bethel, Vermont 05032 602-405-4022 802-234-6984 ljc@cohenscounsel.com ljc@ljcohen.com

**HON RONDA R. FISK** Since July 2023, Judge Ronda Fisk has served as the Maricopa County Family Department's Presiding Judge. Along with the Department Administrator, she manages the Department's day-to-day operations and provides administrative oversight over 40 judicial officers and all Family Court cases. Judge Fisk's major initiatives have focused on implementing significant family law rule changes, including the spousal maintenance guidelines and calculator, informal family law trials, education orders, and department-wide use of the Case Center digital evidence portal. She serves on the Maricopa County Judicial Advisory Committee and the Strategic Planning Committee. In addition, Judge Fisk also serves on the Arizona Supreme Court's Committee on Family Courts (COFC), Committee on the Impact of Domestic Violence and the Courts (CIDVC), Advisory Committee on Evidence Retention (ACER), and Arizona Steering Committee on Artificial Intelligence and the Courts. Judge Ronda Fisk was appointed to the Superior Court of Arizona in Maricopa County in February 2017. She began her judicial career in the Criminal Department, where she managed a regular trial calendar and the Sex Offender Probation calendar. In March 2019, she served as the Criminal Department Associate Presiding Judge and managed the Trial Assignment Calendar for two years. In June 2021, Judge Fisk rotated the Family Department and served as the Department's Associate Presiding Judge. Prior to Judge Fisk's appointment to the bench, she was a partner at Osborn Maledon, PA, where she focused on employment counseling, administrative law, and general commercial litigation. Prior to that, she worked as a sixth-grade teacher in a dual-language program in South Phoenix, teaching half of the day in English and half in Spanish. Judge Fisk graduated from the James E. Rogers College of Law at the University of Arizona in 2002. She has served on the boards of Circle the City, Childsplay, and Unity of Phoenix; has participated numerous times on the Report Committee for the Arizona Town Hall; and is an alumna of Teach For America - Phoenix (1996 Corps).

**PAUL J. MCGOLDRICK** is Partner at Shorall McGoldrick Brickmann. Paul chairs the firm's litigation practice group along with Tom Shorall. Paul focuses his practice on personal injury and insurance cases. He also has experience as lead counsel in complex business disputes. Paul routinely represents clients in nearly every locale of Arizona, and has represented both plaintiffs and defendants, both in tort cases and in the context of commercial and professional liability suits. Paul is a Fellow in the American College of Trial Lawyers. He is the former State Chair for the 2019-2021 term. The American Board of Trial Advocates has elected Paul an associate based upon his many jury trials and peer review. He was the Phoenix Chapter President in 2015. In addition to his litigation practice, Paul is a frequent mediator and arbitrator. He draws

upon his broad experience as a trial lawyer in helping to reach resolutions to lawsuits short of more expensive jury trials. Paul is a member of the National Academy of Distinguished Neutrals. Phoenix Magazine recognized Paul as a Top Lawyer in 2022 in the category of Arbitration and Mediation. Before entering private practice in Phoenix, Paul was a law clerk to the Honorable Frank X. Gordon, Jr., the then Vice Chief Justice of the Supreme Court of Arizona. Since that time, Paul has been appointed a judge pro tempore of the Maricopa County Superior Court (2002-2015). The State Bar has certified Paul as a Specialist in Personal Injury and Wrongful Death Litigation since 1997. He is currently on the State Bar Personal Injury and Wrongful Death Advisory Commission. Martindale-Hubbell, the directory of American law firms, has consistently given Paul its highest "AV" rating since 1995, based upon the reviews of his fellow Arizona attorneys. Paul has been included in Southwest Super Lawyers every year since 2007 and for 2017, 2018, 2019, 2020, 2021and 2022 is listed among Super Lawyers "Top 50" Arizona attorneys. Paul has been selected for inclusion in Arizona's Finest Lawyers and The Best Lawyers in America for Insurance Law, Insurance Litigation and Personal Injury Litigation. Best Lawyers has selected Paul as the Lawyer of the Year (Phoenix) for Personal Injury Litigation - Defense (2023). He has been listed in Top 100 Lawyers in Arizona - AZ Business Magazine, 2018, 2019, 2020, 2021 and 2022.

**ROBERTA L. TEPPER**, Chief Member Services Officer for the State Bar of Arizona, has been with the State Bar since 2004. Roberta leads the Member Services Division team which supports numerous programs and departments, including Continuing Legal Education; Lawyer Assistance Programs (Practice 2.0 and MAP); Legal Specialization; Mandatory CLE and Compliance; the Bar's Resource Center, and more. Roberta served as the Lawyer Assistance Programs Director, from 2013 until September 2021, which included responsibility for Practice 2.0, the State Bar of Arizona's practice management advice program, the Bar's Member Assistance Program, and support for the Bar's 30 Sections as well as the Young Lawyer and Senior Lawyer Divisions. Roberta previously served as a prosecutor in North Carolina; worked in court administration in Delaware; and served as Bar Counsel and then Senior Bar Counsel in the Lawyer Regulation Office at the State Bar of Arizona. Ms. Tepper is an active member of the Law Practice Division of the American Bar Association, serves as the Division's Secretary, is the Feature Editor for Law Practice Magazine, a member of the Ethics and Professional Responsibility Committee, Lawyer Wellbeing Committee, Women Rainmakers, and the Strategy and Planning Committee, and served as the co-Chair of ABA TECHSHOW 2021. She is a frequent author of articles on practice management, best practices and lawyer wellness and well-being for the ABA's Law Practice Magazine and Law Practice Today. She also co-authored Tech From the Trenches, a column for Law Practice magazine that addresses best practices and the use of technology in the practice of law. Roberta is a Fastcase 50 honoree (2019), an award that recognizes innovators, visionaries and leaders in law and was selected as one of the 2021 Women of Legal Tech honorees by the ABA's Legal Technology Resource Center. She chairs the Practice Management Advisors of North America, is a Past President and an ex officio member of the Arizona Women Lawyers Association Board of Directors and, as a past chapter President, is an ex officio member of the AWLA, Maricopa Chapter, Steering Committee. A graduate of the University of Arizona College of Law, Ms. Tepper is admitted to practice in Arizona and is an inactive member of the North Carolina and Delaware Bars.





This column provides tips on starting, building and running your law practice. Send your column ideas and questions to **practice2.0@staff.azbar.org.**

# Client Communication Tips

Wait! Really? Are we going to talk about client communication? Again?

Yes, indeed, an oldie but a goodie. Communication is key. You may be saying, right, we know this, so why do you need to remind me about this? Lack of communication continues to be a primary "rub" that causes client unhappiness, complaints and general discontent.

Why so problematic? Let's review the context.

Clients are typically individuals who, regardless of their ability to deal with information and make decisions in their day-to-day lives, are individuals under stress. How many people hire a legal representative when their lives or businesses are going perfectly? Not many.

People under stress do not process information well. Under stress, our brains focus on fight or flight, or survival, to get through that situation. Making strategic decisions, understanding a legal process—or sometimes even being reasonable—are not included in that ranking. The hard part is that they may appear to be taking in the information or advice you offer, but their recall is impaired. And when they are in crisis, it may be difficult to take anyone's viewpoint other than their own into account.

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What's an earnest, well-meaning lawyer to do? Remember that the implementation and use of technology is not the whole answer. It can help, but it's no substitution for good people skills. Here are some tips.

**As much as possible, avoid legalese and take the time to explain terms.**

**Speak plain English.** And that means in your written communications too. Remember, clients may not be effectively processing information, or they may be unsophisticated. The common wisdom is that you should speak in language a fifth-grader could understand. This may be difficult depending on the legal issue, and it could come across as condescending. But as much as possible, avoid legalese and take the time to explain terms.

**Set reasonable expectations.** You know your practice, your schedule, and your workload. Is it reasonable for a client to expect you'll be available 24/7? Of course not. But the client does have a right to expect information from you or your staff in a reasonable time. What does that look like? Are there times you're unavailable because of your court schedule? When is your office open? Do you have evening hours? Part of setting reasonable expectations is deciding your boundaries. This is both a practice management and a lawyer well-being issue. Tired, overworked lawyers do not do their best work, and their personal lives suffer.

**Demanding clients.** Clients can be demanding, but are they unreasonably demanding? Some who require much individual attention may not be the right fit for your firm. Others, though demanding, may be reasonable—if you create reasonable expectations and a means to access you and information on a regular basis. Consider a regular time for the client to ask questions, get updates, etc. It could even be just 15 minutes, but when you promise to pay attention, be present.

**Using technology.** If you decide to use technology to assist with client communications, be strategic—and helpful. Automated messaging should contain helpful information, not just "thank you for contacting me. I'll be in touch soon." Do you use practice management software that offers a client communication portal? Be sure they understand how that works, how they know when there's info there for them—and that they're comfortable with it. Also, understand the cybersecurity issues related to the tech you use. The duty of technological competence does not mean that you must become a coder or an IT professional, but you must understand where your data lives, who owns it, and how confidentiality is protected.

Need more help? Call Practice 2.0 to talk through your particular situation.



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# Parting

As I write this article, I am dealing with the imminent departure from life of a beloved family member. That made me think of parting in general, and specifically two ways parting relates to legal professionals. Each has its own challenges and result in calls to Practice 2.0 for advice.

In the best of worlds, the parting is gentle and kind, professional and dignified. But sadly, we do not always live in the best of all possible worlds.

**How do you part professionally and with grace? That can be tricky.**

## Parting From Firms

There are firms who are happy to see lawyers they've nurtured leave the nest and turn into valued colleagues and, who knows, referral sources; and legal professionals who leave firms on the best possible terms, both sides happy for the past and excited about the future. These are not the people who call Practice 2.0 in crisis.

Firm breakups, or associates or partners departing their soon-to-be former firm—likely with clients in tow—arouse high emotion and can be challenging economically. Nonetheless, we need to remember that law is a learned profession and is not just a business. Yes, it has business aspects, but we must act professionally and even altruistically when it involves the best interests of our clients.

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So, what does this mean translated into "shoulds" or "shalls"? Whether you are the departer or departee, prepare a joint letter to clients letting them know of the change coming and giving them their choices. What are those choices? Staying with the firm, going with the departing legal professional, or starting over with another legal professional or another firm. We know, no one wants to lose a client, or multiple clients. But the interests of the client come first.

Can you put aside any hurt, sorrow or other emotions that might cause you to act unprofessionally? It always comes out best in the long run if you take the high road. In the process, you enhance your good reputation as a quality firm, an ethical legal professional, and a colleague with whom others want to work in the future.

## Parting From Clients

Ah, this is a tricky one. How do you part professionally and with grace? First, remember that the file is the client's file. Not just a file (digital or otherwise) with their name on it—their actual property. So, the client gets the file. You have to offer it to the client. Sure, you may keep a copy for your reference and records (at your own cost). If the client doesn't want the file or doesn't ask for it, fine, but make sure you keep it accessible to the client for the retention period stated in your fee agreement or engagement letter. You do have a retention period, right? (if not, we have lots of advice about that on Practice 2.0 for reference).

Next, the fee. In Arizona there is really no such thing as a nonrefundable fee. Sure, you can say your fee is earned upon receipt and nonrefundable, but ER 1.5(d)(3) requires that you simultaneously inform the client that they may, nonetheless, be entitled to a refund. The factors in ER 1.5(a) guide us in determining whether the fee is reasonable. You should be using those factors as a guide in setting fees, but also in the "look back" required at the termination of the representation.

So, the matter is over, or the representation is over, and you do the look back. This is why we recommend that everyone keep time records even if you do not bill hourly. That, and your copy of the file, other billing statements, and the factors in ER 1.5(a), should guide you in determining whether any refund is needed. If one is warranted, make the refund promptly. It's the right thing to do.

Parting can be sweet sorrow; Practice 2.0 is here to help you accentuate the sweet and minimize the sorrow.



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# Gearing Up To Wind Down

Congratulations. You've practiced law for as long as you'd planned or are almost to that point. Now it's time to start thinking about winding down your practice, retiring and what comes next. This is not a process you can do overnight, or even over the course of a few weeks or months. Optimally, you should start planning the firm date of your retirement from practice at least two to three years in advance.

If you are with a larger firm, chances are there is already a support system to help with this process. The plan should or will likely include a strategy for passing your longtime clients on to other lawyers, letting go of clients as needed and doing the administrative tasks that come with leaving the practice. But if you are a solo practitioner, in a small firm, or perhaps are the first lawyer in your firm to retire, there is much to be done.

**You should start planning the firm date of your retirement from practice at least two to three years in advance.**

## Getting started

If you've been running your practice at full volume, you need to take stock of your clients and caseload. You'll need a list of your open matters, with the name of the client, status of the matter, statute of limitations, recent activity and trust account balance (if any). Then create a timeline and strategy to either successfully conclude each representation or transition the client and their matter to another lawyer. Of course, we know that clients aren't chattel—you can't just "sell" them to another attorney.

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You also must assess whether you have client files from closed matters. Why? Because unless your fee agreement or engagement letter specifically informed clients of your file-retention period; unless you've already taken steps to offer the file to the client; and unless you've created a plan for any client property, including documents, in your possession, you must address that too. If you haven't thought this through, you'll need to figure out what your retention period needs to be. Practice 2.0 can help—and so can your professional liability insurer. Remember, trust account records must be kept for five years from the end of the representation—so you'll need a plan to maintain files for a while even after retirement.

Next, create a closing procedure. Practice 2.0 offers a helpful checklist (https://tinyurl.com/4w3hhs9t) that may provide guidance. Of course, you won't necessarily want to inform all your clients, or even your staff, that you are going to retire in two or three years. This will happen later in the process. But start preparing in advance to make the closing days of your career a joy—not a slog through 40 or more years of files and clients.

## What else?

Hopefully you will have a financial plan, but some of the activities you engaged in during your work life might no longer be financially viable for you. What? Well, if your firm paid for a country club or golf membership, will those continue? If not, are you willing and able to pick up that expense? Working with a financial planner is something we routinely suggest for clients, but like those shoeless shoemaker's kids, lawyers don't always take their own advice. Start thinking about your finances as soon as possible.

## Membership status

Retiring from your job doesn't automatically impact your membership status with the Bar. You may retire from work but still maintain active status; that means you will pay the full annual fee for membership and will have the same mandatory continuing legal education requirement as you've had—15 hours per year, 3 of which are ethics. If you choose to opt for "retired" status, you pay a reduced annual fee and need no longer complete a CLE requirement—but you will be unable to practice law (with one exception, discussed below). (More detail on this is on page 8.)

## Keeping busy

So what happens that first Monday morning when you get up not to an alarm, but because you've had a good night's sleep? You may think now, "Oh, that's easy, I'll just relax," but after however many years of

—continued



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nose-to-the-grindstone, it may be jarring to wake up and have nothing you must do. If you haven't yet developed hobbies or interests outside your practice, there is no time like the present to give this some thought—and by the present I mean way before your last day at work.

Are you planning any volunteer legal work? If you've opted for "retired" status with the Bar, you may not practice law—and that includes volunteer work for your grandkid's Scout troop, your religious community, friends and family. If you want to do that, you must maintain your "active" membership status. But if you want to pay it forward, Rule 38(d) of the Arizona Rules of the Supreme Court has an option for you; you may become a "certified pro bono counsel" by following the steps in the rule. You may then provide pro bono legal services for a certified legal services organization. There's a list of them on the State Bar website. It's a great way to keep your hand in and stay active while still being "retired."

Want to explore more about planning for retirement? Come to the State Bar Convention, June 14–16. There's a seminar on Wednesday afternoon, June 14, presented by the ARIZONA ATTORNEY MAGAZINE that you'll find helpful. And you may as well stay for the entire convention—plus, if you are a senior lawyer, plan to attend the Senior Lawyer Breakfast on June 16. AZAT





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# Trust Accounting Details and More

We know. Trust accounts and lawyers … so many lawyers have anxiety about correctly managing their client trust account—where the devil is frequently in the details. And with the expansion of multistate legal practices, one of those devilish details seems to be coming up in more and more calls to the Trust Account Helpline (602-340-7305, by the way).

**When a lawyer uses an IOLTA in Arizona at an Arizona bank, and it's correctly set up, required remittances to the Foundation occur.**

What happens if a lawyer licensed in Arizona who is representing Arizona clients is part of a multistate law firm and wants to use that firm's client trust account (set up in another state)? Can this be done under Arizona's rules?

One requirement for an IOLTA (pooled interest-bearing client trust account) in Arizona is that the interest on the funds on deposit be remitted to the Arizona Foundation for Legal Services and Education (aka the Arizona Bar Foundation). (Note: Some banks provide 100 percent of earned interest to the Foundation; some do not.) Overdraft reporting is dealt with pursuant to an agreement the bank executes in order to be on the approved bank list. The interest remittance is a little more complicated.

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When a legal practitioner in Arizona goes to set up their IOLTA at an approved bank, they should take a form provided both on the Foundation and Bar website. It provides the Foundation's Tax ID number. Periodically, the bank calculates interest on the funds on deposit and remits that amount to the Foundation. (These funds are used to support the Foundation's work in providing education and legal services.) When a lawyer uses an IOLTA in Arizona, at an Arizona bank (or the Arizona branch of a national bank), and it is correctly set up, this is automatic, and the lawyer may rely on the bank to be sure it's done.

But when using a non-Arizona IOLTA for Arizona client funds, chances are excellent that the account was not set up in a way that conforms to Arizona rules. For example, if you are a lawyer in the Great State of Franklin (sorry for any bar exam flashbacks, folks), chances are your IOLTA at Franklin National Bank was not set up with the Foundation's Tax ID number, which means the bank is not reporting separately on the interest on Arizona client funds or sending that interest to the Foundation. (And chances are good that the bank's branches in Franklin also have not agreed to report overdrafts as required, but that's for another article.)

While it may be technically possible for a firm to take on the responsibility for calculating the interest on Arizona clients' funds in an IOLTA located elsewhere and then be responsible for regularly remitting those funds to the Foundation, all the risk would be on the lawyer/firm. Frankly, that's unlikely to work well. (Not to mention the reporting requirements regarding overdrafts. It's unlikely the bank would agree to report on overdrafts to more than one state and the state in which the account was opened.) Finally, to keep Arizona client funds in an account outside Arizona would require that each client consent.

So if you are representing Arizona clients on Arizona cases—even if your multistate firm has an IOLTA located elsewhere, even if it's at a national bank—you will need an Arizona IOLTA opened at an Arizona branch of your bank. Use the forms provided, and follow the guidance provided by the Trust Account Manual and quick guide found on Practice 2.0's website and you should be set (call our practice management attorney for more).

And speaking of our practice management attorney, let me formally introduce Practice 2.0's new (well, new to us) practice management attorney, Meredith Vivona. Meredith comes to the Bar with about 20 years' experience, in legal practice and as the Independent Bar Counsel for the last nine years. She knows how to do it right, what can go wrong, and is happy to help guide you to be the best you can be. (She's no longer serving as bar counsel, so everything you tell her is confidential.) Our other addition to the Lawyer Assistance Program world is our new LAP Director, Michelle Hibbert, who previously practiced for about 20 years, mostly in labor and employment. She will be involved in Practice 2.0, MAP, the mentor program, and more. Michelle and Meredith will be sharing in the writing of this column going forward, so you'll hear from all of us sooner or later.



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# Tech From the Trenches- Sharing Files With Clients: Bridging Security and File Management

Roberta L Tepper and Laura L Keeler

May 01, 2023 6 min read

- Dive deeper into issues lawyers should consider when choosing their file-sharing system, including how security, including client confidentiality and encryption, and file management should play a role in your choice.
- Before implementing, consider whether you want to select a tool that has only one purpose or whether you would rather choose a tool that will serve multiple purposes.
- Look at security, encryption, ease of use for you and your staff, the sophistication of your clients and the ease of use for them.



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Lawyers often get stuck trying to navigate the sea of choices of methods for communicating with clients. In our last column we addressed the risks of neglecting training, and the dangers in improperly using file-sharing systems, how file-sharing systems can help with organization and how to avoid improper mistakes. We also compared file-sharing platforms to client portals.

Now we'll dive deeper into issues lawyers should consider when choosing their file-sharing system, including how security, including client confidentiality and encryption, and file management should play a role in your choice.

## Setting the Stage, Redux

There are numerous choices for platforms/systems to share data or files with clients. As you might suspect, each system has pros and cons. You may share documents with your clients through law practice management software client portals, through ecosystems like Microsoft 365, through file-sharing tools including stand-alone solutions. As with all things, file-sharing solutions are not created equally, and lawyers must take care to use them Advisedly.

## Framework

Before implementing, consider whether you want to select a tool that has only one purpose—file-sharing—or whether you would rather choose a tool that will serve multiple purposes, perhaps including robust data security to protect confidentiality, file retention and organization.

Does the tool have adequate security to protect your obligation to safeguard client confidentiality, or the enhanced security you may need given the sensitivity of the information you will be sharing? Does the system lend itself to preserving data for the client file, and what is the ease with which that will be accomplished? Does the system aid in your matter organization, or does it require too many labor-intensive workarounds including regular moving, dragging and dropping, renaming or resaving?

## Assuring Client Confidentiality

Let's look at how safeguarding client confidentiality and file organization come together, or fail to, in some commonly used tools.

### Client portals in law practice management systems

If you read our last column, you already know that we think that client portals are excellent for communication with clients. Their security often parallels the level of security used by bank and medical portals, Advanced Encryption Standard (AES), which strongly protects client confidentiality. Client portals are also a good multipurpose choice for file and document preservation and organization when they are built into law practice management systems (LPMS).

Since LPMS are matter-centric, communications through the client portal are saved in each client's matter. This is far better for file preservation and organization than having to move communications with clients from email, SMS, voicemail, etc., from one folder or system to the next. Client portals also provide options for communicating in multiple ways. For example, preserving texts facilitated through the portal is a snap for file preservation compared to using phone messaging.

Legal professionals can choose which documents to share with the client via the client portal. This aids efficiency by having the files easily cross-referenced. Further, sharing in this way is more secure as access is limited to the proper people. By comparison, systems like email are fraught with risk of inadvertent disclosure to similarly named contacts or the use of "reply all." Other commercial stand-alone, file-sharing solutions may be equally secure but do not offer an integrated solution and require "filing" of the communication in the client's digital file. It is a truism that the fewer steps there are to a system, the less likely it is that there will be a mistake, omission or another disruptive lapse.

## File-sharing systems

Some industry-neutral systems, such as Microsoft 365, have been broadly embraced by the legal community. If you already use Microsoft 365's Business Standard, Business Premium or Enterprise, you have access to its breadth of features that aid collaboration and security. You may, and we'll suggest should, avail yourself of the entire Microsoft 365 ecosystem, from OneDrive to SharePoint to Word, and capitalize on the applications' abilities to work in concert. This will make it far easier to develop processes and workflows to ease and facilitate file organization.

Other file-sharing systems commonly used by solo and small law firms include business versions of Google Drive (Google Workspace), Dropbox (Dropbox Business), Box and Citrix ShareFile. (We have previously advised that the free consumer versions of these solutions should not be used by law firms, so will leave it at that.) These business versions offer many security features for sharing folders with clients. Lawyers should routinely use features that enhance security, like making client information permission-specific and password protection. File organization in such systems must be established by the firm

users. You'll need to carefully train staff and be deliberate in implementing file structure and organization, including folder mapping and naming conventions.

### Document management systems and more

Document management systems have strong capabilities for robust file management and security, but these may be financially prohibitive for some. With that in mind, we are focusing today on more value-friendly systems for sharing files with clients.

Secure messaging solutions like Signal allow texting and messaging with end-to-end encryption, which is great for security. The downside, however, is that you cannot easily preserve communications. This makes such applications less useful, if useful at all, in the professional setting where substantive client communications need to be saved as part of the file.

## Sharing on a Shoestring

Let us be clear up front, we don't advocate file-sharing with clients by email; in fact, we will go so far as to say "Don't." Email is not secure, and attaching confidential documents to email is a recipe for disaster. But as realists, we know that some lawyers will ignore our warning, so we'll offer some tips to lessen your risk if you are insistent on using email.

If you're already using a system like Microsoft 365, both you and your clients should turn on multifactor authentication. Second, does your email version already offer an option to turn on email encryption, or can you upgrade to a version that does offer email encryption? Third, if you are truly on a shoestring budget, at the very minimum you should password-protect shared files. You can password-protect Word, Excel and PDF documents before emailing them to the client. For instance, do not email attachments with a client's financial information that aren't encrypted or password-protected; it's far too risky. But we would feel remiss if we did not stress again that using email as your sharing platform is not advisable. Please don't.

## Security

Lawyers often struggle to understand how to assess security features for client communications. Essentially, is the client's information you store going to be secure? This is a primary question, and one with several parts. We'll elaborate in a future column, but for now, some quick tips.

First, you'll want to know about the security measures included with the solution you choose. It is surprising how many people don't ask whether the systems they're looking at secure "data at rest" and/or "data in transit." You want to have all data secured both in transit and at rest to protect client confidentiality; that securing is most often done via encryption.

## File Structure

Be sure that your file structure sufficiently segregates each client's file from every other client's file. Your file structure in your platform should be both robust enough to do that and simple enough to avoid "misfiling" documents or folders. Much as you would have done with paper files and documents, make sure you have a naming convention that is easy to follow to distinguish each case.

## What Is Better, File Sharing or a Client Portal?

The answer is, as you might have suspected, "It depends." There are pros and cons to both. The most important consideration is that you make an informed choice. Look at security, encryption, ease of use for you and your staff, the sophistication of your clients and the ease of use for them. And consider whether your IT consultant is sufficiently versed in the tool you choose or can refer you to someone.

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ABA American Bar Association
https://www.americanbar.org/groups/law_practice/resources/law-practice-magazine/2023-may-june/sharing-files-clients-bridging-security-file-management/

# Tech From the Trenches: Breaking Up Doesn't Have to Be Hard to Do

Roberta L Tepper and Laura L Keeler

Feb 05, 2024 7 min read

## Summary


- Various ethical opinions outline the obligations of both the departing lawyer and the firm during departures.
- A universally agreed-upon best practice is for the departing lawyer and the firm to send a joint letter to each affected client.
- Efficiently using technology can contribute to a smoother and less painful transition.




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For this Leadership Issue, we'll discuss an area that requires integrity and good character on all sides: breaking up––lawyers leaving firms, and the firms they are leaving behind. Departures, regardless of the reason, can be an emotionally charged process, but tech considerations can make the logistics of separation simpler and less fraught.

As the Paul Simon song reminds us, there are "over fifty ways to leave" a law practice. To narrow the scope, we're addressing the typical scenario of when attorneys separate from a law firm, and that law firm will be ongoing. The kind of succession planning needed when a law firm closes entirely, or when a lawyer dies, becomes incapacitated or is otherwise unable to practice, is a horse of a different color (hats off to those of you who recognize this term from *The Wizard of Oz*).

## The Essential Premise—True Regardless of the Circumstances

Clients are not chattel. Regardless of the reason for a lawyer's departure from a firm, it is always and forever, the client's choice whether to remain with the firm, continue with the departing lawyer (unless they are no longer able to practice) or choose an entirely different lawyer or firm going forward. The professionalism and ease with which a transition occurs when a lawyer and a firm part company can either impress the client and enhance the firm's and lawyer's reputation or can leave a bad impression with everyone involved and diminish the reputation of the firm and the departing lawyer. And in the case of a departure gone really wrong, disciplinary or ethical complaints may result––sometimes brought by both the firm and the lawyer, and sometimes by the client caught in the middle.

There are quite a few ethics opinions discussing the obligations of the firm and lawyer in this scenario, so check for one in your jurisdiction, or call your bar's practice management program for advice. In Arizona, advisory (nonbinding, but persuasive) Ethics Opinion 10-02 clearly lays out the requirements for both the departing lawyer and the firm. For everyone's sake, regardless of hurt feelings, economic fears or other strong emotions, we encourage, even implore, all concerned to make this process as seamless and professional as possible.

## Case Management Considerations––Enter Technology

What must be done? The clients need to be informed; the departing lawyer will need current and past case information for client notification purposes, as well as for future conflict checking purposes; funds being maintained in the firm's IOLTA account need to be reconciled, transferred or refunded; notices of withdrawal or substitution of counsel may

need to be filed; or files may need to be forwarded or transferred. And that short litany may not be complete, depending on the nature of the case(s).

Thankfully, for firms effectively using practice management software, these first steps are easy.

First, generate a list of all active cases being handled by the departing lawyer; this list should be augmented with information about funds held in trust for the client, or other property of the client in the possession of the law firm. Your legal tech will help you sort this information to make it easier to navigate and prioritize. To prioritize client contact or to arrange coverage, think about sorting based on closest upcoming deadlines or court appearances. If you do not use a practice management platform in your firm, this process will require a manual search of all open cases at this point––and will likely require a search of all matters handled during the departing lawyers' tenure to provide the information the departing lawyer will need to conduct conflict checks in the future. Using Outlook (or other email system) contacts may be helpful but will likely require manual sorting. If this hasn't convinced you to use good practice management software, it should.

## Notifying Clients

A universally agreed-upon best practice is for the departing lawyer and the firm to send a joint letter to each affected client. This tends to be a trouble spot (please see our reference to hurt feelings and economic pressure above). We write now in the hope that firm leadership will take the high road, and thereby encourage the departing lawyer to do the same. The letter should, at a minimum, contain basic information (that the lawyer is departing) and lay out the choices facing the client in an emotionally neutral way; this is not the place for a guilt trip. Your bar's practice management program may have a sample letter on which to build (the State Bar of Arizona's Practice 2.0 practice management advice program offers such a letter, for example). Not sure what exactly to say or how to say it or disagreeing about wording? Call your practice management advisor for guidance.

In the unfortunate event that the firm and the lawyer cannot collaborate professionally on this letter, both the firm and the lawyer may send unilateral letters. It is important for the firm to not obstruct the departing lawyer from fulfilling their ethical duty to keep the client informed. Sadly, we frequently see firms immediately locking out the departing lawyer from the case management system. If the firm understands the options, they may provide case information or lists by altering the departing lawyer's access by managing their permissions––for example, providing them read-only access to the cases on which they are listed as involved parties–– this doesn't have to be a point of contention.

## Assembling and Transferring the Complete Case File

Remember, the case file belongs to the client, which includes work product. Again, using technology effectively should mean that the case file and all related information is stored in one central place. For some firms that are paperless and do not use a practice management platform, pieces of the file may be maintained in different systems. Those various pieces, stored in a way that seems haphazard, need to be assembled in a single location to make the efficient transfer of the file possible. A firm may wish to utilize a document management system to collect all parts of the file, or at a minimum a file storage system (think Dropbox, Box, etc.––of course, only the business version, not the free version) to collect all relevant records in one place.

E-discovery software may also be a mechanism by which these separately located items may be collected. Rather than conduct a manual search and find process, e-discovery tools are built to do just that, so depending on the number of records that must be reviewed, this may be a good investment. In addition to File Explorer, you may need to search Outlook/email in- and outboxes, accounting records, and any other programs you may have used in any individual case, but that may not be integrated with a practice management platform. Using rules in Outlook, or searching by "sent to," "from" or "subject" may be helpful. Keep in mind that correspondence and communication records are also part of the client file, as is work product.

## Trust Accounts

Depending on the timing of the departure of the lawyer, and urgency of the client's matter, if the client has funds in your firm's client trust account, you may need to do an off-cycle trust account reconciliation so that you may either transfer client's funds or offer a refund to those clients who also choose to depart. At the risk of being repetitious, if you are effectively using technology, this shouldn't be daunting. We assume for purposes of this discussion that you are already doing the universally required monthly three-way reconciliation of your client trust account (if not, well, you have bigger problems we and our fellow columnists have addressed in previous columns). But asking a client to wait up to a month to get their funds transferred to their new lawyer's trust account may not be reasonable, depending on the circumstances.

We've previously discussed the fact that all platforms claiming to handle trust accounting do not create all the records required for a monthly three-way reconciliation. Hopefully, you've taken heed and chosen a platform that produces the required records. So, conduct that off-cycle trust account reconciliation, and then handle any required funds transfers. Remember that most states' rules specify the way funds may be disbursed from your client trust account.

# More Details

As mentioned above, filing notices of withdrawal or substitution of counsel may be needed. Depending on the requirements of your state, you may need to give notice to the bar, the lawyer regulation system or individuals/agencies other than the clients. Technology is your friend there, too, as the use of templates and documents automation will make this process less painful––maybe not emotionally, but in terms of the procedural steps.

The firm and the lawyer will need to arrange for information from calendar appointments to be efficiently transferred. Email platforms contain built-in mechanisms for sorting. Hopefully your firm has used a logical naming convention––it not, it's never too late to adopt one. If you've utilized the internal categories tagging function in your email platform, you will be able to sort that way. If not, sorting by "to," "from" or "subject" will be necessary. Again, the more efficiencies you build in up front, the easier and less resource-intensive this process will be. So, yes, we are suggesting best practices by looking at the consequences of failing to implement them up front; but there is never a bad time to implement best practices. If you haven't done so already, tomorrow is a new day and a new opportunity to improve your processes through technology.

Most of all, please remember that while a law practice may be a business, law is a learned profession––and that professionalism, courtesy and integrity will help make this process less painful. So will efficiently using technology.

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# Tech From The Trenches: Succession Planning, Risk Management and Tech, Oh My!

Roberta L Tepper and Laura L Keeler

Jan 01, 2023 5 min read

## Summary


- There are numerous considerations for succession planning depending on the size of firm, practice area, systems and more.





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Let's talk about an area that most lawyers avoid … succession planning. As the ABA notes, "succession planning is *essential to every lawyer's* practice, *proactively* protecting clients and colleagues in the event of the lawyer's disability or death" (italics added). Planning protects clients, files, colleagues and even your reputation. There are numerous

considerations for succession planning depending on the size of firm, practice area, systems and more.

## Why Plan?

Even if you are in a firm, you need to take heed. Is there a plan? What if the managing partner gets hit by a bus? Do you know what they have been doing? If you rely on a legal administrator, what happens if that person is suddenly incapacitated? If you are a solo or in a small practice, chances are that the lion's share of responsibility falls on you.

## Risk Management

**Malpractice.** Increasingly, professional liability insurance carriers are requiring that attorneys name a designated backup or successor attorney who is authorized to step in on the insurance application or renewal application. Many lawyers in their engagement letters inform their clients that they have backup counsel; some even let the clients know who that is, just in case.

**Knowledge management.** Succession planning should start with your operations manual —the guide to how the office runs. If someone leaves, you won't have to start from scratch if you have an operations (aka procedures) manual. Don't have one? Start now.

At a minimum, your manual should include procedures on intake and opening a new case, file naming conventions, where to find active and closed cases, your file retention policy, how to close cases and more. (For more information, check out "The Digital Edge" podcast with guest Catherine Sanders Reach about your law firm cookbook.)

## Succession Planning Meets Business Continuity

**Law practice management (LPM) systems.** LPM systems are the lawyer's Swiss Army knife of tools—lifesavers when you need them most. Let's suppose you are suddenly incapacitated. The firm will need a list of your active cases so it can contact the clients, pick up on deadlines and move forward.

LPM systems have numerous built-in tools to aid in this, including an open matters report. Users may pull up records of the cases an individual recently logged time for; cases on which they are the responsible attorney; data that relates to each active matter including correspondence, calendar deadlines, documents, contacts and connection with the client through the client portal; and more.

**Backups.** Hopefully you back up all your case files and data on a regular basis in multiple locations. You want to have backup redundancy both in geography (where they are being backed up) and medium (how the data is backed up). You might subscribe to a cloud-based backup system, usually supported by Amazon Web Services, which has built-in geo-redundancies. Do you also want to have a portable hard drive kept in a place distant from your office?

- *Tip: Remember to back up cloud-based systems, too.* Don't forget to back up your data that already lives in the cloud. Systems such as Backupify, Carbonite and CrashPlan can back up cloud systems.

- *Tip: Test and review your backup plan after implementation.* Test your back-up system to make sure it works. Review at least annually, and regularly update to ensure you are capturing all the places and systems where your practice's data is stored.

## Tech Tools for Accessing Data

Let's say that you've reached the point where you have a written plan, you're backing up your data and using an LPM system for digital records. Good start! But you still need a plan to make sure that someone can access your digital records and accounts—or maybe more than one person. What if the person with designated access dies or becomes incapacitated? How do you prepare? Fortunately, there are many categories of tools for documentation, including digital vaults, password managers, digital identity managers, software asset managers, document management systems, and project management and checklists. Whatever you use, the key is that information should be documented, protected and secure, and available when needed.

**Digital identity management.** Regardless of size, businesses should track, manage, access and document their digital assets. You may already have access to products that can help facilitate this, such as Dropbox Vault or OneDrive Personal Vault. Or you can use digital vaults, some of which even manage "digital inheritance."

**Digital vaults.** To protect important documents, both lawyers and their clients should compile information regarding digital assets, such as photos, videos, bank accounts, properties, insurance policies, passwords for social media accounts, etc.

Digital vaults vary by cost, ability to share accounts, security procedures and storage space. Examples within the market include FutureVault (for businesses), LawSafe and Everplans.

*Password management software.* Password managers are another type of digital vault expressly for login and password information. Some services, like LastPass, have group plans that allow access in case of incapacity/death. If you want to use your password manager as a digital vault to store digital files (attachments) and notes, make sure your plan includes that. Business-oriented password managers like LastPass Business or Dashlane Business have administrative controls that make quick work of changing passwords.

**Social media and online accounts; Google Inactive Account Manager.** Don't forget your online presence. Foremost within this category is the domain for your firm's website and email. The firm's social media accounts should be considered as well. If you lose your IT consultant or media person, will you lose access to those accounts?

You can store access information in your password manager, but you may also set up additional steps. For example, Google platforms have an Inactive Account Manager where the user can designate what happens after a period of inactivity. Similarly, Apple allows you to add a Legacy Contact through Apple ID.

*Software asset management software*. Knowing where your firm keeps data also ideally involves knowing how your firm's computers are configured. To prepare, document software licenses, usernames, installed drivers and service packs for each computer. Belarc Advisor can provide a computer profile summary for an individual computer; for business, you can use companies such as BelManage. Even if you track your hardware and software in an Excel spreadsheet, that documentation may come in handy later.

# Big Picture

Circumstances change, and the keepers to your firm's kingdom may not be around tomorrow to answer questions about how to access important files or data. Literally at the drop of a hat, someone may need to step in to take over client files. While no one likes to consider their mortality, there are processes and tools to help you document your firm's information and data, and tools to help you protect and secure it. Clearly, information must be safeguarded, but it also must be readily available should the need for access suddenly arise. The discussion above is not an exhaustive list but may help you get started. You can go lower tech by using password-protected Excel sheets or Word documents if you want, but you'll find tools like digital vaults and password managers make it so much easier and much more secure.

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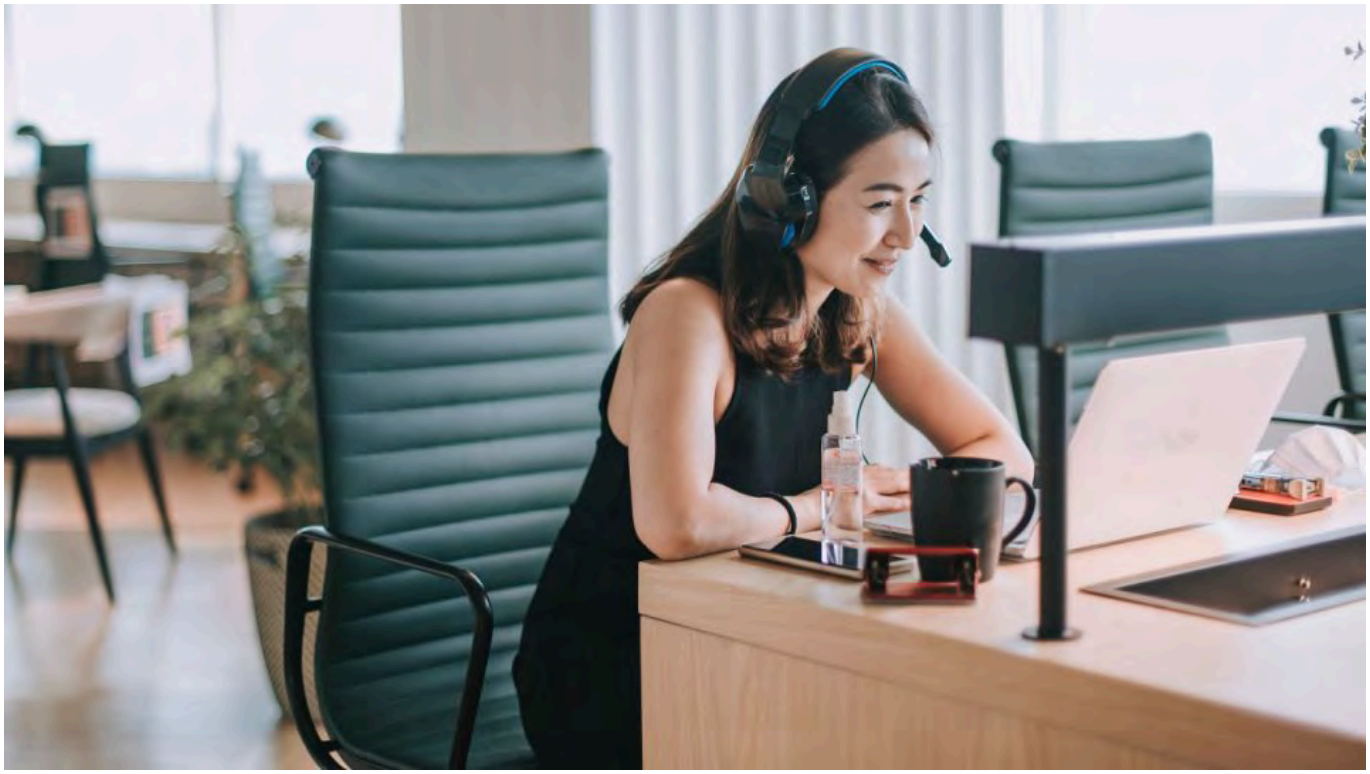
# Tech From The Trenches: Training Is Key in Using Common Technology

Roberta L Tepper and Laura L Keeler

Mar 01, 2023 6 min read

## Summary


- Configuring settings correctly and using features as intended makes all the difference between properly safeguarding client confidentiality and risking inadvertent disclosure.

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Sometimes a technology product becomes ubiquitous— common enough that people think they know how to use it even when they don't. The lack of training and improper use of the system can be risky. Today, we're going to discuss systems like Dropbox and client

portals—and why lawyers who don't pay attention to details or train properly on the systems they use can and do get themselves into trouble.

Let's start with what most people are probably familiar with: services like Dropbox that allow sharing of large electronic documents with relative ease. The interface is simple to use. Office organization is greatly aided by the ability to store and sync files from your desktop to Dropbox, and it has helped lawyers become more familiar and comfortable with saving files to the cloud, rather than just locally on their device.

Configuring settings correctly and using features as intended makes all the difference between properly safeguarding client confidentiality and risking inadvertent disclosure. Let's look at some issues lawyers have encountered and how to avoid missteps.

## Demystifying the Concepts

When lawyers struggle with or do not correctly control permissions and security for technology, it's often because they're struggling to understand the concepts. With that in mind, let's compare a file-sharing system like Dropbox to the physical (not digital) locked filing cabinet that can hold many file folders and subfolders containing client and other confidential information inside.

Security measures should be multistep. You wouldn't want to lock only the filing cabinet, but also the storage room door and the office itself, and perhaps have security cameras outside. This equates to adding on password protection for files or folders and using multifactor authentication. Perhaps some of the information contained should also be encrypted. Encryption is akin to secret messages; you need the right key to be able to read them—remember secret decoder rings?

**User permissions.** Think about which particular people in your firm should be able to only read files versus those who need to be able to edit documents contained in the files or even delete the file. That's what user permissions encompasses. From a security standpoint, it's best to limit access as closely as possible to the work individual firm members need to do on the file, matter or case. So, while you or your paralegal might need to be able to edit, perhaps your assistant might not need the same access. Perhaps access should be restricted to people in a practice area or team? This is a case-by-case analysis.

**Administrator controls or access.** Think about which users may need to set up or transfer other users' permissions. A person with administrator access might be an IT person or legal administrator, or maybe it's you, depending on the size and staffing of

your firm. But keep in mind that the person with these rights has the keys to the kingdom and needs to be thoroughly trained.

Now that we have some understanding of the concepts, let's look at specific features.

## Security Features May Differ Depending on Your Plan

Just as there are differences between what you might require from a personal laptop versus a business laptop, there are considerable differences between, for example, Dropbox for personal use compared to Dropbox for business. These differences include that the latter was specifically built for organizations, with enterprise-level security and privacy controls.

## Encryption

There are measures for enterprise-level data encryption— meaning at the firm level. This is facilitated through secure data transfers, distribution of encrypted files and application-level controls distributed across a scalable, secure infrastructure. In other words, it should be required throughout the entire firm.

## User Permissions and Admin Controls

These control individual user access and other administrative permissions, such as the tracking of user activity and edits. There are heightened security features, such as the commonly understood two-step or multifactor authentication. It is also possible to set up password-protected files and links so that only trusted people can access the documents.

With the features cited above, you can see how systems like the business version of products such as Dropbox, even those not originally designed for the legal space, can be valuable tools when used properly. That's the key. Sometimes law firms dive in and use these tools incorrectly at great risk, without sufficient attention to security features.

## How To Avoid Potential Mistakes

As with any technology, *training matters*—emphasis intended. Go through the support pages and training videos. Be sure you understand how to use the product before implementing it, especially when storing confidential client information. And it's not just you; make sure your staff is also thoroughly trained.

File-sharing systems allow for granular permissions for each folder; yes, that takes a little more time, but it's essential to your duty to safeguard your client information. Let's say that a firm created one case folder for all the firm's matters, with subfolders for each client name. If the subfolders are not given different granular permissions—remember, assigning access only to the proper people associated with the content in each subfolder—you could mistakenly allow Client A access to all firm files. Make sure you consider (and we suggest use) two-step or multifactor authentication.

Yes, nonindustry–specific file-sharing tools, when utilized properly with security features, can be a boon to lawyers. But they are not the only choice.

## Client Portals

A tool continuing to grow in popularity, and favored by practice management advisors for sharing documents with clients, is the client portal. Client portals are often built into law practice management systems (LPMS). They are also referred to as secure client portals because they usually have built-in, end-to-end encryption.

There are many benefits to client portals. They can act as everything from your firm's virtual lobby with how-to information, to a place where you can securely upload information to a virtual secure spot so both the lawyer and client may share information, with an audit trail. If you need to resend a document through the portal, it is quick and easy to resend the link. And do we even have to say that this method is infinitely better than sending an email with secure information in an attachment?

In addition to having strong built-in security that is more likely to be utilized, rather than hoping that someone remembered to password-protect the file with a strong, hard-to-guess password, client portals built into a LPMS also have great productivity potential. Since a LPMS is matter-centric with contacts, tasks, documents and more all relating to each case file in one place, uploading documents not only connects the files with the appropriate matter in a storage location but also connects to the appropriate permissions assigned to each client. You needn't worry about what the client will see—the law firm chooses what goes into the portal to be shared with clients as read-only or editable. This circles back to the concept of permission levels— you have control over information you share with clients. This is advantageous organizationally and increases efficiency with file sharing and storing.

We pause at this point to tip our hats to our colleague Jim Calloway, of the Oklahoma Bar Association, for being one of the strongest proponents for use of client portals in the legal vertical. He has helped many law firms see pathways forward with this tool. Learn much more about client portals in his *Law Practice Tips* blog.

In the end, whatever method you choose to share files, keep in mind these principles: First and foremost, vet the technology you're considering. Then, when you choose one, get thoroughly trained on the system before use, especially if you're using it to share files. Next, it's not enough to know about the product, you also must utilize available security measures from password-protection to encryption to strong passwords and multi-factor authentication. Then, consider permission controls and what levels of access various people should have.

Don't keep all your client files comingled in one large folder. Be sure your file structure segregates information by client and/or matter with appropriately limited access, with consistent naming conventions. Finally, sending a link to a portal or a secure file location is far better than emailing attachments back and forth with clients.

Regardless of the system you use, you must safeguard client data. It's your duty, and it's not hard to do if you take the time to learn your system and train your staff.

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# ETHICAL POTPOURI

Paul J. McGoldrick

JULY 2024

The program goal is to raise awareness and provide reminders of ethical issues lawyers face. The following are my general observations and best practice pointers.

**1. Above All** - Do not lie, cheat, steal or engage in a sexual relationship with a present client. See, ER 3.3; 4.1; 1.8(j)

> **If you were to ask virtually any grade school age child, they would understand that it is not proper to lie, cheat or steal. The fourth tenant is reserved for an older audience. These rules of society are codified and if you read the two pages which set forth in Rule 41, a Lawyer's Obligations, these two pages really say it all.**

**2. What are you hired to do**? Best practices suggest that lawyers should have engagement letters which spell out what you are hired to do for the client. A formal engagement letter should describe the case or project, payment terms, billing cycles (monthly/quarterly, etc.), and whether a retainer is required. It is a good idea to include a fee arbitration provision that disputes shall be arbitrated before the Arizona State Bar Fee Committee.

I recommend keeping track of your time, even if you are on a contingency engagement. First, a description of what you did each day documents your work on the file if there are any questions. Second, the "look back" requirement to determine a reasonable fee is easier and more reliable with contemporaneous time records. See ER 1.5(a), (b); *In re Swartz*, 141 Ariz. 266 (1984).

Oftentimes, clients think of you as their lawyer for all issues. If the client hires you to draft a contract and later approaches you about an accident claim or other substantive matter, document in writing whether or not you have accepted that matter. My advice is to send a letter or email to the effect that "you have asked

me about your wife's accident claim. I gave general advice only. The statute of limitations is 2 years. Neither you or your wife hired me to represent you or your wife for the accident". If you decline a case or engagement, document it.

The court in *Paradigm Ins. Co., v. Langerman Law Offices*, 200 Ariz. 146 (2001), stated that "the attorney client relationship is an **ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on".**

**3. Closing/termination letters**. Send a letter or email that you have completed the project or the case; provide a copy of the release or final judgment or order of dismissal if it was a litigated matter. If your firm has a file retention policy (and it should), remind the client of the retention term. If there is a judgment, remind the client of the need to renew the judgment if collection efforts have not been fully accomplished. See ARS §§ 12-1551(A); 12-1611, 1612(B). Remind the client that a separate retention may be required for renewal of the judgment, collection efforts or an appeal.

**4. Statute of Limitations**. A very frequent claim is that the lawyer missed the statute of limitations or notice of claim deadline. Thus, compute the time limit on all of the claims which apply to the facts. If the client chooses to forego pursuing a particular claim which has a shorter statute of limitations than other claims (strict liability, negligence vs. contract), make sure that decision is documented in writing.

If you miss a statute of limitations, promptly notify the client pursuant to ER 1.4 and do not try and settle the claim with client without complying with ER 1.8(h)(3). **DO NOT IGNORE OR LIE ABOUT THE ISSUE. GIVE CLIENT A COMPLETE COPY OF FILE AT NO COST** (pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes). See ER 1.16(d), comment 9; Ariz. Ethical Op. 04-01.

I've had a number of claims where the statute is missed and the clients were not told.

**EXAMPLES**:

1. Pretend case still ongoing and then tell client judge dismissed case.

2. Tell client other side offered a settlement and suggest it be accepted (usually low number as is being funded by lawyer personally).

3. File on eve of statute, but not timely serving – telling client suit is over because couldn't find party, without explaining you could have sought leave to extend time to serve or use alternative method.

4. Filing a breach of contract action after tort statute ran and having judge grant motion to dismiss or summary judgment.

Notice of claim errors should not occur on technical grounds. Follow the requirements of ARS §12-821.01. The notice must be served within 180 days of accrual of the cause of action for each claimant. The notice must include a **specific amount or sum certain** for which the claim can be settled – even if the client is still treating or is not medically stationary. A notice which states that the claim can be settled for "policy limits" is not sufficient and is subject to dismissal even if timely served. See: *City of Mesa v. Ryan*, 1 CA-SA 23-0154 (2023).

**5. Client Relations**. Act like a professional. Communicate with your clients directly about the case. My advice is to copy or "cc" them on all substantive communication with the opposing party. Send copies of pleadings, disclosure statements, etc. Clients with the file material should have a very good understanding of where the case or project is at all times. A common claim against lawyers is a counter claim when the attorney institutes collection efforts. I have had a bunch of them. Think long and hard about suing a client for fees. **The counterclaim will be defended but subject to your E&O deductible. Most policies have a 5k-10k-25k deductible**. If you are on an hourly retention, pay attention to your payment history. If you stay in the case too long with a "no pay" client, you may have a difficult time withdrawing.

The lawyer in **Ariz. Ethics Op. 00-03** asked the following question: May a lawyer "ethically sue his client for unpaid attorney's fees and costs arising from litigation while continuing to represent the client in the underlying litigation when the client is unwilling to pay or refuses to make mutually satisfactory arrangements to pay".

What do you think? Conflict? Is the lawyer asking for counter claim for malpractice or breach of fiduciary duty?

**6. Common sense** – promptly return phone calls or emails. Clients are understanding and forgiving with respect to personal matters as long as they

are kept abreast of the status. Do not tell a client you have done something that you haven't, i.e., filed a pleading, had a meeting, etc. Do not habitually wait until due date to file answer or pleading – creates stressful atmosphere and you may actually miss a deadline. **Don't take on more work than you can reasonably handle** – nice problem to have, but leads to overload and missed deadlines. See ER 1.3, Comment 2. (A lawyer's work load must be controlled so that each matter can be handled competently). Additionally, "a lawyer shall make reasonable efforts to expedite litigation". ER 3.2. **Rule 41A2 – I will endeavor to achieve my client's lawful objectives as expeditiously and economically as reasonable.**

**7. Don't wander beyond your expertise**. Most lawyers have an area or areas of expertise. Stay generally within those parameters. If you take on a matter completely outside your area of expertise, let the client know that this is a new area which you are happy to get up to speed on and do the best for the client. The responsible thing is to let them know about your background. For instance, if I chose to defend a client in a criminal matter, I would let the client know that I have not done so in the past twenty years but would do my best for him. The point is – don't dabble, but if you do, make sure the client understands your background. If you decide to dabble, do the necessary legal research in order to competently represent client. ER 1.1 states a lawyer must provide competent representation. Comment 4 states, "A lawyer may accept representation where the requisite level of competence can be achieved with reasonable preparation". **Rule 41D – I will keep current in the areas in which I practice and when necessary, will associate with or refer client to a more knowledgeable lawyer in another field or area**.

**8. Specialization.** Don't represent you are a specialist if you are not. Specialists are held to a higher standard, as they should be. The State Bar recognizes specialization in certain practice areas. Don't misrepresent expertise.

**9. Pay or honor legal and valid liens**

The State Bar has issued at least three opinions which address this issue. Ariz. Ethical Op. 97-03; 98-06 (Attorney obligation triggered by actual knowledge of third party's interest in funds. Knowledge creates duties to third party.) and 03-05 (A claimant's attorney may not ethically enter into any settlement that would

require the attorney to indemnify or hold the Releasee harmless from any lien claims.)

**10. Trust Accounts –** it's not your money. You cannot borrow or co-mingle funds with your general account. See Rule 43. You must keep trust funds separate and apart from business or personal accounts. You must have internal controls in place. The Bar requires a monthly three- way reconciliation of the client ledgers, the trust account ledger/register and the trust account bank statement. Rule 43 (b)(2)(C). One of the fastest ways to lose your license is to steal from the trust account (and you are also likely to be sued as well). **There are few more egregious acts than misappropriation of client funds.**

The Bar has the authority to examine or audit trust accounts. There is a rebuttable presumption that a lawyer violates ER 1.15 if he/she fails to maintain trust account records. Your trust account should balance and if a trust account check bounces, expect the bank to contact the Bar.

**11. Frivolous Lawsuits**. Don't file them. Lawyers are exposed to **abuse of process and malicious prosecution** claims along with claims for sanctions. Most E&O policies will cover the defense for abuse of process and malicious prosecution claims and provide indemnity for those claims. Policies typically do not cover claims for sanctions or attorney fees. See ER 3.1; Rule 11; ARS §12- 349. **Rule 41 A4 – "I will advise the client against pursuing litigation that is without merit".**

**12. Make Sure You Know Who the Client Is**. Sometimes a person or entity other than the actual client pays the bills. *** Be cautious of outside persons doing so and then expecting reporting or to influence the representation. You may owe duties to non-clients. See *Fickett v. Superior Court*, 27 Ariz.App. 793 (1976); *Estate of Shano*, 177 Ariz. 550 (App. 1993). But see, ARS §14-5652 (absent express agreement to the contrary, the performance by an attorney of legal services for a fiduciary, settlor or testator does not by itself establish a duty in contract or tort or otherwise to any third party). ***** Rule 41a6 cannot accept compensation for representing a client from anyone other than the client without the client's knowledge and approval.**

**13. Pay attention to your co-workers** – You, as owner or partner, are responsible for **supervising** the staff and lawyers. ER 5.1, 5.3. You are responsible for instituting policies and procedures to detect conflicts of interest, maintain confidentiality, docket, and account for client funds. You can be responsible for notary violations**. Safe guard your notary stamp**. I have had a couple matters in which a lawyer's notary stamp was improperly used by an employee and documents were fraudulently notarized. Same goes for firm computers and lap top computers. Safeguard your passwords. I have had cases in which a lawyer in a firm was suspended and continues to practice – either as lawyer or "paralegal" without proper notification to clients and contrary to the suspension order. If that occurs, certainly other lawyers in the firm well know this is occurring. Pay attention if a co-worker is habitually missing work, coming in late or over delegating to secretary or staff beyond their expertise. You are obligated to supervise staff. Their failings can lead to Bar discipline and exposure to you and your firm.

**14. Ghost writing** – even if you ghost write or help someone and tell them you are not their lawyer **– they will think you are** – particularly if you give them a pleading to sign or letter that you have drafted. Be careful if you decline a case where a person is faced with a statute of limitations. If you draft a *pro per* complaint, what happens if you miss the best theory, an obvious theory or the complaint abates (because you failed to explain service or you attempt to serve for the pro per). What happens if you draft a letter for a person and you are wrong on the law. **The attorney client relationship is largely based on the perspective of the client – not the lawyer**. See *Franko v. Mitchell*, 158 Ariz. 391 (App. 1988) (an attorney who gives gratuitous advice will be held to the same standard of care as if he were under a formal retainer); *Matter of Petrie*, 154 Ariz. 295 (1987) (an important factor in evaluating the relationship is whether the client thought an attorney-client relationship existed).

**15. Civil Claims and Bar Complaints** - they are different. Often a lawyer will file a civil complaint and a bar complaint. Do not try and leverage a civil settlement by filing a bar complaint or threaten to do so. I have had situations when discussing settlement that opposing counsel offers to dismiss the bar complaint if settlement dollars are paid. You ethically cannot do that. Conversely, I have had clients indicate they will give their consent to settle if plaintiff withdraws a bar complaint. Neither position is appropriate. See ER 1.8;8.4; Ariz. Ethics Op. 91-23.

**Bar Complaints – the burden of proof is by clear and convincing evidence and the burden of proof is on the State Bar. Rules 48(d) (e)**

**Civil Complaints – the burden of proof is more probably true than not true and the burden of proof is on the Plaintiff.**

**Bar Complaints – the object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. In re Peasley, 208 Ariz. 27, 90 P.3d 764 (2004).**

**Civil Complaints – the object is to obtain money for alleged damages caused by the attorney.**

**16. Website Disclaimer Language -** Review your website and add disclaimer language. You do not want unsolicited confidential information sent to your firm before the prospective client becomes a firm client. The State Bar has recommended language to add to your website. This disclaimer language prevents the unintentional establishment of an attorney client relationship and may avoid a potential conflict of interest.

## ER 1.1. Competence

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

### Comment

### Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant 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 and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly-admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. 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.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impracticable. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also ER 6.2.

### Thoroughness and Preparation

[5] 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. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See ER 1.2(c).

### Maintaining Competence

[6] 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.

[7] A lawyer, whether appointed or retained, who represents a defendant in a capital case shall comply with the standards for appointment of counsel in capital cases set forth in the Arizona Rules of Criminal Procedure.

# Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-20-0008

**NOTE: ER 5.7, Responsibilities Regarding Law-Related Services, was abrogated August 27, 2020, effective January 1, 2021.**

**FACTS[1]**

The inquiring attorney proposes to contract with an investment advisory firm to provide investment-related services -- as distinct from legal services -- to persons in Arizona. The lawyer would register, either individually or through a corporation, as an investment advisor in compliance with state and federal laws and would maintain his investment advisory functions as a separate business distinct from his law practice. The investment advisory firm would pay the lawyer a fee for referring customers to the firm; this fee would be an ongoing percentage of the customer's fees to the investment advisory firm for its services.

The lawyer's involvement with regard to the investment services would be limited to the following: (1) providing materials about the investment advisory firm to the customer; (2) introducing the customer to the registered personnel of the investment advisory firm; (3) attending meetings where the firm's personnel would explain the investment program and assist the customer in choosing investment services suited to the customer's needs; and (4) receiving copies of periodic investment advisory statements so that the lawyer may monitor the customer's involvement in the investment program.

Thus, it would be inaccurate to characterize the payment involved as merely a "referral" fee; instead, the lawyer would offer, through a separate business, limited investment-related services and would be paid a fee or commission based on an ongoing percentage of the fees paid by the customer to the investment advisory firm.

The lawyer would not provide investment-related services in the same matter in which the lawyer provides legal services. The lawyer also would disclose in writing to the customers that the investment services are not legal services and the protections of the client-lawyer relationship do not apply.

**QUESTION PRESENTED**

Do the Arizona Rules of Professional Conduct prohibit a lawyer from receiving a fee for referring persons to an investment advisory firm in the described circumstances?

**RELEVANT ETHICAL RULES**

**ER 1.7 Conflict of Interest: General Rule**

(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 exists if:

. . .

(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 or to 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 each affected client gives informed consent, confirmed in writing, and:

(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; and

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

**ER 1.8 Conflict of Interest: Prohibited Transactions**

(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 counsel in 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.

**ER 5.7 Responsibilities Regarding Law-Related Services**

(a) A lawyer may provide, to clients and others, law-related services, as defined in paragraph (b), either:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity which is controlled by the lawyer individually or with others.

Where the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer shall be subject to the provisions of the Rules of Professional Conduct in the course of providing such services. In circumstances in which law-related services are provided by a separate entity controlled by the lawyer individually or with others, the lawyer shall not be subject to the Rules of Professional Conduct, in the course of providing such services, only if the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not apply.

(b) The term law-related services denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

**ER 7.1. Communications Concerning a Lawyer's Services**

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

**ER 7.2. Advertising**

(a) Subject to the requirements of ERs 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

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

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

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

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

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

(d) Every advertisement (including advertisement by written solicitation) that contains information about the lawyer's fees shall be subject to the following requirements:

(1) advertisements and written solicitations indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (A) that the client will be liable for expenses regardless of outcome unless the repayment of such is contingent upon the outcome of the matter and (B) whether the percentage fee will be computed before expenses are deducted from the recovery;

(2) range of fees or hourly rates for services may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the total fee within the range which will be charged or the total hours to be devoted will vary depending upon that particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(3) fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the quoted fee will be available only to clients whose matters fall within the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged;

(4) a lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee, or range of fees, for at least ninety (90) days unless the advertisement specifies a shorter period; provided, for advertisements in

the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(e) Advertisements on the electronic media may contain the same information as permitted in advertisements in the print media. If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.

(f) Communications required by paragraphs (c) and (d) shall be clear and conspicuous. To be "clear and conspicuous" a communication must be of such size, color, contrast, location, duration, cadence, and audibility that an ordinary person can readily notice, read, hear, and understand it.

**ER 7.3. Direct Contact with Prospective Clients**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment; or

(3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(1) at the time of dissemination of such written communication, a written copy shall be forwarded to the Clerk of the Arizona Supreme Court and the State Bar of Arizona at its Phoenix office;

(2) written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery;

(3) if a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line;

(4) the lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose:

(A) how the identity and specific legal need of the potential recipient were discovered; and

(B) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

**RELEVANT ARIZONA ETHICS OPINIONS**

Ariz. Ethics Op. 99-09 (lawyer may provide securities and insurance services to clients for commissions if lawyer satisfies ER 1.7 and ER 1.8).

Ariz. Ethics Op. 98-09 (lawyer's acceptance of referral fee from investment adviser for referring clients to the advisor is a "per se" conflict of interest under ER 1.7).

**OPINION**

Analysis of the question presented largely turns on ER 5.7, which expressly recognizes that lawyers may provide "law-related services" either in circumstances that are not distinct from providing legal services to clients or by a separate entity that is controlled by the lawyer individually or with others. Investment services, as the comments to ER 1.8 recognize, are an example of law-related services. ER 1.8, cmt. ¶ 1; *see also* ER 5.7, cmt. ¶ 9 (identifying examples of law-related services, including providing financial planning).

Before the adoption of ER 5.7, Arizona was among several states that concluded it is an impermissible conflict of interest for a lawyer to receive fees from an investment advisory firm for referring clients to the firm for investment services. **[2]** Other states, however, have concluded that such referral fees do not violate the ethical rules provided certain requirements are met, including adequate disclosure and consent by the client involved in the transaction. **[3]**

In Opinion 98-09, the Committee considered a referral program similar to the one described by the inquiring attorney. The Committee then concluded that a lawyer's operation of an investment advisory referral program would constitute a "per se" conflict of interest under ER 1.7(b). This opinion did not address the application of ER 1.8(a) concerning business transactions with clients. *See* Ariz. Ethics Op. 98-09 at 4 n.2. It is also somewhat in tension with a later opinion, Opinion 99-09, which concluded that a lawyer, who was registered as an investment advisor, may offer investment services to existing clients if the lawyer "stringently complies" with all of the requirements of ER 1.7 and ER 1.8. The later opinion recognized the lawyer would be paid a commission for selling investment products to client customers, and discussed a California ethics opinion concluding that, subject to certain requirements, a lawyer could receive commissions for referring clients to an insurance agent who sold them policies. *See* Ariz. Ethics Op. 99-09 at 4-5.

Since the Committee issued these opinions, the Arizona Supreme Court in 2003 significantly amended the Rules of Professional Conduct, and the amendments included the addition of ER 5.7. This rule concerns a lawyer's provision of "law-related services" and is based on, but not identical to, Model Rule 5.7 as approved by the American Bar Association ("ABA").

Provision of "law-related services" is also sometimes referred to as ancillary business activities. ER 5.7 reflects an evolution in the view of the propriety of such activities by

lawyers. *See* ABA CTR. OF PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003) at 501-603 (discussing background to model Rule 5.7). The ABA House of Delegates in 1991 approved a rule that flatly prohibited lawyers from providing ancillary services except to clients in connection with the provision of legal services. That rule, however, was repealed the next year. In 1994, the House of Delegates approved the predecessor to ER 5.7, which recognizes that lawyers may provide "law-related" or ancillary business services and identifies circumstances in which such activities are subject to the ethics rules governing lawyers.

As adopted in Arizona in 2003, ER 5.7 provides:

> A lawyer may provide, to clients and to others, law-related services, . . . either:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) by a separate entity which is controlled by the lawyer individually or with others.

Law-related services are in turn defined as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." ER 5.7(b). As noted above, investment services are identified in the comment to ER 1.8 as an example of law-related services.

The circumstances in which a lawyer provides "law-related services" determine whether the lawyer is subject to the Rules of Professional Conduct in the course of providing such services. In this respect, it is important to distinguish between non-clients and clients.

**1. Provision of Investment Services to Non-Clients**

Under ER 5.7, if a lawyer provides investment services to a non-client through a separate entity that is controlled by the lawyer individually or with others, the lawyer "shall not be subject to the Rules of Professional Conduct in the course of providing such services," provided that the "lawyer takes reasonable steps to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and the protections of the client-lawyer relationship do not apply." ER 5.7(a).

In contrast, a lawyer who provides law-related services in circumstances that are not distinct from the lawyer's provision of legal services, rather than through a separate

entity, is subject to the Rules of Professional Conduct in the course of providing such services, even when the lawyer does not provide legal services to the person for whom the law-related services are performed. *See* ER 5.7 and cmt. ¶ 2.

The inquiring attorney states that he will provide the investment services through a business separate from his provision of legal services. ER 5.7 requires that the services be provided by a "separate entity" if the Rules of Professional Conduct are not to apply to the lawyer's provision of investment services. Although the Rules do not specify any particular form of organization for such an entity, they clearly contemplate some form of business organization distinct from that in which the lawyer provides legal services. The rule further requires that the lawyer, individually or with others, control the entity through which the law-related services are provided.

Provided that the inquiring attorney is operating his investment services activities through an entity distinct from his legal practice, ER 5.7 further requires the attorney to take reasonable steps to assure that non-client customers know that they are not receiving legal services and that the protections of the lawyer-client relationship do not apply.

The steps necessary to assure an appropriate understanding by non-client customers will depend on the circumstances. "The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investment services in connection with a lawsuit." ER 5.7, cmt. ¶ 7.

In this context, the lawyer should explain, "in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship." *Id.*, cmt. ¶ 6. "This communication should be made before entering into an agreement for provision of law-related services, and preferably should be in writing." *Id.*

Thus, the inquiring attorney would be acting prudently in providing written disclosure to customers that the investment services are not legal services and the protections of a client-lawyer relationship do not apply. Written disclosure may not, however, be sufficient in all circumstances, as the attorney must explain these facts in a manner sufficient to assure that the particular customer involved understands their significance.

The question posed by the inquiring attorney contemplates that the lawyer will be providing certain investment-related services through a separate entity (the lawyer's investment advisory business), and that entity in turn would receive "referral fees" or commissions from a third-party investment advisory firm to which non-client customers are referred. The Rules of Professional Conduct do not prohibit this activity if the requirements of ER 5.7 are met. Moreover, the Rules do not themselves require the lawyer to disclose to the non-client customer the particular fee arrangement between the lawyer and the investment services firm to which the customer is referred. The Philadelphia Bar Association recently reached a similar conclusion in an opinion applying ER 5.7 to real estate services offered to non-client customers by business entities in which lawyers are involved. *See* Phila. Bar Ass'n Op. 2002-7.

This Opinion, we emphasize, does not address what disclosure obligations or other legal requirements may apply to the lawyer's activities independent of the Rules of Professional Conduct (e.g. any obligations that may exist under state or federal securities laws or consumer protection laws). Instead, the Opinion presumes that the lawyer complies with applicable legal requirements governing the investment activities. Moreover, even though a lawyer may not be subject to the Rules "in the course of providing" law-related services in circumstances identified in ER 5.7, the lawyer remains "subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services." ER 5.7, cmt. ¶ 2 (citing ER 8.4.). For example, even if a lawyer were not otherwise subject to the Rules in providing investment services to non-clients, it could be professional misconduct under ER 8.4 for a lawyer to engage in fraud or deceit with regard to such services.

Special considerations apply with regard to non-clients who are former clients. In these circumstances, the lawyer should take particular care to assure that the former client understands that he is not entering an attorney-client relationship with the lawyer who is providing investment services through a separate business entity and that the protections of the attorney-client relationship do not apply to transactions with such an entity. Moreover, the lawyer must also comply with ER 1.9. In particular, the lawyer may not reveal information (for example, to the investment advisory company with which the lawyer works) relating to the representation or, except where information has become generally known, use any information relating to the representation to the disadvantage of the former client.

Finally, as noted above, the lawyer will be subject to the Rules of Professional Conduct in providing investment-related services unless: (1) the services are provided by an entity distinct from that through which the lawyer provides legal services, *and* (2) the lawyer takes reasonable steps to assure the customers of the separate entity know that its

services are not legal services and the protections of the lawyer-client relationship do not apply. If these conditions are not met, the lawyer must adhere to the Rules of Professional Conduct in providing law-related services, and customers of such services must be treated as existing clients for purposes of the Rules. *See* ER 5.7(a), cmt. ¶ 3.

**2. Provision of Investment Services to Clients**

ER 5.7 also recognizes that a lawyer may provide law-related services to existing clients. But more exacting ethical restrictions then apply, whether or not the attorney offers such services through an entity separate from the lawyer's provision of legal services. Where a lawyer contemplates business dealings with an existing client, the Rules impose a "heavy burden" on the lawyer to show compliance with "stringent disclosure and consent requirements." These requirements may, as a practical matter, be difficult to meet. *See* Ariz. Ethics Op. 99-09 at 5.

"When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related services entity controlled by the lawyer, individually or with others, the lawyer must comply with ER 1.8(a)." ER 5.7, cmt. ¶ 6. Similarly, the comment to ER 1.8 notes that this rule applies to the lawyers engaged in the sale of law-related goods or services, such as investment services, to existing clients of the lawyer's legal practice. ER 1.8, cmt. ¶ 1.

Also relevant is ER 1.7, the general conflict of interest rule, which recognizes that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." ER 1.7, cmt. ¶ 1. Under ER 1.7(a), a lawyer generally may not represent a client if there is a significant risk that the representation will be materially limited by the lawyer's personal interest. Such a "personal interest" conflict may not be waived by a client's informed consent unless, despite the conflict, the lawyer "reasonably believes" the lawyer will be able to provide competent and diligent representation. ER 1.7(b).

Where existing clients are involved, the facts posed by the inquiring attorney describe a proposed business transaction with a client. As such, the transaction must satisfy both ER 1.7 and ER 1.8 to comply with the ethical rules.

As a threshold determination, the lawyer must assess whether the lawyer can refer the client for investment services by the lawyer's separate business, which will receive fees from a third-party investment advisory firm, and also "reasonably believe" that the lawyer will be able to provide competent and diligent representation as required by ER 1.7. *See* Ariz. Ethics Op. 99-09; Conn. Bar Ass'n, Informal Op. 97-16 (1997). If the answer to this question is no, the lawyer may not provide investment advisory services to the client.

Application of ER 1.7 raises the question whether a lawyer's accepting a "referral fee" for providing investment-related services to a client poses a "per se" conflict of interest under ER 1.7. Opinion 98-09, as noted above, concluded that operation of an investment advisory service very similar to that described by the inquiring attorney presented a "per se" conflict or, in terms of the current Rules, a nonconsentable conflict. For several reasons, we do not believe that Opinion 98-09 is correct with respect to the investment program described by the inquiring attorney.

First, and perhaps most importantly, Opinion 98-09 predates the adoption of ER 5.7 and does not discuss the proposed transaction in terms of ER 1.8(a), which governs business transactions with clients. *See* Opinion 98-09 at 4 n.2 . ER 5.7 does not adopt a blanket prohibition on a lawyer referring a client for ancillary business services in which the lawyer has a financial interest, but instead contemplates that ER 1.8(a) will apply to such activity. With respect to existing clients, the program described by the inquiring attorney does, in fact, involve a transaction in which a lawyer would be engaging in a business transaction by virtue of providing investment-related services and receiving a referral fee or commission from a third party.

Second, in concluding that the proposed payment of a referral fee for investment services presented a "per se" conflict, Opinion 98-09 noted several concerns. Specifically, the opinion observed that if a lawyer receives a fee from a third party for referring a client for investment-related services, then: (1) disclosure of the attorney-client relationship to a third party for a fee may reduce the client's confidence in the lawyer's ability to provide independent advice; (2) the lawyer's professional judgment may be affected by the fact that the lawyer will receive a fee that is a percentage of the fee the client pays to the investment advisory firm; (3) the client may be reticent with the lawyer because of concerns that information will be given to the investment advisor; and (4) the lawyer, in the converse situation, could not pay a fee to the investment advisor firm for referring clients to the lawyer. *See* Opinion 98-09 at 5-6.

These concerns, however, do not support the conclusion that a "per se" or unconsentable conflict arises if a lawyer accepts a fee or commission - even if characterized as a referral fee - from an investment advisory firm to which a lawyer, providing investment-related services, refers clients. The concerns noted in points (1) and (3) are obviated by the fact that a lawyer in this situation must comply with the obligations of ER 1.6 regarding confidentiality. Absent a client's informed consent, a lawyer generally may not reveal information relating to the representation of the client to a third party. *See* ER 1.6(a). This confidentiality rule applies not only to matters communicated in confidence by the client, but to all information relating to the representation, whatever its source. *Id.* cmt. ¶ 3. See also Conn. Bar Ass'n, Informal Op.

97-16 (1997) at 2 (noting that lawyer who refers client to investment advisor and receives referral fee must comply with ER 1.6). Moreover, we note that the same concerns, and the same obligations of confidentiality under ER 1.6, would apply if the lawyer referred the client to an investment advisory company and directly charged the client a fee for the lawyer's investment-related services.

The concern noted in point (2) is no different than any other situation where a lawyer contemplates entering a business transaction with a client. The prospect that the lawyer will benefit financially in either situation poses the danger of affecting the lawyer's independent judgment. But the Rules do not contemplate that this danger in itself supports a blanket prohibition on lawyers engaging in business transactions with their clients. Instead, the Rules provide such transactions may be permitted if the stringent requirements of ER 1.7 and ER 1.8(a) are satisfied in the particular circumstances.

With respect to point (4), the fact that lawyers may not pay others fees for referring clients to the lawyer, we note that ER 5.7 expressly contemplates that lawyers may refer persons, both clients and non-clients, to separate entities for non-legal, but law related, services. Presumably, the lawyers involved will charge for such services. Thus, the issue presented is more correctly posed as whether a lawyer who provides law-related services to a client may be paid for such services by a third party in the form of a "referral fee" or commission. This situation is more like a third party paying for a lawyer's providing legal services to a client than a lawyer paying the third party for referring the client to the lawyer. Under ER 1.8(f), a lawyer is not prohibited "per se" from accepting payment from a third party for representing a client. Instead, such payment is permitted so long as the client gives informed consent, there is no interference with the lawyer's independent professional judgment or the client-lawyer relationship, and information relating to the representation is protected as required by ER 1.6.

Finally, as also noted above, Opinion 99-09 concluded that a lawyer may offer securities and investment-related services to legal clients if the lawyer complies with the requirements of ER 1.7 and ER 1.8(a). This opinion recognized that the lawyer would be paid a commission for selling securities or insurance products to a client and did not base its conclusion on whether the commission was paid by the client or the third-party provider of the securities or insurance products. Instead, Opinion 99-09 focused on whether, in any particular transaction, a lawyer could reasonably believe that the provision of the non-legal services would not adversely affect the legal representation and, if so, whether the client gives written consent to a transaction that satisfies the fairness requirements of ER 1.8(a) after sufficient disclosure. *See* Opinion 99-09 at 5-6.

For the foregoing reasons, we agree with the approach taken in Opinion 99-09 and believe it should apply to the inquiring attorney's acceptance of a referral fee, through

the lawyer's separate investment services business, for referring clients to an investment advisory firm. Hence, ER 1.7 presents a threshold inquiry, but not a "per se" barrier. **[4]** A lawyer may not accept such a fee unless the lawyer reasonably believes that the lawyer will still be able to provide competent and diligent representation to the client. If this condition is met, the lawyer must then consider the requirements under ER 1.8(a).

Under ER 1.8, a lawyer may engage in a business transaction with an existing client only under narrowly defined conditions. Although ER 5.7 allows a lawyer to provide law-related services to a client through a separate entity, the lawyer still must satisfy the specific requirements under ER 1.8:

(1) the transaction must be fair and reasonable to the client;

(2) the transaction must be fully disclosed to the client and transmitted in writing in a manner that the client can reasonably understand;

(3) the client must be advised in writing of the desirability of seeking and must be given the opportunity to seek the advice of independent legal counsel in the transaction; and,

(4) the client must give 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.

ER 1.8(a).

A lawyer faces a "substantial burden" in showing that these requirements are met. *See* Ariz. Ethics Op. 99-09 at 6-8.

In the context of a lawyer providing investment-related services to an existing client, the lawyer must show that each such transaction is fair and reasonable. *Id.* Among other things, the lawyer will bear the burden of showing that the lawyer's compensation is reasonable under the circumstances and that the "client was not taken advantage of in any way." *Id.* (quoting Cal. State Bar Standing Comm. on Prof'l Responsibility Op. 1995-140 at 6.) Thus, the lawyer will be obliged to show that any fees or commissions received are reasonable in relation to the investment-related services provided to the client referred to the third-party investment advisory company. *See* Ariz. Ethics Op. 99-09 (noting lawyer's burden to show reasonableness of compensation received in form of commissions for brokering insurance or securities products to clients).

The transaction must also be fully disclosed to the client in a manner the client can reasonably understand. Such disclosure must include all of the facts relating the lawyer's relationship to any particular investment advisory firm whose products he might sell, including the amount and manner in which the lawyer will receive commissions or fees. The lawyer also must disclose whether comparable products or services are available from other sources and their relative costs and all the reasonably foreseeable adverse consequences of the transaction. *See* Ariz. Ethics Op. 99-09 at 7.

ER 1.8 also requires the lawyer to advise the client in writing of the desirability of seeking the advice of independent legal counsel in the transaction, and the client must have a reasonable opportunity to seek such advice. Thus, a lawyer who contemplates providing investment advisory services to existing clients must affirmatively encourage them to obtain the advice of independent counsel and not merely casually suggest that they consult with another lawyer. *See* Ariz. Ethics Op. 99-09 at 8. **[5]**

The final requirement under ER 1.8 is that the client provide, in writing, informed consent 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. A client's consent is not "informed" unless the lawyer adequately explains both the material risks of the proposed transaction and reasonably available alternatives. *See* ER 1.0(e); ER 1.8, cmt. ¶ 2.

The inquiring attorney states that legal services will not be provided in the same matter in which clients are provided investment-related services. It is particularly important that clients understand that they are not receiving legal services and that certain protections, such as the attorney-client privilege, do not apply to the investment transactions. Moreover, the inquiring attorney is acting prudently in not providing legal and investment-related services in the same matter. Significant risks are posed where a lawyer attempts to play a dual role as both a legal advisor and participant in a transaction. A lawyer may not even seek a client's consent to such dual roles unless the lawyer reasonably believes that the lawyer still can provide competent and diligent representation, which may be impossible given the lawyer's interest in the transaction. *See* ER 1.7(b); ER 5.7, cmt. 8.

**3. Advertising and Maintaining Separation of Law-Related Services**

The inquiring attorney notes that while the investment advisory activities will be conducted through an entity separate from that providing legal services, the lawyer will work out of a single office. Separate phone numbers and letterhead will be used for the investment-related activities, and the letterhead and business cards for the investment business will not indicate that the lawyer has a license to practice law. Moreover, the

inquiring attorney states that separate books and records will be kept for the investment-related business as distinct from the attorney's legal practice. The inquiring attorney also states that he will not use the investment-related business as a conduit for directing clients to the lawyer's legal practice.

Under ER 5.7, "a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services." ER 5.7, cmt. 8. Moreover, a lawyer who operates an investment advisory referral program must also comply with ERs 7.1 through 7.3 regarding advertising and solicitation. *See* ER 5.7, cmt. 10.

A lawyer operating a separate law-related business is generally prohibited under ER 7.2(b) from giving any person anything of value for referring prospective clients to the lawyer for legal services. Moreover, under ER 5.4, a lawyer generally may not share legal fees with a non-lawyer, including non-lawyers who might be involved in a lawyer's separate law-related business activities.

In Opinion No. 97-08, this Committee clarified previous Arizona opinions regarding a lawyer's participation in dual professions. The opinion states that "the major theme gleaned from these [prior] opinions is that, although simultaneous engagement in a business career and the practice of law is permissible, the businesses/professions must be kept independent in operation and practice." Ariz. Ethics. Op. 97-08 at 4. Specifically, a lawyer may operate an ancillary business such as investment services from the same physical location as his or her law office, but must maintain "separate phone numbers, letterheads, books and records as well as assuring that all legal files will remain confidential." *Id.* Furthermore, the lawyer may include on legal letterhead and business cards that he or she is also a Registered Investment Advisor. Ariz. Ethics Op. 88-05 (1988). The lawyer may not, however, show both licenses on letterhead or business cards for his or her investment advisory service. *Id.* By following these precautions, a lawyer may reduce the risk of confusion when providing both legal and non-legal services.

**CONCLUSION**

In the circumstances described, under ER 5.7, the inquiring attorney, who operates a separate investment advisory business, is not ethically prohibited from referring non-clients to a third-party investment advisory firm and accepting a referral fee from the firm. The inquiring attorney may also refer current clients to an investment advisory firm and accept a referral fee if the lawyer complies with ER 1.6, ER 1.7 and ER 1.8(a). Finally, the inquiring attorney must comply with ERs 7.1 through 7.3 and take special care to keep separate the provision of legal and non-legal services to avoid public confusion.

## DISSENT TO OPINION NO. 05-01

## INTRODUCTORY COMMENT

Unlike the majority, we believe the Committee should reaffirm its earlier view in Op. 98-09, which recommended imposing a per se ban against lawyers accepting money from third-party professionals in exchange for referring law clients to those third-party payors. However, like the majority, we agree that a lawyer can accept a fee from a third-party professional for referring non-clients to the third-party's firm, provided that the lawyer complies with Rule 5.7.

## OTHER APPLICABLE ETHICAL RULES

### ER 1.8 Conflict of Interest; Current Clients; Specific Rules

* * * *

(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 ER 1.6.

## DISCUSSION

Analysis Under Rule 5.7: Identify The Proposed Services And Determine Whether or Not Any Of Them Are Subject To The Rules of Professional Conduct:

We begin our analysis with Rule 5.7, entitled "Responsibilities Regarding Law Related Services." Also known as "ancillary services" law-related services are defined in Rule 5.7(b) as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

To be sure, lawyers in Arizona and elsewhere were allowed to provide law related services before Rule 5.7 was adopted. **[6]** The innovation brought about by Rule 5.7 is

that it established a standard gate-keeping mechanism to determine whether and when the Rules of Professional Conduct apply or do not apply in cases where such services are provided by a lawyer or by an entity owned or controlled by a lawyer. The Rule 5.7 analysis must be performed regardless of whether the persons referred by the lawyer are the lawyer's law clients or not.

Rule 5.7 states that the Rules of Professional Conduct apply with full force when the law-related services are provided in circumstances indistinguishable from the lawyer's law practice. By contrast, Rule 5.7 states that the Rules of Professional Conduct do not apply when the law-related services are performed by an entity owned or controlled by the lawyer, separate from the lawyer's law practice, provided that the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not apply. There is a limited exception in the latter case: Even when the law-related services are being provided in such a manner that the Rules of Professional Conduct otherwise do not apply, the lawyer must still comply with Rule 1.8(a) when the law-related (ancillary) services are being provided by the lawyer to law practice clients.

The lawyer in the present inquiry proposes to offer two services, both of which fall under the definition of "law-related services" within the meaning of Rule 5.7(b) in the sense that either could be undertaken by a non-lawyer without "practicing law": (1) making referrals to a third-party investment firm and (2) performing a limited "watchdog" function over the activities of the third-party firm. The issue is whether the proposed services will be provided in circumstances distinguishable from the lawyer's law practice and whether the lawyer takes reasonable measures to assure that a person obtaining law-related services knows that services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not apply. Rule 5.7(a).

While the gate-keeping function in Rule 5.7 does not directly depend on whether or not the persons referred by the lawyer are clients of the lawyer's law practice, the involvement of clients can be a factor in determining whether or not the services will be provided in circumstances "indistinguishable" from the lawyer's law practice.

In this case, one of the proposed services is the rendition of a referral. By its very nature, a referral is a form of advice - a recommendation. Regardless of whether or not advice given by a lawyer to a client in the course of the attorney-client relationship is considered to be "legal advice," the advisory function lies at the very heart of the attorney-client relationship. The fact that the lawyer set up a separate entity to make the referrals is eclipsed by the substance of what the lawyer and the investment advisor are trying to accomplish and by its potential effects on the lawyer's law clients. The whole

point of paying a referral fee to a lawyer is to tap into the relationship of trust and confidence nurtured over time between the lawyer and the lawyer's clients for the benefit of the lawyer and the person paying the referral fee. But the relationship of trust and confidence that gives the lawyer the credibility to make the referral does not disappear just because the lawyer proposes to wear a different hat when rendering that advice. The substance of the transaction controls, not the form, and the substance is that the referral and the fee are designed to build a bridge leading directly from the lawyer's door to the third-party investment adviser's door. Thus, whenever the persons being referred are law firm clients, the referrals are indistinguishable from the lawyer's law practice and are subject to the Rules of Professional Conduct.

By contrast, whether or not the Rules of Professional Conduct apply when the referrals are made to persons who are not clients of the lawyer's law practice depends on whether or not the lawyer complies with Rule 5.7.

A word of caution is in order here. Our dissenting opinion should not be interpreted to mean that the Rules of Professional Conduct always apply when law related services are being provided to clients. That is not what Rule 5.7 says and that is not what we are saying in this dissent. The Rules of Professional Conduct do apply whenever the lawyer renders advice to law firm clients in circumstances which cannot be distinguished from the law practice (again, regardless of whether or not the advice, strictly speaking, is "legal advice"). But whether the Rules apply to other services (including the rendition of advice) provided to law clients outside of the law firm depends on the nature of those services and any other relevant factors which tend to establish or negate connections between the proposed service and the law practice. In other words, it is important to carefully identify and distinguish each proposed service and determine whether it can be differentiated from the law practice.

For example, *see* Comment 5 to Rule 5.7. That comment clearly envisions situations where the services provided by the lawyer's separate entity are sufficiently distinguishable from the law practice that they may be carried on outside of the Rules of Professional Conduct. However, because the referral is to the lawyer's own business, the lawyer must still comply with Rule 1.8(a) (business transactions with clients) if the persons being referred are clients of the lawyer's law practice. As we interpret Comment 5, the referral and the services rendered by the ancillary business are two separate things. The referral is the lawyer's introduction to the ancillary business, not a service rendered by the ancillary business itself. Thus, while the activities of the ancillary business may not be subject to the Rules of Professional Conduct (except Rule 1.8(a), when the services are provided to clients), the referral itself is subject to all applicable

Rules of Professional Conduct because it makes the connection between the lawyer's law practice and the lawyer's ancillary business.

**The Lawyer Cannot Accept A Third-Party Fee For Referring Clients To The Third Party Payor**

In Ariz. Op. 98-09, the Committee recommended imposing a per se ban against lawyers accepting referral fees for referring law firm clients to third party professionals. In that case, as in this case, the third-party was an investment adviser. We expressed the view that the situation presented a non-consentable conflict under Rule 1.7(b). In other words, we were of the opinion that the inherent problems were such that no lawyer could reasonably conclude that the conflict could be cured by disclosure and consent. As more fully explained below, those of us who have joined this dissent continue to recommend the adoption of a per se ban against lawyers receiving third-party referral fees in exchange for referring law clients to the person paying the lawyer's fee.

Turning to the present inquiry, we note some ambiguity in the facts. In Op. 98-09, the lawyer was not proposing to do anything other than make referrals. In that case, it was clear that the fee was being paid solely for making the referral. By contrast in this case, the lawyer is proposing to make the referrals and to perform a limited monitoring or "watchdog" function. It is unclear whether the lawyer has any legal duty to perform the monitoring function. No matter. There are no facts to indicate that the third-party investment firm would withhold payment of the lawyer's fee if the lawyer failed to monitor the investment firm's activities - something that seems highly unlikely as long as the referrals keep coming. Indeed, without the referrals the lawyer wouldn't have any accounts to monitor. In other words, in this case at least, the monitoring services are inseparable from the referrals.

So long as the reality of the transaction is that a third-party professional is proposing to pay a lawyer to refer law clients to the third-party, the lawyer is barred from accepting those payments under Rule 1.7 and Op. 98-09. Indeed, as more fully set forth in the paragraphs that follow, we believe that the per se ban recommended in Op. 98-09 is supported not only by Rule 1.7, but by Rule 1.8(f) as well.

Initially, allowing lawyers to be paid for referring clients to unrelated professionals seems to fly in the face of the public protection spirit of the Rules of Professional Conduct. We note only two express references to referrals in the Rules of Professional Conduct: The first is ER 1.5(e), which prohibits lawyers from accepting referral fees from other lawyers unless, among other things, the referring lawyer assumes joint responsibility for the representation. The second is ER 7.2(b), barring lawyers from accepting referrals from paid "cappers." Against this background, it seems self-

contradictory that rules of more general application, for example, ERs 1.7(b), 1.8(a) and 5.7, should be construed to allow lawyers to, in effect, become cappers for other professionals without assuming any responsibility for the third-party's treatment of the lawyer's clients. That incongruity was not lost on the Committee when it drafted Op. 98-09. **[7]**

We also believe that a per se ban is justified by a cost-benefit analysis that burdens the client with all the risks while all the benefits go to the lawyer and the third-party payor. Arrangements of this nature are fraught with inherent conflicts, otherwise known as risks. Those risks will be borne solely by the client who will be faced with the prospect of uncertain and expensive litigation or no remedy at all if the risks come to pass. That is inconsistent with the policy of protecting the public when the referral fee doesn't benefit the client in the least.

But more fundamentally, the conflicts and the impairment of the lawyer's judgment inherent in this situation are indelible, and the potential cure threatens to do more harm than good. Thus, we believe that the per se ban is supported by Rule 1.7(b) and Rule 1.8(f), alone or in combination with one another.

As we already pointed out, a referral is a form of advice (a recommendation). Under Rule 1.8(f)(2), a lawyer would never be permitted to accept payment from a third party if that payment were conditioned on the lawyer giving specific advice. But that's exactly what happens when a third party pays a referral fee: the lawyer won't get that fee unless he advises the client to consult the person paying the lawyer's fee. Although the degree of impairment may vary depending on the individual lawyer, impairment of the lawyer's professional judgment is unavoidable when the lawyer's self-interest depends on the nature of the lawyer's advice. In addition, the whole intent behind payment of the fee is to narrow alternatives that would "otherwise be available to the client," a practice proscribed under Rule 1.7. *See* Comment 8 to Rule 1.7.

Moreover, before the lawyer could accept a third-party referral fee, Rule 1.7(b) would require the lawyer to disclose the fee and explain how the lawyer's advice may be tainted by the payment of that fee. At a minimum, the lawyer would have to disclose the following risks: (1) the alternatives presented to the client are being narrowed; (2) the lawyer is referring the client to the third-party professional based not solely on the lawyer's best professional judgment; (3) that the lawyer's judgment may be clouded by the payment of a fee from the very person who proposes to take over the client's affairs. In other words, the lawyer would have to disclose to the client, in effect, "There's a risk that I'm putting my self-interest above your well-being." Worse, the client will be told that these risks pertain to making a referral, a form of advice, which strikes at the heart of the attorney-client relationship.

Aside from the fact that the necessary Rule 1.7(b) disclosures would eviscerate the very purpose of the referral - to tap into the relationship of trust and confidence between the lawyer and the client - there is a strong likelihood that, in many cases, the disclosure itself will undermine the client's trust and confidence in the lawyer if the disclosure is properly made. If the disclosure is not properly made, there is a strong likelihood that it will be because the lawyer had a financial incentive not to make a bona-fide disclosure. In other words, the proposed arrangement presents a lose-lose situation both for the well-being of the attorney-client relationship and for the larger system of justice in which it functions.

**CONCLUSION**

The dissenters believe that, under ER 1.7(b) and ER 1.8(f), a lawyer is barred from accepting a fee from a third-party professional in exchange for referring law clients to the third-party. Whether the lawyer can accept such a fee for referring non-clients depends on whether the lawyer complies with Rule 5.7.

**Footnotes**

**[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. c State Bar of Arizona 2003**

**[2]** Such opinions generally concluded that a lawyer's acceptance of a referral fee created an impermissible conflict of interest, irrespective of disclosure and consent by the client. *See* Iowa Sup. Ct., Board of Prof'l Ethics and Conduct, Op. 99-04 (1999); Ky. Bar Ass'n, Op. E-390 (1996); Me. Bar Ass'n, Op. 184 (2004); Md. State Bar Ass'n, Op. 96-17 (1995); N.Y. State Bar Ass'n, Op. 682 (1996); N.C. State Bar Ass'n, Op. 99-1 (1999); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2000-1 (2000); Tex. State Bar Ass'n, Op. 536 (2001); Vt. Bar Ass'n, Op. 98-8.

**[3]** *See* Cal. State Bar Ass'n, Op. 1999-154 (1999); Conn. Bar Ass'n, Informal Op. 97-16 (1997); Fla. Bar Ass'n, Op. 02-8 (2004); Ill. State Bar Ass'n, Op. 97-04 (1998); Mich. State Bar Ass'n, Op. RI-317 (2000); Mo. Bar Ass'n, Informal Adv. Op. 960124; Pa. Bar Ass'n, Op. 2000-100 (2000); R.I. Sup. Ct., Ethics Advisory Panel, Op. 99-08 (1999); Utah Bar Ass'n, Adv. Op. 99-07 (1999).

**[4]** To the extent Opinion 98-09 conflicts with this conclusion, that Opinion has been superseded by ER 5.7. We note, furthermore, that the analysis in the present opinion is limited to situations where a lawyer is conducting investment advisory services - and accepting referral fees - through a separate business as contemplated by ER 5.7. This opinion does not suggest that it would be appropriate for a lawyer, through the lawyer's legal practice, to accept referral fees for referring clients to non-lawyer professionals.

**[5]** If a client has independent counsel in a transaction, the requirement of full disclosure under ER 1.8(a)(1) may be satisfied by written disclosure by the lawyer involved in the transaction or the client's independent counsel.*See* ER 1.8 cmt. ¶ 4.That a client has independent counsel is also relevant in determining if a transaction is fair and reasonable as required by ER 1.8(a).*Id.*

**[6]**See the Committee's previous opinions to that effect (ancillary businesses not prohibited) summarized in Ariz. Op. 97-08 at pp. 2-4.

**[7]** See Ariz. Op. 98-09, p. 6, "Finally, the Committee notes that in the converse situation an attorney would not be permitted to pay a referral fee to the investment adviser firm or another third party for referring clients to the attorney under ER 7.1(j).

**FLORIDA BAR ETHICS OPINION**
**OPINION 24-1**
**January 19, 2024**

**Advisory ethics opinions are not binding.**

Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

**RPC:** 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)

**OPINIONS:** 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842

**CASES:** *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are "deep-learning models" that compile data "to generate statistically probable outputs when prompted." IBM, What is generative AI?, (April 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

**Confidentiality**

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

**Oversight of Generative AI**

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. 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 subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

**Legal Fees and Costs**

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

> The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

## Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

> (3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]
>
> * * *
>
> (5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

## Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

**THE STATE BAR OF CALIFORNIA**
**STANDING COMMITTEE ON**
**PROFESSIONAL RESPONSIBILITY AND CONDUCT**

# PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

## EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as "best practices."

## PRACTICAL GUIDANCE

| Applicable Authorities | Practical Guidance |
|---|---|
| **Duty of Confidentiality**<br>Bus. & Prof. Code, § 6068, subd. (e)<br>Rule 1.6<br>Rule 1.8.2 | Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security.<br>A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client.<br>A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.<br>A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product. |
| **Duties of Competence and Diligence**<br>Rule 1.1<br>Rule 1.3 | It is possible that generative AI outputs could include information that is false, inaccurate, or biased.<br>A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.<br>Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.<br>Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.<br>AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for |

| Applicable Authorities | Practical Guidance |
|---|---|
| | accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.<br><br>A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities. |
| **Duty to Comply with the Law**<br><br>Bus. & Prof. Code, § 6068(a)<br><br>Rule 8.4<br><br>Rule 1.2.1 | A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools.<br><br>There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client. |
| **Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers**<br><br>Rule 5.1<br><br>Rule 5.2<br><br>Rule 5.3 | Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use.<br><br>A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations. |

| Applicable Authorities | Practical Guidance |
|---|---|
| **Communication Regarding Generative AI Use**<br>Rule 1.4<br>Rule 1.2 | A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.<br>The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.<br>A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI. |
| **Charging for Work Produced by Generative AI and Generative AI Costs**<br>Rule 1.5<br>Bus. & Prof. Code, §§ 6147–6148 | A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI.<br>Costs associated with generative AI may be charged to the clients in compliance with applicable law.<br>A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI. |
| **Candor to the Tribunal; and Meritorious Claims and Contentions**<br>Rule 3.1<br>Rule 3.3 | A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court.<br>A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI. |
| **Prohibition on Discrimination, Harassment, and Retaliation**<br>Rule 8.4.1 | Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees).<br>Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases. |

| Applicable Authorities | Practical Guidance |
| --- | --- |
| **Professional Responsibilities Owed to Other Jurisdictions**<br>Rule 8.5 | A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules. |

**PENNSYLVANIA BAR ASSOCIATION COMMITTEE**
**ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY**
**and**
**PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE**
**JOINT FORMAL OPINION 2024-200**

# ETHICAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE

## Introduction

Artificial Intelligence ("AI") has fundamentally transformed the practice of law by revolutionizing various aspects of legal work. AI-powered software can perform legal research, contract analysis, and document review tasks, saving time and increasing efficiency. AI can also help predict legal outcomes, manage cases, and automate routine tasks. AI technology has facilitated the automation of routine legal tasks, allowing legal professionals to focus on higher-value work requiring human expertise and judgment.

Generative AI has taken the advances of AI even further. It can assist lawyers by automating document drafting, preparing summaries, analyzing and synthesizing large volumes of documents and other information, optimizing efficiency, and allowing for more focused attention on legal strategy and client needs.

In short, the use of AI has gone from something in movies to an everyday tool in the practice of law. This technology has begun to revolutionize the way legal work is done, allowing lawyers to focus on more complex tasks and provide better service to their clients.

To attorneys, the thought of using AI to draft pleadings and briefs and review documents may seem unfamiliar and even intimidating because the technology is relatively new, and many attorneys have not used it. Now that it is here, attorneys need to know what it is and how (and if) to use it.

The use of AI has also raised ethical issues for attorneys. Topics such as client confidentiality and competence in the use of AI are at the forefront of our day-to-day legal practices. As outlined in more detail in the "Guidance & Best Practices for the Use of Artificial Intelligence" section below, this Joint Opinion is intended to educate attorneys on the benefits and pitfalls of using this type of technology, and provide ethical guidelines, including:

- Lawyers must ensure that AI-generated content, such as legal documents or advice, is truthful, accurate, and based on sound legal reasoning, upholding principles of honesty and integrity in their professional conduct.

- Lawyers must be competent in the use of AI technologies.

- Lawyers must ensure the accuracy and relevance of the citations they use in legal documents or arguments. When citing legal authorities such as case law, statutes, regulations, or scholarly articles, lawyers should verify that the citations accurately reflect the content they are referencing.

- Lawyers must safeguard information relating to the representation of a client and ensure that AI systems handling confidential data adhere to strict confidentiality measures.

- Lawyers must be vigilant in identifying and addressing potential conflicts of interest arising from using AI systems.

- Lawyers must communicate with clients about their use of AI technologies in their practices, providing clear and transparent explanations of how such tools are employed and their potential impact on case outcomes.

- Lawyers must ensure that AI-related expenses are reasonable and appropriately disclosed to clients.

- Lawyers must engage in continuing legal education and other training to stay informed about ethical issues and best practices for using AI in legal practice.

The rapid growth of AI is forcing the legal profession to confront and adapt to it. As with other forms of technology, from cloud computing to virtual offices, these new technologies implicate old ethical problems. This opinion will clarify how our existing ethical rules impact the proper use of this technology.

The Committees also emphasize that lawyers must be proficient in using technological tools to the same extent they are in employing traditional methods. Whether it is understanding how to navigate legal research databases, use e-discovery software, use their smartphones, use email, or otherwise safeguard client information in digital formats, lawyers are required to maintain competence across all technological means relevant to their practice.

## Definitions of Artificial Intelligence

### 1. Artificial Intelligence

The *Oxford English Dictionary* defines "artificial intelligence" as "software used to perform tasks or produce output previously thought to require human intelligence, esp. by using machine learning to extrapolate from large collections of data."[1]

The National Artificial Intelligence Act of 2020 defines "artificial intelligence" as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action."[2]

### 2. Generative Artificial Intelligence

Although artificial intelligence has been used for decades, generative AI represents a significant change and a dramatic step forward in legal applications, because instead of only analyzing content, it can also generate new content. McKinsey and Company explain that "Generative artificial intelligence (AI) describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and videos."[3]

Generative AI and large language models are like two peas in a pod. Generative AI is the brain behind creating new output, including text, images, and music, by learning from existing data. Of particular concern is the type of generative AI, which, unlike its predecessors, is used not only to analyze data but also to create novel content. Generative AI creates this content using large language models, in which a model is "trained" on vast amounts of data, rendering it able to generate new content by referring back to the data it has ingested. The release of OpenAI's ChatGPT in November 2022 ushered in this new era of technological development.

## Artificial Intelligence's Application for Lawyers

AI has already been used for many years in various legal software applications including document review, legal research, and document assembly. Generative AI differs from non-generative AI because it creates content, and it is the creation of content that necessitates heightened awareness by lawyers.

For example, document review software has enabled Technology-Assisted Review ("TAR") of large document collections, sometimes referred to as "predictive coding" or "computer-assisted review." The Sedona Conference defines TAR as "A process for prioritizing or coding a collection of electronically stored information using a computerized system that harnesses human judgments of subject-matter experts on a smaller set of documents and then extrapolates those judgments to the remaining documents in the collection. … TAR systems generally incorporate statistical

[1] https://www.oed.com/dictionary/artificial-intelligence_n
[2] 15 U.S.C. 9401(3).
[3] https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai

models and/or sampling techniques to guide the process and to measure overall system effectiveness."[4]

Similarly, technology is deployed within legal research software to identify other authorities of interest to the researcher based on the authorities with which the researcher has engaged. Legal research software traditionally utilizes AI for document indexing and natural language processing, enabling it to categorize and index legal documents and efficiently retrieve relevant information. Because generative AI creates content, however, lawyers have an obligation to verify that the citations are correct and that they accurately summarize the cases or other information cited.

In legal applications, generative AI is like having an assistant who can create legal documents, analyze cases, and provide insight into potential outcomes of legal issues. It works by learning from legal data and examples and then using the knowledge to generate new legal documents or predictions. Thus, instead of spending hours drafting contracts or researching case law, lawyers can now use generative AI to speed up their work and make more informed decisions.

**Hallucinations & Biases**

Among the reasons that AI, particularly generative AI, is so controversial is that the software sometimes responds to queries with "hallucinations," or "false answers." IBM describes hallucinations as follows:

> AI hallucination is a phenomenon wherein a large language model (LLM)—often a generative AI chatbot or computer vision tool—perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate.
>
> Generally, if a user makes a request of a generative AI tool, they desire an output that appropriately addresses the prompt (*i.e.*, a correct answer to a question). However, sometimes AI algorithms produce outputs that are not based on training data, are incorrectly decoded by the transformer or do not follow any identifiable pattern. In other words, it "hallucinates" the response.

Generative AI is not a clean slate, free from prejudices and preconceptions. To the contrary, AI has biases that are the result of the data input into them. These biases can lead to discrimination, favoring certain groups or perspectives over others, and can manifest in areas like facial recognition and hiring decisions. Addressing AI biases is essential to obtaining the best results.

Lawyers have fallen victim to hallucinations and biases, signing their names to briefs authored entirely by or with the assistance of AI, which included some nonexistent cases. Some recent examples include:

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[4] The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition, 21 SEDONA CONF. J. 263 (2020) (definition adopted from Maura R. Grossman & Gordon V. Cormack, The Grossman-Cormack Glossary of Technology Assisted Review with Foreword by John M. Facciola, U.S. Magistrate Judge, 7 FED. CTS. L. REV. 1, 32 (2013)).

- A New York lawyer filed a brief citing fake cases generated by ChatGPT, stating in an affidavit that he consulted ChatGPT for legal research when preparing a response to a motion, and that ChatGPT provided the legal sources and assured him of the reliability of the opinions. The lawyer ultimately admitted that the source of the legal opinions had "revealed itself to be unreliable."[5]
- A New York lawyer filed an appellate reply brief citing a nonexistent case, and was referred to the court's Grievance Panel.[6]
- A Colorado lawyer submitted a brief that included false citations generated by ChatGPT. "Respondent provided example searches/results to explain his confidence in the technology. Based on the prior results, he explained, 'it never dawned on me that this technology could be deceptive.'"[7]

An example of AI bias in legal applications can be found in the predictive algorithms for risk assessment in criminal justice systems. If the algorithm disproportionately flags individuals from marginalized communities as high-risk, it could lead to unjust outcomes such as harsher sentences, perpetuating systemic biases within the legal system.

These and similar incidents have caused much concern about AI, and generative AI in particular.

**How Courts Are Reacting to AI**

Courts have begun to create new rules or implement new policies relating to the use of AI in court submissions. Some Courts are mandating certain attorney disclosures and verifications when submitting any document to the Court that may be generated in whole or in part by some form of AI program or application.

For example, one federal judge in the Eastern District of Pennsylvania has issued a standing order requiring:

> … that counsel (or a party representing himself or herself) disclose whether he or she has used generative Artificial Intelligence ("AI") in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court, including in correspondence with the Court. He or she must, in a clear and plain factual statement, disclose that generative AI has been used in any way in the preparation of the filing or correspondence and certify that each and every citation to the law or the record in the filing has been verified as authentic and accurate.[8]

A federal judge in Texas has a standing order requiring a Mandatory Certification Regarding Generative Artificial Intelligence. The Order identifies that generative AI "is the product of programming devised by humans who did not have to swear [an attorney's] oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such

[5] *Mata v. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263 (SDNY June 22, 2023).
[6] *Park v. Kim*, No. 22-2057, 2024 WL 332478 (2d Cir, Jan. 30, 2024).1
[7] 2023 Colo. Discipl. LEXIS 64 (Colo. O.P.D.J, Nov. 22, 2023).
[8] https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/praso1_0.pdf

programs act according to computer code rather than conviction, based on programming rather than principle."[9]

Courts are also sanctioning lawyers and their firms for the misuse of AI.

For example, in *Mata*, the Southern District of New York sanctioned attorneys for writing a legal brief using ChatGPT. The Court determined that the lawyers "abandoned their responsibilities" when they submitted the AI-written brief and "then continued to stand by the fake opinions after the judicial orders called their existence into question." Both the individual attorneys and their law firm were fined $5,000 each.[10]

In *People v. Crabill*[11], an attorney was suspended for one year and one day for using cases created by ChatGPT that were not actual cases. The attorney did not cite or check any of the case references generated by ChatGPT, and he solely relied on the technology to create his brief without any review. The Colorado Supreme Court held that his conduct violated Colorado Rules of Professional Conduct 1.1, 1.3, 3.3(a)(1) and 8.4(c).

The Ninth Circuit struck a brief containing false authority drawn from generative AI.[12]

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[9] See https://www.txnd.uscourts.gov/judge/judge-brantley-starr, in which the Judge writes:

> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

[10] *Mata v. Avianca, Inc.*, Case No. 22-CV-1461, 2023 WL 4114965, 2023 U.S. Dist. LEXIS 108263 (S.D.N.Y., July 7, 2023).

[11] *People v. Zachariah C. Crabill*. 23PDJ067. November 22, 2023.

[12] https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-sanctions-for-fake-generative-ai-cites-harm-clients#:~:text=There%20are%20other%20ways%20to,appropriate%20bar%20or%20disciplinary%20committee.

Lawyers are, therefore, facing disciplinary actions, both before judges and disciplinary authorities, for using AI technology without taking appropriate steps to ensure its accuracy and that their clients are receiving effective representation with its use.

## What Other Jurisdictions Are Saying

In every jurisdiction that has issued guidance or made recommendations concerning the use of AI, there is one common theme: Lawyers must recognize the risks and benefits of AI technology. If they choose to use AI, particularly generative AI, they must understand its strengths and weaknesses and employ it consistent with their ethical obligations under the Rules of Professional Conduct.

### Florida

The Florida State Bar, Ethics Opinion 24-1 (2024), concludes that lawyers may use generative AI in the practice of law but must (1) protect the confidentiality of client information, (2) provide accurate and competent services, (3) avoid improper billing practices, and (4) comply with applicable restrictions on lawyer advertising.

The Opinion points out that lawyers must also make reasonable efforts to prevent unauthorized access to client information and understand the risks associated with the use of technology. They also remain responsible for their work product and must verify the accuracy and sufficiency of research performed by generative AI. The Opinion concludes that lawyers must continue to develop competency in the use of generative AI and stay informed about the risks and benefits of new technologies.

### New York

The New York State Bar Association Task Force on Artificial Intelligence issued a Report and Recommendations (2024) in which it offered "no conclusions." Rather, the Task Force stated:

> As a profession, we must continue to refine the initial guidelines suggested in this report and audit the efficacy of proposed rules and regulations. We liken this journey to the mindset of ancient explorers: be cautious, be curious, be vigilant and be brave.

The Report does, however, affirm that lawyers must comply with the Rules of Professional Conduct. In addition, the Report provides (1) an extensive history and analysis of the evolution of AI and generative AI, (2) the benefits and risks of AI and generative AI use, (3) the impact of AI on legal profession, (4) legislative overview and recommendations, (5) AI and generative AI guidelines under the Rules of Professional Conduct.

California

The State Bar of California Standing Committee on Professional Responsibility and Conduct issued "Practical Guidance For The Use Of Generative Artificial Intelligence In The Practice Of Law" (2023), explaining that:

> Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

New Jersey

The New Jersey Supreme Court Committee on Artificial Intelligence and the Courts issued "Preliminary Guidelines On New Jersey Lawyers' Use of Artificial Intelligence" (2024). The Guidelines explain that AI does not change the fundamental duties of legal professionals to be aware of new applications and potential challenges in the discharge of such responsibilities. In particular, the report notes that "As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape."

The Guidelines further explain that the use of AI does not change the lawyer's duty to (1) be accurate and truthful, (2) be honest and candid when communicating, (3) preserve confidentiality, (4) prevent misconduct, including discrimination, and (5) provide oversight to lawyers, nonlawyer staff and others.

Michigan

The State Bar of Michigan, in Ethics Opinion JI-155 (2023), addresses judicial competence and artificial intelligence, and concludes that judicial officers need to maintain competence with advancing technology, especially artificial intelligence, and how it affects their conduct and decisions. The Opinion provides examples of how AI can pose ethical dilemmas, such as bias, partiality, explainability, or accuracy, as well as how AI can assist judges in tasks like docket management, legal research, drafting documents, or answering questions.

The Opinion concludes that judicial officers have an ethical obligation to understand technology, including AI, and take reasonable steps to ensure that AI tools are used properly and within the confines of the law and court rules. The document also recommends that judges ask the right questions and place their analysis and application of AI on the record.

## How the Pennsylvania Rules of Professional Conduct Apply to AI Use for Lawyers

Lawyers' use of artificial intelligence implicates the same ethical issues as other forms of technology. However, there is the additional caveat that lawyers must not only comply with the Rules of Professional Conduct but also ensure that AI adheres to the same requirements.

In particular, the use of AI applies to the lawyer's duties of (1) confidentiality, (2) competence, (3) candor, (4) truthfulness, (5) supervision, (6) communication, (7) conflicts of interest, and (8) the unauthorized practice of law, and implicates the following Rules of Professional Conduct:

### 1. Duty of Competence

Pennsylvania Rule of Professional Conduct 1.1(Competence) states:

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

In addition, Comment [8] states in relevant part:

> 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.

Thus, if a lawyer chooses to use AI or any other technology, the lawyer has the responsibility to (1) understand the technology and how it works, (2) understand the benefits of the technology, (3) understand the risks of the technology, (4) check and verify all citations and the material cited, and (5) especially in cases where the benefits outweigh the risks, have an obligation to educate the client and seek their informed consent to use the technology. At their core, the obligations under all of the relevant Rules are subject to Rule 1.1.

### 2. Communication

Pennsylvania Rule of Professional Conduct 1.4 ("Communication") states:

> (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.

Rule 1.4 requires the lawyer to inform the client of the benefits, risks, and limits of the use of generative AI. In conjunction with the client, the lawyer must also determine whether the permissible use of generative AI would serve the client's objectives in the representation.

3. Duty of Confidentiality

Pennsylvania Rule of Professional Conduct 1.6 ("Confidentiality of Information") states in relevant part:

> A lawyer shall not reveal information relating to representation of a client unless the clients give informed consent, except for disclosures that are impliedly authorized in order to carry out the representation ….

4. Conflicts

Pennsylvania Rules of Professional Conduct Rules 1.7 ("Conflict of Interest: Current Clients") and 1.9 ("Duties to Former Clients") preclude a lawyer from revealing information relating to a representation of a current or former client or from using that information to the disadvantage of the current or former client. Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another. Therefore, a lawyer must not input any confidential information of a client into AI that lacks adequate confidentiality and security protections.

5. Meritorious Claims and Contentions

Pennsylvania Rule of Professional Conduct 3.1 ("Meritorious Claims and Contentions") states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for 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.

In addition, Comment [4] states in relevant part:

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities… The underlying concept is

that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

The ability of AI tools to generate text opens a new frontier in our ethics guidance. Rather than focus on whether a lawyer's choice of specific legal arguments has merit, some lawyers have used Generative AI platforms without checking citations and legal arguments. In essence, the AI tool gives lawyers exactly what they were seeking, and the lawyers, having obtained positive results, fail to perform due diligence on those results. Regardless, whether a baseless argument is made with the assistance of AI or not is irrelevant; the lawyer is responsible.

6. Candor Toward the Tribunal

Pennsylvania Rule of Professional Conduct 3.3 ("Candor Toward the Tribunal") states in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) 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 the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Further, Comment [10] to Rule 3.3 states in relevant part:

> Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false… In such situations… the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial

> action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The full version of this Comment is focused on a false statement by a *client*; however, a lawyer has an obligation to ensure that evidence has not been altered or invented from whole cloth by an AI tool. Upon learning of altered or invented evidence, the lawyer must take "reasonable remedial measures."

Rule 3.3 imposes multiple obligations on lawyers. A lawyer must be both proactive and reactive in not presenting false statements or false evidence to a tribunal. This Rule goes hand in hand with Rule 1.1 (Competence); lawyers must be competent in their use of legal tools, including AI, which may reduce the risk of violating Rule 3.3.

7. Duty to Supervise

Pennsylvania Rule of Professional Conduct 5.1 ("Responsibilities of Partners, Managers and Supervisory Lawyers") states:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Pennsylvania Rule of Professional Conduct 5.3 ("Responsibilities Regarding Nonlawyer Assistance") states:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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

The same ethical rules that apply to lawyers who employ or retain paralegals, junior associates, or outside consultants applies to lawyers who utilize AI. Rule 5.1 addresses the responsibilities of partners, managers, and supervisory lawyers at a law firm and requires that they "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

While Rule 5.3 applies to "non-lawyers" and "persons," where AI is able to function like a human, the Rule should apply with the same force. Thus, when contemplating the appropriate use of generative AI, lawyers should consider whether an AI tool can satisfy the Rules of Professional Conduct to the same extent as a human hired to complete the same tasks.

8. Unauthorized Practice of Law

Pennsylvania Rule of Professional Conduct 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law") states in relevant part:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

In AI's development, even in machine learning, where AI learns independently, humans initially program the technology, making AI essentially a creation of humans. To the extent that the AI programmer is not a lawyer, the programmer may violate Rule 5.5 regarding the unauthorized practice of law. To avoid the UPL, lawyers must ensure that AI does not give legal advice or engage in tasks that require legal judgment or expertise, without the involvement of a licensed attorney. There must always be a human element in the legal work product to ensure that lawyers are upholding their ethical obligations.

9. Duty of Truthfulness

Pennsylvania Rule of Professional Conduct 8.4 ("Misconduct") provides in relevant part:

It is professional misconduct for a lawyer to:

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

**Prior Committee Opinions**

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility in Formal Opinion 2011-200 ("Ethical Obligations For Attorneys Using Cloud Computing/Software As A Service While Fulfilling The Duties Of Confidentiality and Preservation Of Client Property") describes the steps that a lawyer should take when dealing with "cloud" computing, including

detailed lists of required steps and descriptions of what other states have held on the issue. The same rationale applies to a lawyer's use of AI.

In that opinion, the Committee emphasizes that "lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards."

In PBA Formal Opinion 2022-400 ("Ethical Obligations For Lawyers Using Email And Transmitting Confidential Information"), the Committee stated:

> Given the changes in technology and the rise of cyberattacks, this Formal Opinion concludes that the Rules of Professional Conduct require more. Rule 1.1 requires a lawyer to be competent, including understanding the benefits and risks associated with technology such as email. Rule 1.4 requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.6(d) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

In PBA Formal Opinion 2022-500 ("Ethical Considerations For Lawyers Storing Information Relating To The Representation Of A Client On A Smartphone"), the Committee stated:

> … if a lawyer's smartphone contains information governed by Pa.R.P.C. 1.6, then the lawyer may not consent to share the information with a smartphone app unless the lawyer concludes that no human being will view that information, and that the information will not be sold or transferred to additional third parties, without the client's consent.

**Guidance Applicable to Technology Generally**

A lawyer's duty of competence requires them to possess the necessary knowledge and skills to represent their clients effectively. The Committee has previously stated and reaffirms that the obligation extends to the use of technology:

Lawyers must be proficient in using technological tools to the same extent they are in employing traditional methods. Whether it is understanding how to navigate legal research databases, use e-discovery software, use their smartphones, use email, or otherwise safeguard client information in digital formats, lawyers are required to maintain competence across all technological means relevant to their practice.

In sum, lawyers must act reasonably, and their duty of competence applies equally to technology as it does to any other aspect of legal representation.

**Guidance & Best Practices for the Use of Artificial Intelligence:**

When using AI, a lawyer must ensure that any client information and materials remain confidential and safeguard that information to ensure that it is protected from breaches, data loss, and other risks. Multiple Rules of Professional Conduct are implicated in a lawyer's use of AI because so many questions arise:

- Is the client's information being used when forming queries, and if so, is it kept confidential?
- Who has access to that information?
- Is the information secure or "out in the world" for all to see?

To address these concerns, for example, some firms are implementing internal policies on whether a lawyer can use AI (and programs such as ChatGPT) when creating pleadings or other documents that may contain sensitive client information. Additionally, some legal malpractice insurance carriers will not insure for AI's use, and many policies now limit firms that are covered by them from using AI to prepare any documents, especially those that are being filed with a Court.

Therefore, the Committees conclude as follows:

- **Being Truthful & Accurate:** Lawyers must ensure that AI-generated content, such as legal documents or advice, is truthful, accurate, and based on sound legal reasoning, upholding principles of honesty and integrity in their professional conduct.
- **Verifying All Citations & The Accuracy of Cited Materials:** Lawyers must ensure the accuracy and relevance of the citations they use in legal documents or arguments. When citing legal authorities such as case law, statutes, regulations, or scholarly articles, lawyers should verify that the citations accurately reflect the content they are referencing.
- **Assuring Competence:** Lawyers must be competent in using AI technologies.
- **Maintaining Confidentiality:** Lawyers must safeguard information relating to the representation of a client and ensure that AI systems handling confidential data (1) adhere to strict confidentiality measures, and (2) confidential data will not be shared with other clients or others not protected by the attorney-client privilege.
- **Identifying Conflicts of Interest:** Lawyers must be vigilant in identifying and addressing potential conflicts of interest arising from using AI systems.
- **Communicating with Clients:** Lawyers must communicate with clients about using AI technologies in their practices, providing clear and transparent explanations of how such tools are employed and their potential impact on case outcomes. If necessary, they should obtain client consent before using certain AI tools.
- **Assuring Information is Unbiased & Accurate:** Lawyers must ensure that the data used to train AI models is accurate, unbiased, and ethically sourced to prevent perpetuating biases or inaccuracies in AI-generated content.

- **Ensuring That AI Is Properly Used:** Lawyers must be vigilant against the misuse of AI-generated content, ensuring it is not used to deceive or manipulate legal processes, evidence, or outcomes.
- **Adhering to Ethical Standards:** Lawyers must stay informed about relevant regulations and guidelines governing the use of AI in legal practice to ensure compliance with legal and ethical standards.
- **Exercising Professional Judgment:** Lawyers must exercise their professional judgment in conjunction with AI-generated content, and recognize that AI is a tool that assists but does not replace legal expertise and analysis.
- **Utilizing Proper Billing Practices:** AI has tremendous time-saving capabilities. Lawyers must, therefore, ensure that AI-related expenses are reasonable and appropriately disclosed to clients.
- **Maintaining Transparency:** Lawyers should be transparent with clients, colleagues, and the courts about the use of AI tools in legal practice, including disclosing any limitations or uncertainties associated with AI-generated content.

## Conclusion

Artificial intelligence and generative AI tools, like any tool in a lawyer's arsenal, must be used with knowledge of their potential and an awareness of the risks and benefits the technology offers. They are to be used cautiously and in conjunction with a lawyer's careful review of the "work product" that those types of tools create. These tools do not replace personal reviews of cases, statutes, and other legislative materials. Additionally, although AI may offer increased productivity, it must be accomplished by utilizing tools to protect and safeguard confidential client information.

The Committees believe that, with appropriate safeguards, lawyers can utilize artificial intelligence in accordance with the Pennsylvania Rules of Professional Conduct.

**CAVEAT:** The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| ESTABLISHING THE ARIZONA | ) | Administrative Order |
| STEERING COMMITTEE ON | ) | No. 2024 - 33 |
| ARTIFICIAL INTELLIGENCE | ) | |
| AND THE COURTS | ) | |
| | ) | |
| | ) | |

As part of the Court's ongoing commitment to innovation and improvement of legal services, the Court recognizes the transformative nature Artificial Intelligence (AI) technologies will likely have on the justice system. AI technologies present unprecedented opportunities and challenges and have the potential to further improve the way courts process cases, streamline workflows and analyze legal information, and impact decision-making. However, it is imperative to approach the integration of AI into court processes in an organized manner that takes into account ethical issues, proper handling of confidential information, understanding of possible biases, and the proper use of these new technologies.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED establishing the Arizona Steering Committee on Artificial Intelligence and the Courts ("Steering Committee"), as follows:

**1. Purposes.**

a. **Advise**: The Steering Committee shall advise the Arizona Judicial Council on matters related to the implementation, evaluation, and ethical use of AI technologies within the state's judicial system.
b. **Serve as a collaborative platform**: The Steering Committee shall serve as a collaborative platform, bringing together experts in AI technologies, legal professionals, technologists, and stakeholders from within and outside the judiciary.
c. **Identify and implement AI solutions**: The Steering Committee shall recommend guidelines for identifying and implementing AI solutions to improve the efficiency of business processes, reduce case backlogs, enhance overall operational effectiveness, and improve access.
d. **Develop guidelines and best practices**: The Steering Committee shall develop and recommend guidelines and best practices to ensure the responsible use of AI in the judiciary, mitigating potential biases and upholding the principles of fairness and justice.

e. **Rules, procedures, and products**: The Steering Committee shall develop and recommend any necessary rules and procedures for use of AI technologies by judicial officers, legal practitioners, and judicial employees and shall recommend specific products to be authorized as state standard technologies, for common work procedures in the judiciary.

**2. Membership and Terms.** The Steering Committee will consist of standing and ad hoc members. Standing members listed in Appendix A are appointed as members beginning on entry of this Order through the noted term of expiration and may be eligible for re-appointment. Members shall continue to serve until a replacement has been named. The Chief Justice may appoint additional members as necessary.

**3. Work Groups.** The Steering Committee Chair may establish or dissolve work groups which may be, but are not required to be, partially comprised of persons not members of the Steering Committee. Work groups should be created for the completion of a specific task.

**4. Meetings.** Steering Committee meetings shall be scheduled at the discretion of the Chair. Pursuant to ACJA § 1-202, all meetings shall comply with the public meeting policy of the Arizona Judicial Branch.

**5. Staffing**. The Administrative Office of the Courts shall staff the Steering Committee.

**6. Reports.** The Steering Committee shall submit reports and recommendations to the Arizona Judicial Council on an as needed basis. Because AI technology is developing at a rapid pace, the Steering Committee may also issue brief reports on specific topics to alert the courts to issues and opportunities that arise.

IT IS FURTHER ORDERED that the individuals listed in Appendix A are appointed as members of the Arizona Steering Committee on Artificial Intelligence and the Courts for terms beginning upon signature of this Order and ending on the dates shown by their respective names.

Dated this 24th day of January, 2024.

_____

ROBERT BRUTINEL
Chief Justice

Attachment: Appendix A

## APPENDIX A
## Membership List
## Steering Committee on Artificial Intelligence and the Courts

### Chair

Chief Justice Robert M. Brutinel
Arizona Supreme Court

### Members

Donald (Don) Bivens
Don Bivens PLLC
Term Expiration: 12/31/2026

David K. Byers
Administrative Office of Courts
Term Expiration: 12/31/2027

Bennett Evan Cooper
Dickinson Wright PLLC
Term Expiration: 12/31/2025

Hon. Jeff Fine
Clerk of the Superior Court of Maricopa County
Term Expiration: 12/31/2026

Judge Ronda R. Fisk
Superior Court of Maricopa County
Term Expiration: 12/31/2025

Judge David B. Gass
Arizona Court of Appeals, Division One
Term Expiration: 12/31/2026

Judge Pamela Gates
Superior Court of Maricopa County
Term Expiration: 12/31/2027

Karl Heckart
Arizona Administrative Office of Courts
Term Expiration: 12/31/2027

Aaron L. Judy
County of Maricopa
Term Expiration: 12/31/2026

Ken Kung
Chandler Municipal Court
Term Expiration: 12/31/2025

Mark Lanterman
Computer Forensic Services
Term Expiration: 12/31/2025

Gary Marchant
Arizona State University, Sandra Day O'Connor College of Law
Term Expiration: 12/31/2026

Lori Maxwell
State Bar of Arizona
Term Expiration: 12/31/2027

John Rezzo
Public Member
Term Expiration: 12/31/2025

Kyle Rimel
Superior Court of Mohave County
Term Expiration: 12/31/2027

Jordan Rose
Rose Law Group PC
Term Expiration: 12/31/2025

Lynda C. Shely
The Shely Firm
Term Expiration: 12/31/2027

Jamie Sheppard
BDO
Term Expiration: 12/31/2026

Keith Swisher
University of Arizona, James E. Rogers College of Law
Term Expiration: 12/31/2026

**Staff:**
Jennifer R. Albright
Stewart Bruner
Marretta Mathes

# NOTICE TO THE BAR

## LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

### Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.

### Questions and Suggestions

Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to Court-Use-of-AI.mbx@njcourts.gov. As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.

Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to Comments.Mailbox@njcourts.gov.

Stuart Rabner
Chief Justice

Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: January 24, 2024

## PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can "hallucinate" and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

### Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not "assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . ." RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making "a false statement of material fact or law . . . ." or offering "evidence that the lawyer knows to be false . . . ." RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must "abide by a client's decisions concerning the scope and objectives of representation . . . and as required by

RPC 1.4 shall consult with the client about the means to pursue them." RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client's reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI. As to client interactions, a lawyer can use AI to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . ." consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

Confidentiality

RPC 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client." RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including "conduct involving dishonesty, fraud, deceit or misrepresentation;" "conduct that is prejudicial to the administration of justice;" and "conduct involving discrimination . . . ." RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.

## Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

## Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

## ER 1.3. Diligence

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

### Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See ER 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in ER 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See ER 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See ER 1.2.

## ER 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 ER 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.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

(d) All lawyers/legal paraprofessionals in private practice shall inform the client in writing, prior to or at the commencement of the representation, if they do not have professional liability insurance. If notice has not been provided at or before the commencement of the representation, the lawyer/legal paraprofessional shall inform the client in writing within thirty (30) days of the date the lawyer/legal paraprofessional no longer has professional liabitlity insurance during the representation.

**Comment [2003 amendment]**

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

**Communicating with Client**

[2] 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 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 reject the offer. See ER 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. A lawyer should promptly respond to or acknowledge client communications.

**Explaining Matters**

[5] The client should have sufficient information to participate intelligently in decisions 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 ER 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 mental disability. See ER 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 ER 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

**Withholding Information**

[7] 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. ER 3.4(c) directs compliance with such rules or orders.

**ER 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) the degree of risk assumed by the lawyer.

**(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 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 in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

(1) court-appointed lawyers who are paid by a court or other governmental entity, and

(2) lawyers who provide pro bono short-term limited legal services to a client pursuant to ER 6.5.

**(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;

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

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

**(e)** Two or more firms jointly working on a matter may divide a fee paid by a client if:

(1) the firms disclose to the client in writing how the fee will be divided and how the firms will divide responsibility for the matter among themselves;

(2) the client consents to the division of fees in a writing signed by the client;

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

**COMMENT [2021 AMENDMENT]**

**Reasonableness of Fee and Expenses**

[1] 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.

**Basis or Rate of Fee**

[2] 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. When the scope of the representation changes, in a material way, the lawyer should notify the client about the changes in writing. In a new client-lawyer relationship, however, a written understanding as to fees and expenses must be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing 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, including consideration of the degree of risk assumed by the lawyer at the outset of the representation. 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 all of 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.

**Terms of Payment**

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See ER 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 ER 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of ER 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. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

**Prohibited Contingent Fees**

[6] 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.

**Disclosure of Refund Rights for Certain Prepaid Fees**

[7] Advance fee payments are of at least four types. The “true” or “classic” retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under

other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

**Disputes Over Fees**

[8] The State Bar of Arizona has established an arbitration procedure for the resolution of fee disputes. Each 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.

**COMMENT [2022 AMENDMENT]**

**Fee Sharing versus Compensation for Referral**

[9] Paragraph (e) applies only to the sharing of a fee paid by a client for joint work. It does not apply to compensation paid or received solely for the referral of a client. Compensation for a referral and any associated impact on the representation of the client and/or the legal fee may be governed by ERs 1.5(a) and 1.7(a)(2).

# 86-09: Fees

**FACTS**

The inquiring law firm contemplates charging interest on invoiced accounts unpaid for 30 days or more upon notice to the client where there is no written fee agreement.

**QUESTION**

Where no written fee agreement exists between the actorney and client, may the attorney charge interest on the past due balance on invoiced accounts unpaid for 30 days or more upon notice to the client?

**ETHICAL RULE INVOLVED**

**ER 1.5. Fees.**

**OPINION**

The Rules are silent on this issue. However, ER 1.5(b) encourages attorneys to reduce all fee agreements to writing.

"ER 1.5(b). When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

This committee has previously addressed this issue in May, 1981. Our Opinion No. 81-14 permits an attorney to charge interest on a client's delinquent account ". . . provided the charge is made with the client's agreement."

The committee is mindful of ARS § 44-1201(A) which allows a creditor, in the absence of a written agreement providing for interest, to charge interest at the rate of 10% per annum.

"ARS § 44-1201(Al. Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of 10 per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to."

Nevertheless, the committee interprets ER 1.5(b ) to require communication of the "rate of the fee" either before the representation begins or within a reasonable time thereafter. In the situation presented by the inquiring firm, the representation has proceeded for at least 30 days and more than likely for a substantially longer period of time.

While the committee is prevented from answering questions of law pursuant to paragraph 6(a) of our Statement of Jurisdictional Policies, we are of the opinion that the client must receive notice that interest is to be charged, consent in writing thereto, or be afforded the opportunity of bringing the account current, before the interest begins to accrue.

The committee also wishes to encourage the bar to use written fee agreements in all matters. Written fee agreements foster the attorney/client relationship, increase the efficiency of practice, and help minimize fee disputes.

The committee answers the inquiring law firm's question in the negative. Absent a written fee agreement or the client's consent after notice with opportunity to bring the account current, interest may not be charged on delinquent invoices. The committee declines to issue an opinion on whether ARS § 44-1201(a) permits a law firm to charge interest without client consent in the absence of a written agreement as being a question of law.

**Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceeding. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rules change, a different conclusion may be appropriate.**

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# 00-07: Collection of Legal Fees; Fee Agreements; Interest; Billing; Confidentiality

**FACTS[1]**

The inquiring attorney wants to: 1) charge interest on a client's account receivable, at a reasonable rate, provided that the client has given informed consent in a written fee agreement; and 2) charge the client the cost of using a collection agency to collect the unpaid fees and costs from the client, again provided that the client has given informed consent in a written fee agreement. Though the inquiring attorney has not identified the interest rate to be charged, the attorney represents that collection agencies typically charge a fee of one-third (33 1/3%) of any amount collected if no legal action is taken, and forty-five percent (45%) of the amount collected if the collection agency takes legal action on behalf of the assignor.

QUESTIONS PRESENTED

1. Can a lawyer add to the amount of unpaid legal fees and costs the cost of the collection agency fees if the client consents to such an arrangement in a written fee agreement?
2. Can the lawyer also charge interest on the unpaid principal sum, in addition to the collection agency fees, provided that the client also consents in a written fee agreement and the rate of interest is reasonable?

RELEVANT ETHICAL RULE

ER 1.5. Fees

(a) A lawyer's fee shall be reasonable. 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing 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. 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 division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

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

(3) the total fee is reasonable.

## OPINION

### Charging Interest

As a general proposition, an attorney may ethically charge interest on a client's delinquent bill, provided that the rate is reasonable and the client has given informed consent. *See* Ariz. Ops. 81-14 and 86-9. *See also* ABA Formal Op. 338 (1974). These Opinions require that the interest charge be disclosed in the written fee agreement.

### Use of a Collection Agency to Collect Unpaid Fees

An attorney may use a collection agency to collect a client's delinquent bill, provided that the client has given informed consent. *See* Ariz. Op. 94-11. This Opinion requires that the use of collection agencies be disclosed in the written fee agreement and that the lawyer discloses to the agency only the minimum

amount of client information necessary to collect the debt, pursuant to ER 1.6(d). An attorney also may submit for collection an amount that includes the interest owed.

### Pass-through of Collection Agency Fees

The question whether an attorney may pass to the client the cost of using a collection agency to collect the client's delinquent account is novel. The inquiring attorney's question comprises two distinct issues. First, may the cost of using a collection agency be charged to the client? Second, if so, may this additional charge itself be submitted, together with the underlying account, to the collection agency for collection?

First, assuming that the client has given *informed* consent, the attorney may charge the client for the actual cost of using a collection agency, if the actual cost is reasonable. The attorney should make clear to the client, however, how this additional charge will be computed. Where, as often is the case, the lawyer is the more sophisticated party to the fee agreement, the lawyer needs to take special care to ensure that the resulting fee agreement is fair and reasonable to the client. The mere fact that the client has agreed, in writing, to a particular term is not in itself sufficient reason to conclude that the term is fair or reasonable.

Whether the actual cost is reasonable in a given instance may depend on facts not presented by the inquiring attorney. To meet the reasonableness requirement of ER 1.5, the attorney should endeavor to use a method of collection that does not unnecessarily increase the client's ultimate liability. Where the amount of unpaid fees is high, the percentage-based fee charged by the collection agency might well exceed the reasonable cost of collection through traditional legal process. On the other hand, smaller fee amounts could lend themselves to efficient collection by collection agencies. (It merits note that the State Bar has established an arbitration procedure for the resolution of fee disputes, and this process might obviate the need for significant collection costs in some cases.)

Second, though it is not unethical to require the client to pay for the actual and reasonable cost of collection, it does not follow that adding to a client's principal balance an additional charge meant to cover the cost of collection itself would always be proper. In the circumstances outlined by the inquiring attorney, such a measure could have the effect of charging the client for a cost not incurred. Suppose, for example, that the client properly owes $3,000 for legal fees and costs. To recover the full cost of collection via a pass-through (assuming a charge of 33%), the inquiring attorney would have to submit for collection an account showing $4,500 due. From the client's perspective, this amount would be 50% of the amount due, not 33%. Though some circumstances might conceivably warrant such a cost, a 50% collection fee cannot be viewed as reasonable in every case. Moreover, at the time the attorney submits the bill to the collection agency, the client actually owes not $4,500, but $3,000. If the collection agency fails to collect any amount from the client, the client's liability should continue to be only $3,000 - not a higher amount based on fees that the collection agency never collects. The risk that a client might be charged for costs not actually incurred runs afoul of ER 1.5. *Compare* ABA Formal Op. 93-379 (1993) (concluding that the ER 1.5 requirement of reasonableness applies to costs as well as fees, and requiring that discounts from third-party providers must be passed along to the client to avoid creating "profit centers").

### CONCLUSION

Attorneys may: 1) properly charge reasonable interest on outstanding balances if so disclosed in the written agreement; 2) use collection agencies to collect such balances as set forth in Ariz. Op. 94-11; and 3) charge their clients for the actual and reasonable costs of collection. But the practice of adding a 33% charge to the original

balance owed before assigning a balance to a collection agency risks: 1) imposing unreasonably high collection fees on clients; and 2) imposing prospective liability on clients for costs not actually incurred. Accordingly, the practice proposed would violate ER 1.5.

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[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.** **© State Bar of Arizona 2000**

# 03-06: Hybrid Fee Agreement, Fee Structure

**FACTS**[1]

The inquiring attorney has asked about the ethical propriety of a fee agreement in which a lawyer is compensated for his or her services by receiving the greater of a contingency fee (33% to 40% of gross proceeds) or the firm's hourly time charges.

**QUESTION PRESENTED**

Would a fee agreement violate the Arizona Rules of Professional Conduct if it provides that in return for the attorney's services, the attorney will receive the greater of a contingency fee (33% to 40% of gross proceeds) or the firm's hourly time charges?

**RELEVANT ETHICAL RULES**

ER 1.5 Fees

(a) A lawyer's fee shall be reasonable. 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.

* * * *

(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 writing 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 a 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. 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.

**RELEVANT ARIZONA ETHICS OPINIONS**

Ariz. Op. 94-15 (Dec. 12, 1994)

**OPINION**

The fee arrangement described by the inquiring attorney makes the client responsible for paying the greater of either a prescribed contingent fee or the firm's hourly time charges. One obvious concern with this arrangement is that it takes the "contingency" out of the contingent fee component of the lawyer's fee.

The Arizona ethical rules expressly authorize lawyers to enter contingent fee arrangements in certain cases, subject to certain procedural safeguards. ER 1.5(c). The Arizona Supreme Court has recognized that the fee from such an arrangement ultimately "may be much larger than that attorney or others would have charged had they been retained and paid on a time basis." *In re Swartz*, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984). Such a result is justified mainly on the ground that under most contingent fee arrangements, the lawyer runs a risk of not being paid if he or she is unsuccessful in securing a recovery in a case. REINSTATEMENT OF THE LAW GOVERNING LAWYERS § 35 cmt. c (2000) ("A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk.") That rationale, however, is inapplicable here because the fee arrangement guarantees that the lawyer will receive no less than his or her time charges for the matter.

Although the ethical propriety of the fee arrangement described by the inquiring attorney has never been addressed by an Arizona court or the Committee on the Rules of Professional Conduct, one New York court has held that such a fee structure is *per*

*se* illegal and unenforceable. In *Beltzer v. Bollea*, 571 N.Y.S.2d 365 (Sup. Ct. 1990), counsel for a settling plaintiff asked the trial court to approve an increase in his contingent fee from one-third to one-half of the recovery. The court denied the application, limiting counsel to the one-third contingency set forth in his retainer agreement with his client. During its discussion of the issue, the court noted that the fee agreement called for a contingent fee of one-third of the gross proceeds of the recovery "or whatever the Firm's straight time billing charges would have been, whichever is greater." *Id*. at 366. The court sharply condemned that provision in dictum because it potentially allowed counsel to recover more than the agreed-upon contingency:

If there is a contingency agreement, the attorney cannot exceed the permitted percentages by providing for alternatives, which would result in even higher compensation. The contingent fee is permitted because the attorney takes the risk of recovering nothing at all. If the agreement provides for the certainty of recovery in any event, the risk which justifies the contingency fee is removed, especially if there can be a recovery on a time billing basis should that turn out to be more remunerative.

*Id*. at 366-67.

While the court in *Belzer* had good grounds for questioning the fee at issue, it does not appear to have been justified in suggesting that it is *never* ethically appropriate to combine elements of a contingent fee arrangement with hourly billing. Although the structure of a fee arrangement can have important ethical consequences, the key issue under ER 1.5(a) is not how a fee is structured, but whether the fee amount is "reasonable." The rule lists eight factors that should be considered in making that determination, only one of which is whether the representation is undertaken on a contingent fee basis. Assuming that the resulting fee is "reasonable," nothing in ER 1.5 expressly precludes combining hourly rates with a contingency component in a fee arrangement, so long as the client agrees and the arrangement is otherwise consistent with the procedural requirements of ER 1.5.[2]

Such a fee structure is sometimes called a "modified contingent fee" or a "hybrid fee." It is not difficult to envision circumstances in which a "hybrid fee" arrangement would not produce an excessive fee. For example, In *Boston & Maine v. Sheehan, Phinney, Bass & Green, P.A*., 778 F.2d 890 (1st Cir. 1985), the First Circuit approved a "hybrid fee" arrangement in which a law firm in an eminent domain case received not only its hourly charges, but also 15 percent of any recovery greater than the amount initially offered by the defendant. It was stipulated that lawyers typically received a 50 percent of the recovery in handling such matters on a contingent fee basis, which would have produced a much larger fee than the firm's "hybrid fee" arrangement. *Id*. at 897. Also, the client was in bankruptcy, which made it more difficult for it to secure representation

by a specialist in the field. *Id*. at 895 & 898 n.9. The court also noted that the trial court had acknowledged that the firm had responded: "imaginatively to two difficult legal challenges, both of which were vital to obtaining a high damages award." *Id*. at 899. In light of those factors, the First Circuit held that the lower court abused its discretion in not awarding the firm a fee consistent with the "hybrid fee" arrangement. *Id*.

Especially significant to the court was that in exchange for having the security of hourly fees, the firm had agreed to a reduced contingency percentage:

In return for the lowered risk, Sheehan accepted a much lower contingency fee - 15%. Thus, Sheehan assumed the risk, indeed the likelihood, of receiving considerable less compensation that it might normally have received. And the [client] could believe that the 15% being contingent upon the amount of additional moneys the attorneys brought in, would spur them to greater efforts that would ultimately benefit the [client] and its creditors. We do not think the arrangement was unreasonable in the circumstances simply because it combined two different forms of fee calculation.

*Id*. at 897.

Ethics committees in other states also have approved of "hybrid fee" arrangements, subject to the requirement that they not produce "excessive" fees. In one leading opinion, the New York State Bar Association concluded that a "hybrid fee" arrangement combining a contingent bonus with hourly fee charges was not prohibited under the Model Code so long as the resulting fee was not excessive. New York State Bar Ass'n , Committee on Professional Ethics, Op. 697 (12/30/97). The key factor for the committee was whether "the contingency percentage will be lower than it would be if the fee were based on a pure contingency." *Id*. In such circumstances, "[a]lthough the lawyer who charges a modified contingent fee does not assume the full risk of no recovery (since he or she is receiving an hourly fee), the lower risk to the lawyer is balanced by the lower 'bonus' if the representation yields a significant recovery." *Id*.

The opinion also noted that if the lawyer agreed to reduce his or her hourly rate as part of the arrangement, it would serve the central purpose in allowing contingency fees in the first place: making legal services available to clients who otherwise may not be able to afford them.[3] There may be cases that are so risky or difficult that a reasonable lawyer might be willing to work on them solely on a contingent fee basis. At the same time, the lawyer might be willing to work on such a matter for a reduced hourly rate if the client agrees to pay the lawyer a reduced percentage of the recovery. A "hybrid fee" arrangement in such circumstances might allow the client to secure legal representation when other types of fee arrangements would not. *Id*. ("[I]f the hourly fee is reduced, it is likely to make counsel available to clients whose cases do not have such a high

probability of success that a straight contingency fee would be attractive to prospective counsel."); *see also* Nevada Formal Op. 4 (1987) (fee arrangement not unethical where lawyer gave a client 20% discount on hourly fee rate and received a 50% contingency on any punitive damage recovery).

These considerations lead to the conclusion that ER 1.5 does not prohibit "hybrid fee" arrangements if the resulting fee is not "excessive" and the other requirements of ER 1.5 are satisfied. It also bears emphasizing that a fee's reasonableness ultimately must be determined after the services are rendered, as "[e]ither a fixed or contingent fee, proper when contracted for, may later turn out to be excessive." *In re Swartz*, 141 Ariz. At 273, 686 P.2d at 1243.

That leaves the question whether the fee arrangement described by the inquiring attorney would produce an "excessive" fee. It certainly is suspect. Unlike *Boston & Maine* and the facts considered by the New York State Bar Association in Op. 697, the contingency (33% to 40%) does not appear to be any smaller than the percentage typically charged in many types of contingent fee matters. The hourly fee rate also does not appear to have been discounted, reflecting instead what appears to be standard "hourly rate charges."

Unfortunately, the inquiring attorney has not provided sufficient facts to determine definitively whether this fee structure would produce an "excessive" fee. Consistent with the factors listed in ER 1.5(a), fee arrangements that initially may appear excessive may nonetheless be justifiable (and, in light of the rendered services, justified) because of factors such as the difficulty or risk of the matter, the contingent fee rates typically charged for similar matters, the size of the expected or actual recovery, the time constraints involved, the unique skills of counsel, and the competing demands for counsel's services. The facts provided by the inquiring attorney do not shed light on any of these issues. However, unless one or more of these factors provide substantial support for the reasonableness of the fee, the fee structure described by the inquiring attorney appears likely to yield an "excessive" fee and therefore would be prohibited under ER 1.5(a).

## CONCLUSION

Although ER 1.5 does not prohibit "hybrid fee" structures that combine aspects of contingency fee and hourly billing arrangements, the resulting fee must not be "excessive." The fee structure described by the inquiring attorney - requiring the client to pay the greater of 33% to 40% of the gross proceeds of a prospective recovery or the firm's standard time charges-is likely to result in an excessive fee, unless other factors listed in ER 1.5(a) are sufficiently compelling to justify the size of the fee.

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**[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2003**

[2] Indeed, subject to the requirements in the rule, ER 1.5 affords lawyers and clients considerable flexibility in structuring fee arrangements. Billing on an hourly or flat-fee basis is permissible, and ER 1.5(c) authorizes proceeding on a contingent fee basis in certain types of cases and if certain procedural requirements are satisfied. The comments to ER 1.5 also state that in lieu of a monetary fee, a lawyer may ethically accept an interest in property in payment for services so long as the lawyer does not "involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation" contrary to ER 1.8(j). The Committee on the Rules of Professional Conduct also has concluded that an attorney may accept a partial assignment of a patent in return for rendering legal services in preparing and prosecuting the patent. Ariz. Op. 94-15 (Dec. 12, 1994).

[3] See also *In re Swartz*, 141 Ariz. 266, 272, 686 P.2d 1236, 1242 (1984) ("Whatever the dangers, it is now generally accepted that the contingent fee is proper and has substantial social utility because such arrangements are 'often the only method by which a person of ordinary means may prosecute a just claim to judgment.'" (quoting Note, *Lawyer's Tight Rope - Use and Abuse of Fees*, 41 CORNELL L.Q. 683,689 (1956)).

# 86-06: Fees

## FACTS

A common practice of attorneys in criminal defense is to enter into fee arrangements which provide for a fee "earned upon receipt." These agreements result in a non-refundable fee, not specifically dependent upon the amount of work performed for the client.

## QUESTION

Are fee arrangements providing for fee "earned upon receipt" unethical so as to require disciplinary action by the Arizona Bar Association?

## CODE PROVISIONS INVOLVED

ER 1.5 Fees

(a) A lawyer's fee shall be reasonable. 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 lawer;

(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 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.

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

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

Formerly AR 2-106 which stated that:

(A) A lawyer should net enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered. . . in determining reasonableness. . . include . . .: (same as in ER 1.5).

(C) "a contingent fee in a criminal case" is prohibited.

**OPINION**

The Comnittee is of the opinion that there is no per se rule holding "earned upon receipt" fee contracts unethical. In fact, ER 1.5(a)(8) specifically recognizes fixed fee contracts. Therefere, each fee contract must be held to be reasonable or unreasonable in light of the guidelines set forth in ER 1.5 and the specific facts of each case.

**Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceeding. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rules change, a different conclusion may be appropriate**.

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# Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-20-0001

## FACTS

Lawyers have raised many questions about ethical obligations when a decision for withdrawal from representation has been made. These questions most often involve the intersection of ER 1.16 (withdrawal) and ER 1.6 (confidentiality obligations). Questions also frequently arise regarding whether fees may be charged for withdrawal-related work. In light of these frequent requests for ethics advice, the Attorney Ethics Advisory Committee has chosen to issue this formal opinion sua sponte.

## QUESTIONS PRESENTED

1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?

2. May a lawyer charge a client for withdrawal-related work?

3. What obligations does the withdrawn lawyer have to the former client?

4. What confidential client information can be disclosed, either orally or as part of the client file, by withdrawn counsel to successor counsel in the absence of the client's informed consent?

## APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER _")

### ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee.

. . . .

### ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

. . . .

**Comment**

[21] 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, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

**ER 1.9 Duties to Former Clients**

. . .

(c) A lawyer who 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.

**ER 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 services to perpetrate a crime or fraud;

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

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

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

(7) other good cause for withdrawal exists.

(c) A lawyer shall 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 documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

**Comment**

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also ER 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 ERs 1.6 and 3.3.

**ER 3.3 Candor Toward the Tribunal**

**Comment**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

**RELEVANT ARIZONA ETHICS OPINIONS**

State Bar of Arizona, Rules of Professional Conduct Committee,[1] Ariz. Ops. 93-02, 94-02, 00-11, 04-01, 05-05, 08-02, 09-02, 15-02.

Supreme Court of Arizona Attorney Ethics Advisory Committee, Ethics Op. EO-19-0009.

**OTHER RELEVANT ETHICS OPINIONS**

2007 N.C. Ethics Op. 8; Mich. Ethics Op. RI-296

**OPINION**

**1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?**

ER 1.16 sets forth the circumstances under which a lawyer may and shall withdraw from further representation of a client. See ER 1.16(a) and (b). The lawyer's responsibility to

follow the law and procedures of the tribunal in attempting withdrawal is set forth in ER 1.16(c). Further, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." ER 1.16(c). The lawyer is not prohibited from seeking withdrawal relief from a higher tribunal. While the lawyer is seeking relief, and if relief is not sought or granted, at all times the lawyer must continue to represent the client competently and diligently. ERs 1.1 and 1.3.

ER 1.16 does not relieve the withdrawing lawyer from the duties of confidentiality set forth in ER 1.6. This Committee cautions the withdrawing lawyer to carefully review and follow ER 1.6 during the withdrawal process. Comment [3] to ER 1.16 addresses the practical problem that a lawyer seeking to withdraw may face questions from the tribunal about the reasons for withdrawal: "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."

ER 1.6(d)(4) allows disclosure of confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Yet, that disclosure must be made only "to the extent the lawyer reasonably believes necessary." ER 1.6(d). The withdrawing lawyer ordinarily should resist any disclosure during the withdrawal process in favor of citing and following the directions in Comment [3] to ER 1.16 to state that professional considerations require withdrawal of the lawyer. See Lawyer Disciplinary Bd. v. Farber, 488 S.E.2d 460 (W. Va. 1997) (lawyer moving to withdraw from representation violated Rule 1.6 by adding affidavit reporting on his plea discussions with defendant).

"Reasonably necessary" has been construed quite narrowly in connection with ER 1.6(d)(4) disclosures. Ariz. Op. 93-02 (March 1993) addressed whether the inquiring lawyer could speak to an author and refute the former client's accusations to the author that the lawyer had represented the client incompetently and had engaged in a conspiracy with the prosecution. In holding that the Ethical Rules allow the lawyer to do so, the narrowness of the "reasonably necessary" component of ER 1.6(d) was stressed:

We emphasize that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegations. ER 1.6(d) permits disclosure only to the extent the lawyer reasonably believes necessary to establish a claim or defense. Therefore, an attorney must determine whether he or she can adequately establish a claim or defense against accusations of misconduct without disclosing information protected by ER 1.6(a). Whether disclosure is "reasonably necessary" for the purposes of ER 1.6(d) is ultimately within the independent judgment

of the attorney involved, after a careful assessment of the facts and the nature of the controversy.

Ariz. Op. 93-02.

Even when a lawyer has learned that his or her client has submitted fraudulent evidence warranting the lawyer to withdraw the evidence, the lawyer must first try to withdraw the evidence without revealing that the client submitted fraudulent evidence:

If an attorney can refuse to offer evidence the attorney reasonably believes to be false, see ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence.

Ariz. Op. 05-05 (July 2005) (footnotes omitted). See also ER 3.3, Comment [15] ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.")

Given the narrowness of exceptions to the confidentiality requirements of ER 1.6 even in light of a lawyer's obligation of candor towards the tribunal as set forth in ER 3.3, if the lawyer believes it is reasonably necessary to disclose a client confidence as part of withdrawal proceedings, the withdrawing lawyer should consider whether an ex parte submission may be warranted and permitted under the rules of the tribunal.

Comment [15] to ER 3.3 supports a lawyer revealing the least possible confidential information in support of the lawyer's withdrawal: "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6."

Withdrawing and withdrawn lawyers also should be mindful that what constitutes confidential information about the client is construed quite broadly. In addressing what a lawyer should do when subpoenaed for client information, the State Bar of Arizona Rules of Professional Conduct Committee, in Ariz. Op. 00-11 (November 2000), wrote: "Under ER 1.6, a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered

elsewhere.... Indeed, the lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record." (Internal citations omitted.)

Despite the lawyer's obligation to keep a client's confidences, Comment [21] to ER 1.6 is clear that, once withdrawn, the lawyer may give notice of the fact of withdrawal, "and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." See Ariz. Op. 05-05.

**2. May a lawyer charge a client for withdrawal-related work?**

A lawyer's charged fees must be reasonable. See ER 1.5. Neither ER 1.5 nor its comment addresses the particular circumstances of whether a lawyer may charge for withdrawal-related work such as preparation, filing, and arguing a motion to withdraw. Other jurisdictions have addressed this question, however, in 2007 N.C. Ethics Op. 8 (http://www.ncbargoviethics) (July 13, 2007), the North Carolina State Bar opined that the act of the withdrawal with the Court is the professional obligation of the lawyer, and therefore the lawyer may not shift the cost of the withdrawal to the client. "Whether the client or the lawyer is the first to conclude that the relationship must end, determining who is at fault or the motivation of the client or the lawyer when ending the relationship is often impossible and, ultimately, beside[s] the point. Regardless of who may be at fault, the cost of the work necessary to file and argue a motion to withdraw must be incurred because the lawyer is required by the Rules of Professional Conduct and the court rules to obtain the permission of the court to withdraw." Further, in North Carolina, a fee agreement provision requiring the client to pay for the cost of preparing, filing, and arguing a motion to withdraw if the client terminates the lawyer's services is improper because "[s]uch a provision would have an improper chilling effect on a client's right to terminate a lawyer's services at will." Id.[2]

North Carolina poses two exceptions to the general rule of not charging for withdrawal-related work. One exception is when "a lawyer must file a motion to withdraw, with the consent of the client, to advance the client's objectives for the representation and not because the client is dissatisfied with the lawyer's services or the lawyer wishes to terminate the representation." Id. An example:

[A]n insurance carrier hires a lawyer to defend its insured in a personal injury lawsuit. Before trial, the carrier offers the full policy limits to the plaintiff. The carrier hires another lawyer to file the appropriate motion seeking to have the carrier relieved of its duty to defend the insured. The lawsuit must go forward, however, to determine whether there is liability entitling the plaintiff to recover the proceeds from an underinsured or other excess liability insurance policy. If the motion to be relieved of

the duty to defend is allowed, the lawyer originally hired to defend the insured must make a motion to withdraw to further the insurance carrier's objective of being relieved of the duty to defend. The insurance carrier typically anticipates and assumes that it will pay the legal fees associated with the preparation and presentation of the motion to withdraw.

Id.

The second exception identified by North Carolina is where a court-appointed lawyer's withdrawal is necessary because of a conflict of interest, a breakdown of the relationship, or other similar circumstance, and the cause of such is not the lawyer's conduct. "Judicial review provides oversight to insure that the fee charges are warranted and, unlike in private representation, seeking compensation for filing the motion will not have a chilling effect on the client's right to terminate the relationship." Id.

The State Bar of Michigan's Standing Committee on Professional and Judicial Ethics takes somewhat of a different view, allowing the lawyer to charge a client for withdrawal-related services if the withdrawal is the client's choice and the lawyer has explained the consequences of withdrawal to the client, including the cost:

When a client seeks to discharge a lawyer, the lawyer has an obligation under MRPC 1.4(b) to explain to the client the effect of the withdrawal, including the likelihood of the judge granting the withdrawal under MRPC 1.16(c), that the lawyer continues as counsel until the judge grants the motion to withdraw, and that the motion to withdraw may not terminate the lawyer's ethical obligations to refrain from assisting illegal or fraudulent conduct of the client [MRPC 1.2(c), 1.2(d), 3.3(a)]. Presuming that the lawyer has fulfilled all obligations at the time of the contract and at the time withdrawal is requested, and as in this case, the contract is hourly [not contingent or fixed fee], the lawyer may charge to fulfill the client's wishes.

On the other hand, when it is the lawyer who has decided to withdraw, whether with cause or otherwise, the lawyer is not serving the interest of the client and therefore may not charge the client for expenses incurred in seeking the withdrawal.

Mich. Ethics Op. RI-296 (July 15, 1997) (http://www.michbar.org/opinions)

While the North Carolina opinion better serves the client's right to have counsel of his or her own choice , we do not believe the circumstances a lawyer may charge for withdrawal-related work are as narrow as adopted in North Carolina. Because a breakdown in a lawyer-client relationship is often difficult to distill down to client choice

or lawyer choice (and in the same case, the client and the lawyer may perceive the decision-maker and the reasons therefor differently), we do not adopt the Michigan decision. Rather, we refer withdrawing lawyers to the reasonableness requirement of ER 1.5. The work a lawyer reasonably undertakes in support of a smooth transition to new counsel or pro per representation is usually work that may be charged to the client if otherwise appropriate under the fee agreement and if the withdrawal is not clearly solely due to the lawyer's circumstances (such as a lawyer closing the lawyer's law office in favor of public employment). Nevertheless, clients will likely scrutinize closely withdrawal-related charges, and a lawyer must be able to justify all such charges as reasonable under the circumstances.

**3. What obligations does the withdrawn lawyer have to the former client?**

"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 documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned." ER 1.16(d). Even if money is owed by the client to the withdrawn lawyer, the client is entitled to the client's property, including the file. See ER 1.16(d); Ariz. Ops. 04-01 (January 2004) and 08-02 (December 2008) (as amended by Ariz. Op. 15-02 (June 2015)); Ariz.Ethics Opinion No. EO-19-0009.

A withdrawn lawyer can find additional ethical duties owed to former clients generally set forth in ER 1.9 and ER 1.6 because the withdrawn lawyer has an ongoing duty of confidentiality even after termination of a representation. For example, ER 1.9(c) makes clear that duties of confidentiality continue for former clients:

A lawyer who 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.

**4. What confidential client information can be disclosed, either orally or as part of the client file, by withdrawn counsel to successor counsel in the absence of the client's informed consent?**

When a lawyer withdraws from a representation or is terminated by the client, any disclosure of confidential information relating to the representation of the client to successor counsel or prospective successor counsel not specifically allowed by ER 1.6(a) is prohibited regardless of the reason for the withdrawal or termination. It frequently happens that when a representation is being transferred from one lawyer to another, the withdrawing or terminated lawyer has little or no direct communication with the client and, therefore, limited opportunity to obtain the client's informed consent to disclose confidential information to successor counsel. Exactly what steps a withdrawing or withdrawn lawyer must follow for the orderly transition of the matter will be a case-by-case analysis.

In most situations, a withdrawing lawyer must advise the new counsel (as well as the client) of any pending court dates, a detailed status of the matter and issues, and anything else necessary and appropriate for the smooth and efficient transfer of the representation. Confidential disclosures of this nature to new counsel are impliedly authorized by ER 1.6(a) so long as the withdrawing lawyer reasonably believes that the disclosures will advance the interests and objectives of the client in the representation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000) ("A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation."). The withdrawing lawyer, however, must always remain mindful of reasons that may make further briefing of successor counsel imprudent or not in accordance with the client's interests and objectives. "Indeed, if the withdrawal is occasioned by a conflict, briefing successor counsel may taint the successor." Mich. Ethics Op. RI-296. In short, the withdrawing or withdrawn lawyer should participate in the transition of representation due to withdrawal such that the lawyer has reasonably tried to minimize (or alleviate, if possible) prejudice to the client from the withdrawal. The lawyer must always be mindful of protecting the former client's interests during an orderly transition to new counsel or pro per representation.

As a general rule, transfer of the client file consistent with Ariz. Ethics Opinion No. EO-19-0009 to successor counsel is impliedly authorized by ER 1.6(a) to protect the client's interests even in the absence of express direction from the client. However, the withdrawn counsel should whenever possible confirm with the former client directly that the former client authorizes transfer of the file to a specific new counsel. Lawyers should be able to accept the avowal of another lawyer that they are taking over a client matter, but risk management considerations recommend confirming such transfers with the client. Regardless of the basis for the authority to transfer the file, i.e., implied or express, however, the lawyer must remain vigilant to the fact that the file may contain confidential client information that cannot or should not be disclosed to successor

counsel without the client's informed consent. This admonition applies to both hard-copy and electronic file contents. In some circumstances, the client may be entitled to receive portions of the client file that the withdrawn lawyer cannot or should not disclose directly to successor counsel in the absence of the client's informed consent. For instance, if the client sent threatening emails to withdrawn counsel, it may not be prudent for withdrawn counsel to include those emails in the file sent to new counsel, even though client is entitled to a copy of the client "file" including all substantive documents, which includes emails. The burden is on the withdrawn lawyer to facilitate a transfer of the client file, either to the client or to successor counsel, in accordance with the Rules of Professional Conduct.

Because of these uncertainties inherent in transfer of the representation and client file, it is the recommendation of the Committee that a withdrawing lawyer seek the client's consent to disclose specific confidential information to successor counsel as part of the transition. This approach maximizes the probability of a complete and fully informed transfer of the representation and client file and applies equally when, as frequently happens, successor counsel (or prospective successor counsel) seeks input about the matter directly from withdrawn counsel.

**CONCLUSION**

A client remains so until the lawyer's withdrawal is complete regardless of the reasons for and timing of the cessation of the lawyer-client relationship. The withdrawing lawyer must protect the client's interests despite any dispute between the lawyer and the client and despite any wrongdoing of the client. Any disclosures of confidential information must be strictly limited to those circumstances authorized by the Rules of Professional Conduct. Fees must always be reasonable and appropriate. A withdrawing or withdrawn lawyer should participate in an orderly transition to new counsel or pro per representation to minimize prejudice to the client from the withdrawal. Once a lawyer is withdrawn, ethical obligations continue as for any former client.

**Pursuant to Rule 42.1(l) Opinion as Defense.** Reliance on a final Committee opinon may be raised as a defense in any disicipline proceeding.

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[1] Opinions issued by the State Bar of Arizona's former Rules of Professional Conduct Committee are nonbinding.

[2] [1] See Ariz. Op. 94-02 (March 1994) (In opining that a fee agreement provision preventing the client from discharging the lawyer without "good cause" was unethical, the State Bar of Arizona Rules of Professional Conduct Committee stated: "Such a

provision would likely discourage or deter a client, who no longer had confidence in or even distrusted counsel, from discharging the lawyer and hiring a new lawyer.")

# Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-20-0003

## FACTUAL BACKGROUND

An Arizona bankruptcy practice funds its operations through a fee-financing arrangement with a lender. Under the terms of the arrangement, the lender provides the practice with advances on a line of credit on a per-case basis, eventually advancing 75% of the total amount of fees payable in connection with each case. In exchange, the lender retains 25% of the legal fees to cover financing and collection-management services, and the practice assigns the accounts receivable to the lender. The practice's fee agreements disclose the existence of this arrangement as a payment option. If clients opt for the arrangement, they are required to pay the lender in monthly installments over varying lengths after the bankruptcy petition is filed. Several other notable provisions of the fee-financing arrangement include: (1) an agreement that the advances are with recourse to the practice, meaning the practice is liable for any amount the lender is unable to recover from the practice's clients; and (2) to facilitate the lender's collection activities, the practice provides the lender with copies of the fee agreement, payment authorization, pay stubs, bank account statements, and other personal information related to the collection of payments.

There is a dispute over whether a lawyer can ethically participate in the fee-financing arrangement described above and, if so, the scope of a lawyer's ethical duties under the Rules of Professional Conduct while participating in such an agreement.

## QUESTIONS PRESENTED

1. Does a fee financing arrangement that provides for the lender to retain a portion of the lawyer's fee constitute impermissible fee sharing?
2. May a lawyer pass financing and collection fees charged by a lender onto a client, and, if so, what must the lawyer disclose concerning their fee?
3. May a lawyer disclose information concerning the client to a lender to facilitate a fee financing arrangement?
4. What conflicts of interest may arise in fee financing arrangements?
5. What are lawyers' ethical duties regarding the bankruptcy court when entering a fee financing agreement?

## APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER")

ER 1.0. Terminology

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(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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(n) “Business transaction,” when used in reference to conflicts of interests:
(1) includes but is not limited to:
(i) the sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;
(ii) a lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest; or
(iii) transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include:
(i) ordinary fee arrangements between client and lawyer; or
(ii) standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.
***

**ER 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 ER 1.0(e), is required by these Rules;
***

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

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Comment

Explaining Matters
[5] The client should have sufficient information to participate intelligently in decisions 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. . . . 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 ER 1.0(e).

**ER 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) the degree of risk assumed by the lawyer.

(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 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.

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**ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

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**ER 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:

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(2) there is a significant risk that the representation of one or more clients will be materially limited . . . 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 each affected client gives informed consent, confirmed in writing, and:

(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; and
(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.

**ER 1.8. Conflict of Interest: Current Clients: Specific Rules**

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(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 . . . .
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(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 ER 1.6.
***

(m) A lawyer wishing to engage in a business transaction with a client must comply with both ER 1.7 and 1.8(a) if:

(1) the client expects the lawyer to represent the client in the transaction; or
(2) 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.

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**ER 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.

**ER 3.3. Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal . . . .

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**ER 5.3. Responsibilities Regarding Nonlawyers**

(a) A lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and those who have access to attorney-client information, is compatible with the professional obligations of the lawyer. Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling, or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and
(2) to ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of a lawyer comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining

the confidentiality of all lawyer client information protected by ER 1.6.
***

(c) A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer has managerial authority in the firm and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**ER 5.4. Professional Independence of a Lawyer (Abrogated August 27, 2020, Effective January 1, 2021) ("Former ER __")**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . . .

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(c) A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

**RELEVANT ARIZONA ETHICS OPINIONS**

State Bar of Arizona, Rules of Professional Conduct Committee, Opinion Nos. ("Ariz. Ethics Op. _") 01 07, 98 05, 94 11, 92 04, 89 10, 71 34, 70-20.

**OTHER RELEVANT ETHICS OPINIONS AND AUTHORITY**

R-20-0034 Petition to Restyle and Amend Supreme Court Rule 31; Adopt New Rule 33.1; and Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–58, 60, and 75–76 ("2020 Petition) (Jan. 2020) (Full Text Available Here).

Arizona Supreme Court No. R-20-0034, Order Amending the Arizona Rules of the Supreme Court and the Arizona Rules of Evidence ("Ariz. Sup. Ct. Order No. R-20-0034") (Aug. 2020) (Full Text Here)

Task Force on the Delivery of Legal Services, Report and Recommendations ("Task Force Report") (Oct. 2019) (Full Text Here)

ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 484 ("ABA Formal Op. 484") (Nov. 2018) (Full Text Here).

Maine Board of the Overseers of the Bar Professional Ethics Commission Opinion 193 ("Maine Op. 193") (Dec. 2007) (Full Text Here).

State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 36 ("Nevada Op. 36") (Jan. 2007) (Full Text Here).

New York State Bar Association, Committee on Professional Ethics, Formal Opinion No. 2018-5 ("New York Op. 2018-5") (July 2018) (Full Text Here).

State Bar of North Carolina, 2018 Formal Ethics Opinion 4 ("North Carolina Op. 4") (Apr. 2018) (Full Text Here).

State Bar of Oregon, Formal Ethics Op. 2005-133 ("Oregon Op. 2005-133") (Revised 2016) (Full Text Here).

State Bar of Utah, Ethics Advisory Opinion Committee, Opinion No. 17-06 ("Utah Op. 17-06") (Aug. 2018) (Full Text Here).

State Bar of Utah, Ethics Advisory Opinion Committee, Opinion No. 97-11 ("Utah Op. 97-11") (Dec. 1997) (Full Text Here).

Virginia State Bar Standing Commission on Legal Ethics, Advisory Opinion 1764, ("Virginia Op. 1764") (May 2002) (Full Text Here).

Daniel E. Garrison, There's No Such Thing As Too Much Information: Disclosure of Bifurcation and Financing in Chapter 7 Cases, 38-JUL Am. Bankr. Inst. J. 20 (2019) (Full Text Available on Westlaw).

Adam D. Herring, Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice", 37-OCT Am. Bankr. Inst. J. 32 (2018) (Full Text Available on Westlaw).

American Bankruptcy Institute, Final Report of the ABI Commission on Consumer Bankruptcy (2019) (Full Text Here).

Steven Garber, Rand Institute for Civil Justice, Law, Finance and Capital Markets Program, Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns 7–16 (2010) (Occasional Paper series) (Full Text Here).

American Bar Association Commission on Ethics 20/20, Informational Report to the House of Delegates (2012) (Full Text Here).

## OPINION

The topic addressed in this opinion stands at the nexus of two recent developments within the United States' legal system and presents varying ethical issues for lawyers today.

The first is third-party litigation funding, referred to as "alternative litigation finance," or "ALF," by the American Bar Association ("ABA"), in the United States. The numerous and evolving types of ALF arrangements defy a single definition. Still, the ABA characterizes them most generally as "mechanisms that give a third party (other than the lawyer in the case) a financial stake in the outcome of the case in exchange for money paid to a party in the case." American Bar Association Commission on Ethics 20/20, Informational Report to the House of Delegates 5 (2012). These transactions often involve sophisticated financial entities and have been the subject of many studies, praise, criticism, and scrutiny by the legal community, including various states' ethics committees. Id. at 1–2, nn.1–4 (collecting commentary and ethics opinions on the subject); see also Steven Garber, Rand Institute for Civil Justice, Law, Finance and Capital Markets Program, Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns 7–16 (2010) (Occasional Paper series) (describing the ALF industry).

The second is the current state of the law in the federal bankruptcy system, particularly the law governing chapter 7 consumer bankruptcies. Due to language within the Bankruptcy Code and caselaw interpreting it, lawyers offering representation in chapter 7 cases face significant hurdles in collecting fees for their services. See Chrystin Ondersma, Small Debts, Big Burdens, 103Minn. L. Rev. 2211, 2231–38 (May 2019) (providing a summary of the history and present situation surrounding these hurdles). These challenges have incentivized consumer bankruptcy lawyers to require up-front retainers to represent potential chapter 7 debtors, a cost that is impossible for many individuals contemplating bankruptcy to afford. See Hon. Henry Callaway & Jonathan Petts, Too Broke for a Fresh Start, 38-FEB Am. Bankr. Inst. J. 24, 24 (2019). The situation is aptly summarized by a recent report compiled by the American Bankruptcy Institute:

How consumers pay for legal representation in bankruptcy is one of the most important issues facing the bankruptcy system. Consumers who cannot pay either cannot access the bankruptcy or must file pro se, and studies show pro se filers get inferior outcomes. Another study suggests consumers are increasingly using "no money down" chapter 13

cases that allow payments of their attorney's fees through the chapter 13 plan, although such filers end up paying more and are less likely to receive a bankruptcy discharge. A bankruptcy system that works only for those who can pay for legal representation does not further the American ideal of equal justice under law.

American Bankruptcy Institute, Final Report of the ABI Commission on Consumer Bankruptcy 89–90 (2019) (footnotes omitted); see also In re Hazlett, No. 16-30360, 2019 WL 1567751, at *5-7 (Bankr. D. Utah Apr. 10, 2019) (expressing concerns with the current state of the chapter 7 bankruptcy system).

The confluence of these developments has resulted in the increasingly prevalent use of fee-financing arrangements with third-party financers to provide consumer bankruptcy lawyers with immediate payment and debtors an opportunity to delay paying the fees until after a discharge of debt is received.[1] Scrutiny of this practice abounds, however, and critics contend these fee-financing arrangements are designed to benefit lawyers primarily, not debtors, and that they encourage improper behavior such as the inflation of fees and the use of deceptive practices to convince debtors to agree to the arrangements. Adam D. Herring, Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice", 37-OCT Am. Bankr. Inst. J. 32, 58–59 (2018); see also American Bankruptcy Institute, supra at 91 (expressly disapproving "fee factoring agreements between debtors' counsel and third-party collectors"). This scrutiny has triggered significant litigation within the bankruptcy courts. See, e.g., In re Carr, 613 B.R. 427, 434–42 (Bankr. E.D. Ky. 2020); In re Milner, Case No. 19-11539-SAH, 2019 WL 8161155, at *14–23 (Bankr. W.D. Okla. 2019), Hazlett, 2019 WL 1567751, at *11–12; In re Wright, 591 B.R. 68, 89–96 (Bankr. N.D. Okla. 2018).

By addressing the ethical questions presented by the fee-financing arrangement detailed above, the opinion provides useful guidance to lawyers preparing to or already navigating the troubled waters generated by fee-financing arrangements in consumer bankruptcy proceedings in Arizona. Fee-financing arrangements with features akin to the arrangement at-issue here are not per se unethical. Still, they present numerous ethical issues that lawyers must carefully resolve to avoid running afoul of Professional Conduct Rules. Lawyers must assess their ability to participate ethically in a fee-financing arrangement—whether it be one that resembles the arrangement considered here or something different—on a case-by-case basis, and must adhere to the principles of professional independence, adequate disclosure, candor, and informed consent when participating in such an arrangement.

**1. Does a fee-financing arrangement that provides for the lender to retain a portion of the lawyer's fee constitute fee-sharing?**

Previously, a lawyer was prohibited from "shar[ing] legal fees with a nonlawyer," except in limited exceptions. Former ER 5.4. Because the fee-financing arrangement described in the opinion request provides that the lender will retain 25% of the advance proceeds used to pay the lawyer's fee, an issue arose concerning whether such an arrangement constituted impermissible fee-sharing under this rule. However, effective January 1, 2021, the Arizona Supreme Court eliminated Former ER 5.4 as part of sweeping changes to the Rules of Professional Conduct proposed by its Task Force on the Delivery of Legal Services (the "Task Force"). Ariz. Sup. Ct. Order R-20-0034 at 2; 2020 Petition at 1. The Task Force recommended eliminating Former ER 5.4 after finding "[t]he prohibition was not rooted in protecting the public but in economic protectionism," and that "it has been identified as a barrier to innovation in the delivery of legal services and contributing to the justice gap." 2020 Petition at 9; see also Task Force Report at 10-16. As stated by the Task Force, the elimination of Former ER 5.4

means nonlawyers could partner with lawyers in an entity that solely provides legal services or in an entity that provides legal services among non-legal services. A nonlawyer could make a passive investment in a legal-services entity. A lawyer even could pay nonlawyer personnel a percentage of fees earned by the law firm on a particular case.

2020 Petition at 11 (emphasis added). Thus, the fee-financing arrangement at issue here is no longer subject to Former Rule 5.4 and—provided the arrangement does not run afoul of any other Rules of Professional Conduct—it is permissible for a nonlawyer lender to retain a percentage of a lawyer's fee in exchange for services rendered. As recognized by the Task Force and discussed below, however, the goal of maintaining lawyers' professional independence, the confidentiality of client information, and conflict-free representation remain paramount.[2]See 2020 Petition at 11.

**2. May a lawyer pass financing and collection fees charged by a lender onto a client, and, if so, what must the lawyer disclose concerning their fee?**

The fee-financing arrangement described in this opinion raises two ethical questions concerning the fee charged under such arrangements. First, may a lawyer include the amount retained by the lender in their fee? Second, if a lawyer can, what disclosures must they make to a client regarding such charges and the fee generally?

ER 1.5(a) provides that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses." When entering into a fee agreement with a client, a lawyer must communicate to the client in writing "the basis or rate of the fee and expenses for which the client will be responsible." ER 1.5(b). A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to

make informed decisions regarding the representation." ER 1.4(b); see also ER 1.4 cmt. 5. When a lawyer wishes to pass charges not associated with their services onto a client, the lawyer must inform the client of the details to the extent reasonably necessary to allow the client to make an informed decision concerning whether to agree to pay those expenses. Ariz. Ethics Op. 01-07.

If a fee-financing arrangement requires that a discount or service charge be deducted from the lawyer's accounts receivable, the lawyer may only pass that charge onto the client if his or her fee remains reasonable. Utah Op. 17-06. Like all other lawyers, a consumer bankruptcy lawyer participating in a fee-financing arrangement remains subject to the factors governing the reasonableness of a fee outlined in ER 1.5(a). Id.

The lawyer must also inform the client of the nature and details of the charge. Ariz. Ethics Op. 01-07. If passing the service charge or discount onto the clients causes a lawyer to charge a higher fee for a fee-financing arrangement than other fee arrangements, the lawyer must inform the client of that fact. ABA Formal Op. 484. In other words, a potential client cannot give informed consent to a fee-financing arrangement without information concerning where the fees will be allocated and whether selecting that arrangement will result in a greater expense to the client than an alternative fee arrangement. ER 1.0(e) (informed consent requires "adequate information" and information on "available alternatives"); ER 1.4(a). No matter the reasonableness of the fee charged, a lawyer may not conceal expenses unrelated to the legal services it agrees to provide a client or fail to provide the client with information concerning other fee arrangements. The lawyer must convey this information to the client in as clear, direct, and simple manner as possible. ER 1.0(e); ER 1.4 cmt. 5; see also Milner, 2019 WL 8161155, at *15–18 (holding fee agreements void where lawyer's fee structure led the court to "seriously doubt[] that [the] [d]ebtor fully understood her rights or her obligations and to whom they were owed"). If these requirements are met and the client, now properly informed, gives their consent to bear the charge's cost, the lawyer may then account for the charge in their fee, so long as the overall fee remains reasonable.

**3. May a lawyer disclose information concerning the client to a lender to facilitate a fee-financing arrangement?**

Because the fee-financing arrangement here involves furnishing the lender with information concerning clients—including copies of the fee agreement, payment authorization, pay stubs, bank account statements, and personal information related to the collection of payments—the issue arises whether the lawyer may disclose such information to a third party. The disclosure of such information falls within the scope of

ER 1.6(a), which provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

Several past Arizona ethics opinions have concluded that a lawyer may disclose information such as a list of their accounts receivable, including the name of the person or company owning the account, the account balance, and the age of the account, to a bank to facilitate acquiring a line of credit or to assist a collection agency in collecting delinquent fees. Ariz. Ethics Op. 94-11; Ariz. Ethics Op. 92-04; Ariz. Ethics Op. 89-10.

On the other hand, Arizona Ethics Opinion 98-05 concluded the sale of a client's account receivable to a finance company created an ER 1.6(a) violation that could not be waived by client consent. The opinion's chief concern was that, under the terms of the proposed agreement at-issue in that opinion, the company was permitted, in its sole discretion, to resell the accounts receivable it purchased from the lawyer in the marketplace. The opinion found:

The lawyer could not conceivably anticipate and communicate to the client all of the factual permutations and legal implications of such a sale to a factor. It is unlikely any lawyer could assess the uncertainty of client accounts receivable being sold into the secondary market replete with the time cards, file, correspondence, legal memoranda, and all other confidential matters relating to the client, sufficiently, for the client to appreciate the significance of what he is being asked to do.

However, the rationale of Opinion 98-05 is unpersuasive because the disclosures contemplated by a fee-financing arrangement such as the one at-issue here are not nearly so broad or far-reaching. The lender is not purchasing accounts receivable that can then be resold in a secondary market. Instead, the lender acts as the financer of a line of credit and a collection service for the accounts receivable assigned to it as security for the loans. Thus, the lender has no right to engage in the activities that would lead to disclosures the lawyer could not possibly "anticipate and communicate to the client." Instead, the disclosures involved here fall within the types of disclosures long found ethically permissible in Arizona, subject to the requirement that the lawyer obtains informed consent from the client to disclose the information to the lender. And this conclusion aligns our interpretation of ER 1.6(a) in this context with those adopted by the opinions of several other jurisdictions, including Utah, Oregon, and the ABA. Utah Op. 17-06; Oregon Op. 2005-133; ABA Formal Op. 484.

Thus, ER 1.6 permits a lawyer to disclose information of the type described here to a lender provided they obtain the client's informed consent. In receiving the client's informed consent, however, the lawyer must inform the client of the full range of consequences that may result from the disclosure of financial information related to the

representation. This includes the potential waiver of attorney-client privilege, provided such information is not already subject to public disclosure as part of the bankruptcy process. ABA Formal Op. 484.

The lawyer must also be aware that assigning the accounts receivable to a lender does not obviate their responsibility to limit the disclosure of information falling within the ambit of ER 1.6 or their ethical duties generally. See Ariz. Ethics Op. 94-11 ("[A] lawyer is legally and ethically responsible for the conduct of the agents of a collection agency and may not 'assist or induce' another to act unethically, if a lawyer does turn over delinquent accounts to a collection agency."). Newly amended ER 5.3, adopted alongside the elimination of Former Rule 5.4, provides that lawyers must make reasonable efforts to ensure nonlawyers assisting in the delivery of legal services engage in conduct that aligns with the lawyer's ethical obligations, including "avoiding conflicts of interest" and "maintaining the confidentiality of all lawyer client information protected by ER 1.6." ER 5.3(a)(2); ER 5.3(c)(1) (attorney liable for conduct by nonlawyer violating Rules of Professional Conduct if lawyer ordered or ratified such conduct); see also Petition at 14 ("[T]he proposed amendments to ER 5.3(a) instruct that all lawyers in a firm must ensure that the firm has in effect measures that provide reasonable assurance that the conduct of all nonlawyers . . . comports with a lawyer's professional obligations.").

**4. What conflicts of interest may arise in fee-financing arrangements?**

Potential conflicts of interest may arise during the execution of the fee-financing arrangement contemplated here. ER 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer. ER 1.8(a) likewise provides that a lawyer "shall not . . . knowingly acquire a[] . . . pecuniary interest adverse to a client . . . ."

A potential conflict is present if, under the terms of the fee-financing arrangement presented here, the lender's advances are recourse loans to the lawyer, meaning the lawyer can be held liable for any fees the lender fails to recover from the client. The recourse nature of the arrangement places the lawyer in a position directly adverse to the client's should the client be unable to pay the lender or dispute some aspect of the lender's collection activities. This, in turn, raises the possibility that the lawyer will place their personal financial and pecuniary interest in avoiding liability for the client's unpaid fees ahead of the client's interests. See ER 1.7(a)(2); ER 1.8(a). Prior Arizona ethics opinions considering third-party financing arrangements have consistently stated that the arrangements must be without recourse to the lawyer to avoid such conflicts of interest. See Ariz.Ethics Op. 98-05; Ariz. Ethics Op. 89-10; Ariz. Ethics Op. 70-20.

However, these opinions did not address whether a conflict arising out of a recourse loan could be waived under ER 1.7(b) and ER 1.8(a).

A lawyer wishing to enter into a fee-financing arrangement with a client and a lender that involves an advance or loan with recourse to the lawyer must comply with the process for waiving the conflicts of interest presented by such an arrangement under both ER 1.7(b) and ER 1.8(a). To properly acquire the client's informed consent, confirmed in writing, the lawyer must inform the client of the nature and details of the recourse loan and the possibility that the lawyer's judgment could be affected by the threat of liability. Nevada Op. 36 ("Counsel should explain that incurring debt in connection with a case could affect counsel's assessment of what constitutes reasonable resolution of the case and thus affect counsel's advice to the client regarding settlement.").

Next, a conflict of interest may arise from the financial incentives a fee-financing arrangement may provide a lawyer. ER 1.7(a)(2). As stated in ABA Formal Opinion 484: "[T]he . . . risk is that the lawyer will recommend the finance company or broker to the client even though fee financing is not in the client's interests because the client's arrangement of financing best assures payment or timely payment of the lawyer's fee." See also Oregon Op. 2005-133. Again, the client's conflict may be waived, provided the lawyer complies with the waiver provisions of ER 1.7(b). But a lawyer will avoid such conflicts altogether if they refrain from recommending or referring a fee-financing arrangement to a client but instead first present it as one of several payment options for the client to consider. ABA Op. 484; North Carolina Op. 4. If the client expresses interest in a fee-financing arrangement, the lawyer may then supply more detailed information with little fear that they have placed a thumb on the scale in favor of one payment option over the other.

Third, a conflict could arise if the lawyer refers the client to a lender in which the lawyer has a financial interest if (1) the client expects the lawyer to represent them in dealings with the lender or (2) the lawyer's financial interest in the lender poses a significant risk to the lawyer's professional independence. ER 1.8(m); ER 1.0(n)(ii). In such a situation, the lawyer must comply with ER 1.7 and ER 1.8(a). ER 1.8(m). Importantly, the Committee believes the term "financial interest" as used in ER 1.8(m) and ER 1.0(n) is intended to be broad and includes scenarios ranging from a lawyer owning a stake in an entity to a lawyer's financial interest in maintaining a beneficial relationship with a particular entity. See Ariz. Ethics Op. 01-07.

Finally, because the fee-financing arrangement here means the lawyer is effectively accepting compensation from the lender for representing the client and not directly from the client, the lawyer must comply with the requirements listed in ER 1.8(f). This

means that: (1) the client must give informed consent to the arrangement; (2) there can be no interference with the lawyers "independence of professional judgment or with the client-lawyer relationship"; and (3) as described above, information related to the representation must be protected as required by ER 1.6. ER 1.8(f).

A lawyer entering a fee-financing arrangement, such as the one contemplated here, must be alert to the possibility of several conflicts of interest. Nevertheless, in each instance, the client may give informed consent to the representation even in the face of such conflicts, provided the requirements contained within ERs 1.7 and 1.8 are satisfied.

**5. What are lawyers' ethical duties regarding the bankruptcy court when entering a fee-financing agreement?**

ER 3.3(a)(1) provides that an attorney shall not knowingly "make a false statement of fact or law to a tribunal . . . ." Comment 3 to the rule further explains that:

an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

In every bankruptcy case, the debtors' counsel must submit a statement to the court disclosing the source of any compensation paid or agreed to be paid to counsel. 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2016(b); Wright, 519 B.R. at 89–90. These responsibilities are critical to the bankruptcy process. The bankruptcy court is empowered to review these disclosures and the reasonableness of the fee charged. 11 U.S.C. § 329(b); Fed. R. Bankr. P. 2017. As summarized succinctly by the Bankruptcy Court for the Northern District of Texas:

The honest and comprehensive disclosure of compensation payments plays a vital role in maintaining the integrity of the bankruptcy system. Moreover, it is only upon full and complete disclosure of compensation payments under section 329(a) of the Bankruptcy Code and Rule 2016 that this court is able to review and determine whether such payments were excessive under section 329(b) of the Bankruptcy Code and Rule 2017 . . . . Because of the importance of this process, a bankruptcy court retains the power, authority, and duty to police the disclosure and reporting requirements set forth in the Bankruptcy Code and Rules with its sanctioning powers, including the power to order the disgorgement of all sums received by counsel and the forfeiture of all compensation paid to counsel in a particular case.

In re Netoche Brigham Fair, Case No. 15-33400-SGJ-13, 2016 WL 3027264, at *13 (Bankr. N.D. Tex. May 18, 2016) (footnotes omitted); see alsoWright, 591 B.R. at 95 ("This Court has previously noted the bankruptcy system is a fragile one, built on the principles of full and candid disclosure. Its operation and survival rely on the integrity and professionalism of its practitioners." (footnote omitted)). Given the affirmative obligation placed on debtors' counsel in bankruptcy proceedings to disclose any source of compensation paid or agreed to be paid to counsel in connection with the proceedings, a lawyer who knowingly fails to disclose the use of a fee-financing arrangement to the bankruptcy court not only risks sanctions under the Bankruptcy Code and Rules but also would violate their ethical duty of candor under ER 3.3(a)(1).

To avoid violating their ethical duty of candor to the tribunal, lawyers must disclose the nature and details of a fee-financing arrangement to the bankruptcy court. As stated by the Bankruptcy Court for the Western District of Oklahoma: "'Disclosure, disclosure, disclosure,' should be every debtor's counsel's mantra . . . ." Milner, 2019 WL 8161155, at *14; see also Daniel E. Garrison, There's No Such Thing As Too Much Information: Disclosure of Bifurcation and Financing in Chapter 7 Cases, 38-JUL Am. Bankr. Inst. J. 20, 68 (2019). To help lawyers understand the level of disclosures required, lawyers must heed the lessons found within the numerous recent bankruptcy court decisions addressing this issue. See, e.g., Carr, 613 B.R. at 434–42; Milner, 2019 WL 8161155, at *14–20; Hazlett, 2019 WL 1567751, at *11–12; Wright, 591 B.R. at 89–96.

## CONCLUSION

Although fee-financing arrangements akin to the one considered here are not per se unethical under the Rules of Professional Conduct, they present numerous pitfalls that lawyers must take care to avoid. Lawyers must maintain their professional independence and remain vigilant for conflicts of interest when engaging in such arrangements. They must also provide clients with the information necessary to make an informed choice to participate in a fee-financing arrangement, including detailed explanations of the nature and details of their fee, the availability of other options, and the information to be disclosed to the lender. These explanations must be presented in a direct, simple, and concise manner. In the consumer bankruptcy context, lawyers must affirmatively disclose the existence and details of a fee-financing arrangement to the bankruptcy court.

**Pursuant to Rule 42.1(l) Opinion as Defense.** Reliance on a final Committee opinon may be raised as a defense in any disicipline proceeding.

[1] The rise of fee-financing arrangements in consumer bankruptcy cases is hand-in-hand with the increased use of "bifurcated" fee agreements, which call for clients to enter two separate fee agreements—one before the petition for bankruptcy is filed, and one after. Adam D. Herring, Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice", 37-OCT Am. Bankr. Inst. J. 32, 58 (2018). Under the pre-petition agreement, the lawyer agrees to file a "skeletal" petition for little or no fee. After the skeletal petition is filed, the client and lawyer enter a second fee agreement that covers a broad range of services, including services that might, in usual circumstances, be done before the petition is filed. Id. The goal of the bifurcated fee model is to avoid discharge of the debt owed for the lawyer's services. Id. Although the bankruptcy courts have both expressed praise and skepticism of this practice, it appears that none has yet held it per se impermissible. See, e.g., In re Hazlett, 2019 WL 1567751, at *7–10 (distinguishing unbundling services from bifurcated fee agreements and approving bifurcation subject to lawyer's ethical obligations); In re Grimmett, No. 16-01094-JDP, 2017 WL 2437231, at *4–7 (Bankr. D. Idaho 2017) (characterizing such agreements as "unbundling" and expressing skepticism). Because the ethical propriety of such agreements was not raised in the opinion request, however, we do not address them further in this opinion.

[2] The Arizona Supreme Court also adopted a regulatory framework for a so-called alternative business structure ("ABS"), or an entity that "provides legal services to third parties and in which a nonlawyer has an economic interest or decision-making authority." See Ariz. Code. Jud. Admin. § 7-209. This opinion does not address the ethical propriety and ethical considerations surrounding an ABS that combines both legal and litigation-funding services. Additionally, this opinion does not apply to excuse compliance with the ABS rules and/or structure, as applicable.

**141 Ariz. 266 (1984)**
**686 P.2d 1236**

# In the Matter of a Member of the State Bar of Arizona, John F. SWARTZ, Respondent.

No. SB-72-3.

**Supreme Court of Arizona, En Banc.**

July 10, 1984.

268 *268 Stephen L. Weiss, Phoenix, for State Bar.

Jack C. Cavness, Phoenix, for respondent.

FELDMAN, Justice.

A Local Administrative Committee (Committee) of the State Bar of Arizona filed a complaint on September 8, 1981, alleging that John F. Swartz (respondent) violated Disciplinary Rule 2-106, Code of Professional Responsibility, and Rule 29(b)(1) of the Rules of the Arizona Supreme Court, 17A A.R.S.[1], by charging a clearly excessive fee. In an amended complaint, the Committee charged that respondent's conduct also violated, *inter alia,* DR 1-102(A)(5) (conduct prejudicial to the administration of justice).

The Committee held hearings on three separate dates, ending in February, 1982. It concluded that respondent had violated DR 2-106(A) by charging and collecting a clearly excessive fee for the "total representation" of his client. Finding that respondent had attempted to maximize his fee at his client's expense, the Committee further concluded that respondent had violated DR 1-102(A)(5) by consciously and willfully taking advantage of the system for handling third party tort claims of injured workers who have sought benefits under the workmen's compensation system. A majority of the Committee recommended that respondent be suspended from practice.

Respondent objected to the Committee's findings, conclusions and recommendation. The State Bar Disciplinary Board (Board) reviewed the matter and voted to accept the Committee's findings and conclusions, but modified the disciplinary recommendation of the Committee. Respondent objected to the Board's recommendation and the matter was then filed with this court. We have jurisdiction pursuant to Rules 36(d) and 37.

FACTS

269 Steven Sarge was injured in a work-related accident on September 7, 1979 when he *269 was hit by a car while setting barricades on the Black Canyon Freeway. Sarge sustained severe, multiple injuries; one leg eventually was amputated. Between September 7 and 13, while Sarge was in intensive care, respondent met with Sarge's mother and brother in the hospital room. They retained respondent to represent Sarge with respect to both a workmen's compensation claim and a personal injury claim against the responsible driver.

A.R.S. § 23-1023 permits an injured worker to follow parallel remedies. He may file a workmen's compensation claim and may, while receiving benefits, pursue a tort claim against any person (other than his employer or a co-employee) legally responsible for the injury. Such tort claims are sometimes described as "third party claims." The industrial carrier (in this case the State Compensation Fund (Fund)) is given a lien against the net recovery on the third party claim for the amount of past benefits paid the injured worker. A.R.S. § 23-1023(C). Any net recovery in excess of the lien is retained by the injured worker, but is to be offset against future benefits which the worker would otherwise receive from the industrial carrier. *Id.* Thus, if there is no reasonable chance that the net tort recovery will exceed attorney's fees, costs, the workmen's compensation lien and the credit for future benefits, there is no advantage in bringing the tort action, because none of the recovery would inure to the worker's benefit. An exception exists if the attorney for the worker can persuade the industrial carrier to reduce its lien, thus reducing the "nut" which the worker must meet before he may pocket any recovery. According to the evidence, one of the factors the Fund considers in determining whether to reduce its lien claim is a reduction in the amount of the fee to be charged by the attorney for the injured worker.


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Sarge was seriously incapacitated and respondent appropriately established a conservatorship on November 1, 1979. On that date a written fee agreement for the tort claim was made with Sarge's mother and brother; it called for respondent to represent Sarge for a fee equal to one-third of all sums recovered.

The facts surrounding the accident were not disputed. The driver of the vehicle which struck Sarge had been intoxicated. No real defense existed and liability was clear. Punitive damages may have been recoverable. Sarge's injuries were extensive. Although a coverage issue was raised at first, it was soon abandoned, and there was no serious dispute concerning insurance coverage. In fact, the driver was covered by two separate policies,[2] with respective limits of $100,000 and $50,000. Aside from these two policies, there were no significant assets subject to execution or garnishment. Two weeks after respondent entered into the contingent fee agreement, one of the liability carriers offered to pay its $100,000 policy limit; approximately two months later, the second carrier offered its policy limit of $50,000. These settlements were made after minimal negotiation between respondent and representatives of the insurance carriers. It was not necessary for respondent to file the tort action and none was ever filed. Although respondent kept no time records, he testified that effecting the settlement had involved a "tremendous amount of work." A qualified expert witness called by bar counsel reviewed the files of all parties and estimated that respondent could not have spent more than twenty to thirty hours in handling all aspects of the claim.

By the time settlement was achieved it had become clear that the Fund's liability for payment of workmen's compensation benefits, and therefore its statutory lien, would soon exceed the net recovery to Sarge. In fact, at the time the settlement with the insurance carriers was consummated, the Fund's total lien was approximately $90,000. Future benefits payable,
270 reduced to present value, were estimated at *270 more than $150,000. The proposed settlement distribution was as follows:

| | |
|---|---|
| Gross settlement: | $150,000.00 |
| Attorney's fees (1/3): | 50,000.00 |
| Costs: | 83.20 |
| Net Proceeds: | 99,917.00 |

As required by A.R.S. § 23-1023(C), the settlement was approved by the Fund. It was also approved by the probate court. Payment of the statutory lien in favor of the Fund consumed all but approximately $10,000 of the net proceeds of settlement. After paying almost $90,000 of the net proceeds to the Fund in satisfaction of its lien and disbursing the fee of $50,000 to himself, respondent retained approximately $10,000 in a trust account. This sum was evidently held for payment of accruing medical expenses and the like. These "excess" funds were credited by the Fund against future benefits and constituted an offset against such benefits. From a practical standpoint, the net result of the settlement was that the Fund got $100,000, respondent received the $50,000 fee, and Sarge received nothing.

In addition to the $50,000 fee which respondent charged and collected on the recovery in the tort claim, respondent requested $1,320 and was awarded $350 in fees by the probate court for work done in the conservatorship proceedings. Respondent also charged and collected 15% of the funds which Sarge received on his workmen's compensation claim until such time as Sarge retained other counsel to represent him in connection with that claim. Respondent testified that his normal charge on workmen's compensation proceedings was 25% and that he reduced his fee to 15% because of the fee which he had received in the tort action.

Respondent and Sarge eventually had a disagreement with regard to both the compensation claim and the tort recovery; Sarge retained counsel and a malpractice action against respondent was filed in Maricopa County Superior Court. Summary judgment was granted against Sarge. The record of that action was admitted in evidence at the Committee hearing. In its findings, the Committee indicated that it had given no weight to that record, the results of the action, nor the testimony of the attorney who had represented Sarge in the malpractice action and who respondent called as a witness in the disciplinary proceedings. During respondent's case-in-chief in the disciplinary proceedings, he called a polygraph examiner to testify to the results of a polygraph test given to respondent at his request. The Committee admitted the results in connection with the issue of whether respondent had attempted to negotiate with the Fund toward compromise of its lien.[3] In its findings, the Committee indicated that it had not considered the polygraph results in reaching its decision.

ISSUES

Respondent contends:

1. He did not charge a clearly excessive fee and the record does not support the conclusion of the Committee that:


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> Respondent violated DR 2-106(A) by charging and collecting clearly an excessive fee for the total representation of his client.

2. The record does not support the Committee's finding that respondent:

> made absolutely no effort to obtain a reduction in the Fund's lien by compromising his attorney's fees or otherwise [with the result that] Sarge personally received nothing from the ... settlement....

Thus, respondent claims also, the Committee erred in concluding that respondent violated DR 1-102(A)(5) by "consciously and willfully" taking

> advantage of the system of allowing attorney's fees for third-party claims in workmen's compensation cases so as to *271 maximize his own fees without attempting to obtain any direct monetary benefit to his client.

271

3. The Committee erred in failing to consider the polygraph examination results in reaching its findings of fact.

4. The Committee erred by disregarding the results of the malpractice action and the testimony of Sarge's attorney.

STANDARD OF REVIEW

We first note the standard applicable to review of the evidence in disciplinary proceedings. Evidence of misconduct must be clear and convincing in order to support disciplinary action, but need not equal proof beyond a reasonable doubt. *In the Matter of Rubi,* 133 Ariz. 491, 652 P.2d 1014 (1982). It is our duty to make an independent determination of the ultimate facts, though the recommendations, findings of fact and conclusions of the Committee and the Board are entitled to great weight. *In the Matter of Burns,* 139 Ariz. 487, ___, 679 P.2d 510, 515-516 (1984) citing *In the Matter of Lurie,* 113 Ariz. 95, 95-96, 546 P.2d 1126, 1126-27 (1976); *In the Matter of Rubi, supra.* Although this court is the ultimate finder of fact in disciplinary proceedings, the findings and recommendations of the Committee are especially pertinent where the credibility of a witness who testified before the Committee is at issue. *Matter of Burns, supra.*

WAS THE FEE EXCESSIVE?

DR 2-106 provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. It provides, also, that:

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

So far as relevant to this case, the rule enumerates the following factors "to be considered as guides in determining the reasonableness of a fee":

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> * * * * * *
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> * * * * * *
>
> (8) Whether the fee is fixed or contingent.

DR 2-106(B).

At the Committee hearing, Bar counsel presented a qualified local attorney who gave expert testimony that the fee collected in the tort proceeding was clearly excessive. In essence, the witness testified that there was no real contingency involved in the case and that the minimal amount of work done by respondent fell far short of justifying the fee collected. The witness stated that under these facts the standard of ethical practice followed in the community would have required the respondent to greatly reduce the fee charged.



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Respondent defends the propriety of the fee collected on the ground that a one-third percentage is customary for a personal injury claim in this community. He asserts that until and unless the bench and bar adopt rules regulating the amount of contingent fees, the "one-third contingent fee, which is not dependent upon work done and perhaps other considerations, is the customary fee" and may properly be charged.

We disagree, first, with the contention that appropriate regulations have not been adopted. Legal history indicates the opposite. The contingent fee was originally considered unethical and illegal as a form of champerty. *See* Note, *Lawyer's Tight Rope — Use and Abuse of Fees,* 41 Cornell L.Q., 683, 685-86 (1956); Radin, *Maintenance by Champerty,* 24 Cal.L.Rev. 48 (1935); Radin, *Contingent Fees in California,* 28 Cal.L.Rev. 587, 588 (1940). It is still considered champertous
272 and illegal in most countries, including Great Britain and the Commonwealth nations. *See* Note, *supra,* *272 41 Cornell L.Q. at 685 and authorities cited therein.

Whatever the view in other countries, the contingent fee was long ago recognized in the United States and is approved in nearly all, if not all, jurisdictions. Radin, *supra,* 28 Cal.L.Rev. at 589. That acceptance, however, was "grudging"; the fee was approved because it was considered a "necessary evil." Note, supra at 684-85 n. 20, quoting from Conference of Bar Association Delegates, 5 A.B.A.J. 61 (1918). To paraphrase, what was before disreputable and illegal became lawful, but not respectable. *Rooney v. Second Avenue R.R.,* 18 N.Y. 368, 373 (1858). It has been suggested that the opposition to contingent fees was chiefly based upon the fear that lawyers would speculate (Note, *supra,* at 689), the danger that lawyers with a direct pecuniary interest in a case would be tempted to manufacture or twist evidence, tamper with the process or otherwise act improperly (*id.* at 697) and the fear that lawyers would overreach because of the conflict between the profession's goal of serving the public and their own self interest. *Id.* at 705. There is also the danger, of course, that such a fee arrangement will increase the filing of vexatious and frivolous actions, though it is certainly possible to argue that such actions may as easily be brought by lawyers who receive substantial fees on a traditional basis. Radin, *supra,* 28 Cal.L.Rev. at 589.

Whatever the dangers, it is now generally accepted that the contingent fee is proper and has substantial social utility because such arrangements are "often the only method by which a person of ordinary means may prosecute a just claim to judgment." Note, *supra,* at 689.[4] We believe that social utility strongly favors the contingent fee as a "poor man's door to the courthouse." Further, given present costs of litigation, we recognize that both the middle class and the wealthy may need or prefer representation on a contingent basis. Properly used, therefore, we believe that the contingent fee is a necessary method of insuring the availability of legal services. Abuses are best handled by control and regulation. In Arizona both the existence and regulation of contingent fees is recognized by our Disciplinary Rules and comments. DR 2-106(B)(8) expressly recognizes that fees may be "fixed or contingent." The Canons of Professional Ethics provide as follows:

> A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of the court, as to its reasonableness.

Canon 13, ABA Canons of Professional Ethics.[5]

Thus, contrary to respondent's assertion, the contingent fee is expressly recognized in the rules and is not merely a matter of custom; *see, e.g.,* Ethical Consideration (EC) 2-20. Further, the Disciplinary Rules, adopted as binding rules of conduct, set limits for all fees, fixed and contingent. DR 2-106(B). We have recognized before that collection of clearly excessive contingent fees warrants imposition of discipline. *In the Matter of Mercer,* 126 Ariz. 274, 614 P.2d 816 (1980). The court's inherent power to prevent collection of excessive contingent fees was acknowledged in *Covert v. Randles*, 53 Ariz. 225, 230, 87 P.2d 488, 490 (1939).

Contrary to respondent's suggestion, DR 2-106 may be violated even though no court in this state has set any particular
273 percentage as appropriate for *273 contingent fees. It is no more possible to set such percentages in advance than it would be to set a single fixed fee for all divorce cases or all real estate litigation. We hold, therefore, that contingent fees are subject to regulation by this court. Excessive fees should not be charged (ABA Canons of Professional Ethics, Canon 12) and "clearly excessive fees" will constitute grounds for disciplinary action, whether the fee is fixed or contingent. DR 2-106.

Respondent is correct in contending that the one-third contingent fee initially agreed upon was within customary limits for the type of case and was not excessive. We do not believe, however, that recognition of the propriety of the initial fee arrangement gives the lawyer carte blanche to charge the agreed percentage regardless of the circumstances which



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eventually develop. Either a fixed or contingent fee, proper when contracted for, may later turn out to be excessive. Radin, *supra,* 28 Cal. L.Rev. at 591. We realize that business contracts may be enforced between those in equal bargaining capacities, even though they turn out to be unfair, inequitable or harsh. *Goodman v. Newzona Invest. Co.,* 101 Ariz. 470, 473-474, 421 P.2d 318, 321-322 (1966). However, a fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client. Thus, in fixing and collecting fees the profession must remember that it is "a branch of the administration of justice and not a mere money getting trade." ABA Canons of Professional Ethics, Canon 12. We hold, therefore, that if at the conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract; he must reduce the fee. What is reasonable and within permissible limits will be determined by the circumstances, including the factors listed in DR 2-106.

In the case at bench, we believe that at the time of settlement it was obvious that the agreed fee was unreasonable and clearly excessive. We recognize that a lawyer working on a contingent fee basis may receive a large fee without that fee being excessive. The fee may be much larger than that which the attorney would have received if he had made no agreement and sued for the reasonable value of his services. Radin, *supra,* 28 Cal.L.Rev. at 592. It may be much larger than that attorney or others in the community would have charged had they been retained and paid on a time basis. Such disparity is inherent in the nature of a contingent fee and is, therefore, one of the circumstances to be considered under DR 2-106(B)(8). Nevertheless, also inherent in the nature of the contingent fee is the concept that the share of the recovery to be paid the lawyer as a contingent fee is properly the product of a number of factors, including: 1) the degree of uncertainty or contingency with respect to liability, amount of damages which may be recovered, or the funds available from which to collect any judgment; 2) the difficulty of the case and the skill required to handle it; 3) the time expended in pursuing it; and, 4) the results obtained. In the case at bench there was no contingency or uncertainty as to liability, and it was apparent that the damages would be substantial but recovery limited to the relatively small amount of insurance available. The limits of the insurance policies available were known almost immediately. There was nothing novel or difficult about the case and it was not even necessary to file a legal action. At the most, only thirty hours of time were expended on the case. There was, in short, no contingency, no difficult problem and little work. There was also no result for the client. Under these circumstances, we agree with the Bar's expert that a fee of $50,000 is both clearly excessive and shocking. Had respondent not deducted the fee but attempted to recover it from Sarge by legal action, it would have been the "duty" of this court "to deny a
274 recovery" on the ground that the fee was out of proportion to the services *274 rendered. *Covert v. Randles, supra.* In dealing with his client, respondent may not be allowed to obtain by self-help what he could not have properly obtained in a court of law. When it became evident that the fee agreed upon was excessive, it became respondent's duty to reduce the agreed fee so that he would charge and collect no more than was reasonable.

Respondent argues, however, that the fee can not be considered excessive because it was approved by both the State Compensation Fund and the Probate Court. We disagree. The evidence showed that such "approvals" are made on a pro forma basis with no real inquiry into the factors that determine whether the fee is reasonable. An arrangement calling for a one-third contingent fee seems reasonable on its face, and may well have been approved, according to the testimony, without real inquiry.

Respondent argues, also, that the amount of the fee had no effect on his client because the client would have recovered nothing even if the fee had been smaller. Respondent contends that reduction of the fee would only have resulted in a greater recovery by the Fund, which was not his client and to which, the argument continues, he had no duty. Assuming, *arguendo,* that all this is true (see *post,* p. 1244), we believe that respondent misapprehends his obligation. The issue is not one of tort duty to the Fund, but a question of the duty which respondent owes to the system of justice. Even if respondent owed no legal duty to the Fund, he owed his client, the profession and the judicial system an ethical obligation of charging no more than was reasonable. The profession's ethical requirements do not permit an attorney to extract unreasonable fees simply because those who must bear the ultimate loss are not in a lawyer/client relationship with the attorney. The axiom that a lawyer's duty is owed to his client does not support the corollary that all others are fair game.

We hold, therefore, the respondent did collect a clearly excessive fee in violation of DR 2-106(A). The Committee's findings and conclusions on this issue are approved and adopted.

THE FAILURE TO ATTEMPT A COMPROMISE



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The charges pertaining to DR 1-102(A)(5) ("conduct that is prejudicial to the administration of justice") revolve around the possibility that the Fund might have agreed to compromise its lien in order to allow Sarge to retain at least some portion of the tort recovery if respondent had offered a significant reduction in his contingent fee. In essence, the Committee concluded that respondent was aware of this possibility but was unwilling to reduce his fee and therefore made no attempt to negotiate with the Fund. In other words, the finding was that respondent manipulated the system by deliberately ignoring an opportunity to benefit his client in order to keep the entire fee. These conclusions are based upon the following evidence.

Although not required by statute, the Fund often will agree to reduce its lien. The situations where this is likely to occur vary. Where there are questions as to either liability or the amount of recovery, the Fund may reduce its lien, thus enabling the claimant to personally receive some monetary benefit, in order to encourage him to settle rather than go to trial. By such an arrangement, the Fund waives part of its lien but protects itself from loss of the entire lien if the verdict is adverse. However, in Sarge's case there was no question of either liability or amount of recovery. The evidence also showed that in some cases where ordinarily the claimant would receive nothing from his third party claim, the Fund would agree to reduce its claim if there was a corresponding reduction in attorney's fees. This reduction by the Fund could be in the form of a lien credit, whereby the claimant receives a lump sum payment which offsets future benefits or in the form of a waiver of part of
275 both the lien and the future offset, so that the claimant receives some direct monetary *275 benefit which is not to be deducted from his future benefits.

Terence Fox, then an attorney for the Fund, testified that at his original meeting with respondent he suggested that at some time prior to a tender of policy limits by the liability insurer,

> it would be appropriate at that time to then approach the State Compensation Fund for a possible negotiation either by way of reduction of lien or reduction of [future] credit.

Fox testified that despite this suggestion, respondent failed to make any attempt to negotiate a lien reduction with the Fund. Consequently, Fox never presented any formal proposal for lien reduction to his supervisor, Robert Park. Fox testified that if he had received a compromise offer from respondent he would have sent it to Park with a favorable recommendation.

Respondent also contacted Charles Wilmer, a specialist in Workmen's Compensation, for advice concerning Sarge's case. Wilmer testified

> I think I suggested to him, that on a couple of occasions I have reduced attorney's fee of my recovery in a third party case, particularly with the State Compensation Fund, where the — the result of the settlement was not going to mean that much to the plaintiff, and I wanted my client to be happy — to feel there was a concrete result. And, I — it had been my experience that on some occasions, and perhaps all that I had been involved with, I really don't remember, the Fund would correspondingly reduce their lien if you would reduce attorney's fees. And, I said I didn't know whether they would do it in your case — I have no idea. But, I think that's your only possible route in terms of attempting to convince the Fund to reduce that roughly $100,000 lien.

Respondent claims he did attempt to negotiate, but his offer was rejected. However, the evidence that respondent did not negotiate for such a compromise is strong. Fox testified that respondent made no offer, and indeed, that on his own Fox informally inquired of Park whether the Fund might be allowed to initiate a proposal, but that Park vetoed the suggestion. Although respondent maintains that when he made an offer Fox refused to allow any compromise, there is no evidence to corroborate that testimony. Neither respondent's own files nor those of the Fund, reflected either offer or negotiations. Although the absence of such references in the files is not determinative, it strongly corroborates the evidence from Fox that respondent did not negotiate with the Fund.

Respondent argues that even if there is clear and convincing evidence to support the finding of fact that he made no effort to obtain a reduction in the Fund's lien by compromising his attorney's fees "or otherwise," this would not support the rest of the finding that "accordingly, Sarge personally received nothing" from the settlement of his personal injury claim. Respondent argues that even if he had compromised his fee, the only one to benefit would have been the Fund, and not his client. We find this unpersuasive. The evidence shows conclusively that the Fund has reduced its lien in other cases. Even in some cases where there was no particular advantage to the Fund, it has agreed that a reduction in fees would induce a partial, equivalent waiver of the lien, either with or without an offset as a credit to future benefits. Whether the Fund would have made any waiver in the case at bench is a matter of conjecture because respondent did not offer to reduce his fees and did not commence negotiations. Therefore, the Committee's finding that "accordingly" Sarge received nothing


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personally from the $150,000 settlement is supported by the evidence. Respondent was retained for the purpose of handling the workmen's compensation and third-party claims, and had a duty to give Sarge the benefit of the chance that such a waiver could be obtained. By not fulfilling his obligations, respondent ensured that no waiver was obtained. The
276 Committee could infer causation from these facts. *See Restatement, Torts* (Second) § 323; *Thompson v. Sun* *276 *City Hospital, Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984). We think the finding is appropriate.

Thus, we find that there is clear and convincing evidence to support the findings of the Committee. Based on the Committee's findings of fact, we uphold the Committee's conclusion that by his conduct respondent

> consciously and willfully took advantage of the system of allowing attorneys' fees for third-party claims in workmen's compensation cases so as to maximize his own fees without attempting to obtain any direct monetary benefit to his client.

Respondent does not challenge the Committee's ultimate legal conclusion that such conduct would violate DR 1-102(A)(5) which states that a "lawyer may not engage in conduct that is prejudicial to the administration of justice."

THE POLYGRAPH RESULTS

Respondent argues that the Committee erred by not considering the results of his polygraph examination. Disciplinary proceedings are governed by the rules of evidence applicable in the superior courts "as far as is practicable." Rule 35(b), Rules of the Supreme Court, 17A A.R.S.

We have previously held that the results of polygraph examinations will not be admissible as evidence in this state absent stipulation. *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). We have permitted use of polygraph evidence where the parties have stipulated to its admission in civil actions. *Hyder v. Superior Court*, 127 Ariz. 36, 617 P.2d 1152 (1980). No such stipulation was made here. Respondent argues that the evidence should have been considered by the Committee without stipulation and asks us to note the concurring opinions of Judges Howard and Hathaway of the Court of Appeals in *State v. Molina*, 117 Ariz. 454, 456, 573 P.2d 528, 530, (App. 1977). We need not reach that issue today. Even where the parties have stipulated, the admission of polygraph results is subject to the discretion of the trial judge. *State v. Molina, supra*. In fact, where such evidence has been admitted pursuant to stipulation, the trial judge must instruct the jury that the examiner's testimony does not prove or disprove any element of the charge, but at most tends to indicate that at the time of the examination, the person examined was or was not telling the truth. *State v. Trotter*, 110 Ariz. 61, 514 P.2d 1249 (1973). In addition, the court is to instruct the jury that they must determine the corrobative weight and effect which should be given to such testimony. *Id.*

Thus, even on stipulation for admission, in a disciplinary hearing the Committee would have had the discretion to admit or reject the polygraph evidence and, admitting it, to have given it some or no weight. In this case, the Committee admitted the evidence and gave it no consideration or weight. We note that the two relevant questions at issue in the polygraph exam were phrased as follows:

> 1. Did you fail to ask Terence Fox about Steven Sarge receiving money from that $150,000 settlement?
>
> 2. Did you at any time fail to ask Terence Fox about getting money from that $150,000 settlement specifically for Steven Sarge?

Respondent's answer to both questions was "no."

Both questions, however, were phrased in the negative, and, with a negative response, were ambiguous. On that basis alone, the Committee could have decided to disregard the polygraph results. From our independent review, we are not disposed to give significant weight to results based on questions phrased as were these.

USE OF THE RESULTS OF THE MALPRACTICE ACTION

Respondent argues that the Committee should have considered the summary judgment entered in the malpractice action to the extent that the issues in that action parallel issues before the Committee. He asserts that issues concluded by the
277 court's summary judgment had a direct *277 bearing on the issues in this disciplinary proceeding. For support, respondent cites *In the Matter of Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982), quoting the following passage:



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> The best support Kleindienst can muster for his defense is that the jury that considered the criminal charges arising from the same alleged perjury acquitted him. *Although serious consideration should be given to a jury's verdict of acquittal for the same conduct that is the subject of bar disciplinary proceedings, see* Siegal v. Committee of Bar Examiners, 10 Cal.3d 156, 110 Cal. Rptr. 15, 514 P.2d 967 (1973), ...

*Id.* 132 Ariz. at 101, 644 P.2d at 255 (emphasis added).

The language that continues at the end of the quote follows:

> *the acquittal is not conclusive of any fact in the bar proceedings,* especially where there is substantial evidence contrary to the verdict.

*Id.,* (emphasis added).

Sarge's malpractice action raised three issues. First, Sarge alleged that respondent negligently failed to discover an error in the Industrial Commission's calculation of average monthly wage and, therefore, failed to appeal that determination. Second, Sarge's complaint charged that respondent negligently relied on the advice of attorneys and adjusters from the State Compensation Fund in settling the third-party claim, and as a result paid all of the proceeds of the tort action to the Fund in settlement of their statutory lien, leaving Sarge with no money. Third, Sarge asserted that respondent was negligent because he failed to research the relevant area of the law and failed to consult disinterested counsel.

We do not believe the summary judgment entered against Sarge has particular evidentiary value in these proceedings. The issue regarding determination of average monthly wage was not relevant to the findings or conclusions of the Committee. The other allegations made in Sarge's malpractice action are also different from the issues decided in the findings and conclusions of the Committee. It is quite possible that respondent could be exonerated of the allegations made in Sarge's malpractice action and still be found to have committed the acts charged in this proceeding. We therefore hold that the record and outcome of the malpractice action against respondent was not relevant to any issue determined in the bar proceedings. The Committee's refusal to accord any weight to the results of that action was proper.

SANCTIONS

The Local Administrative Committee recommended a six month suspension, while the Board recommended suspension for only thirty days. Three members of the Board dissented — two because they thought the discipline too mild, and one because he thought it too severe. The purpose of professional discipline is to protect the public rather than to punish the attorney. *In the Matter of Burns, supra.* A further purpose is the deterrence of like conduct by others. *In the Matter of Mercer, supra.* We note, further, that in evaluating proper discipline to be imposed, we may consider any prior disciplinary proceedings. Rule 38(a)(4). Respondent has previously been censured by this court. *See In the Matter of Swartz,* 129 Ariz. 288, 630 P.2d 1020 (1981). On analysis, that case bears one striking similiarity with the present proceedings. In the former case respondent concealed from or failed to disclose information to those with whom he was in a fiduciary relationship; there, as here, the impropriety was one calculated to give respondent a personal gain or advantage to which he was not entitled. In the former proceeding the personal advantage was the accumulation of money which was held by respondent, without the knowledge of his co-investors, for the purpose of protecting respondent in the event that he was forced to make good on his guarantee to his co-investors. In the matter at bench, respondent failed to perform his obligations to his client
278 for the purpose of protecting *278 his fee. We find the pattern of similarity disturbing.

While charging an excessive fee may warrant no more than a brief suspension, we believe that manipulation of the system to the client's disadvantage and for the lawyer's personal advantage strikes to the very heart of a lawyer's obligation to his client. Thus, while we customarily defer to the recommendations of the Board and Committee (*See In the Matter of Burns,* 139 Ariz. at 492, 679 P.2d at 515; *In the Matter of Kleindienst,* 132 Ariz. at 102, 644 P.2d at 256), we cannot do so with regard to the violation of DR 1-102(A)(5). We hold, therefore, that respondent shall be suspended from the practice of law for a period of six months, commencing thirty days from the date on which this opinion is filed. It is further ordered that costs of $3,405.50 be assessed against respondent, pursuant to Rule 37(g), Rules of the Supreme Court.

One further matter must be considered. Respondent has collected a fee which is clearly excessive. It is not proper that respondent retain these funds. We have inherent power to regulate the practice of law. *See Matter of Anonymous Member of the State Bar of Arizona,* 128 Ariz. 238, 239, 624 P.2d 1286, 1287 (1981); *State Bar of Arizona v. Arizona Land Title and Trust Co.,* 90 Ariz. 76, 88, 366 P.2d 1, 9 (1961); *In the Matter of Greer,* 52 Ariz. 385, 81 P.2d 96 (1938). Accordingly, it is



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ordered that respondent refund to Sarge and the State Compensation Fund the excessive portion of the fee collected. If the parties cannot agree on the amount of a reasonable fee, that sum may be determined by submittal of the matter to the appropriate bar committee. Respondent will not be allowed to apply for reinstatement until the refund has been made. *See Florida Bar v. Moriber,* 314 S.2d 145, 149 (Fla. 1975).

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and CAMERON, JJ., concur.

[1] The Rules of the Supreme Court, 17A A.R.S., will hereafter be referred to as "Rule ____." Those Rules incorporate the Disciplinary Rules (DR) promulgated by the American Bar Association as part of the Code of Professional Responsibility (Code), Rule 29(a).

[2] The driver was not the owner of the car. One policy covered the driver; one covered the owner of the car and extended coverage to the permissive driver.

[3] The evidence was admitted "conditionally;" the Committee stated they might or might not consider it in their deliberations.

[4] Most of the countries in which contingent fees are considered unethical and illegal also maintain systems whereby the social problem of serving the poor is solved by appointing lawyers paid from public funds to represent civil litigants who are unable to afford proper representation. *See* Note, *supra,* authority cited at 689 n. 47.

[5] While the Canons are not adopted as Rules of Conduct for the profession in Arizona, as are the Disciplinary Rules, they are important for understanding and interpreting the Disciplinary Rules and the obligations of the bench and bar.



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## ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

(1) 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;

(2) to 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;

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

(4) 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

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

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

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

### 2003 Comment [Amended 2021]

[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 ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client. ER 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 ERs 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 ER 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. 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 also applies in such situations where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[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.

**Authorized Disclosure**

[5] 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, and nonlawyers in the firm, information relating to the legal representation of a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Any such shared information shall be subject to requirements of confidentiality.

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

**Disclosure Adverse to Client**

[7] 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) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have a change of mind.

[8] Paragraph (c) permits the lawyer to reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. Paragraph (c) does not require the lawyer to reveal the intention of a client to commit wrongful conduct, but the lawyer may not counsel or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d): see also ER 1.16 with respect to the lawyer's obligation or right to withdraw from the representation from 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 ER 1.13(b).

[9] The range of situations where disclosure is permitted by paragraph (d)(1) of the Rule is both broader and narrower than those encompassed by paragraph (c). Paragraph (c) permits disclosure only of a client's intent to commit a future crime, but is not limited to instances where the client seeks to use the lawyer's services in doing so. Paragraph (d)(1), on the other hand, applies to both crimes and frauds on the part of the client, and applies to both on-going conduct as well as that contemplated for the future. The instances in which paragraph (d)(1) would permit disclosure, however, are limited to those where the lawyer's services are or were involved, and where the resulting injury is to the financial interests or property of others. In addition to this Rule, a lawyer has a duty under ER 3.3 not to use false evidence.

[10] Paragraph (d)(2) 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 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 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (d)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal,

disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (d)(4) 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.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes ER 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 ER 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (d)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] Paragraph (d)(5) 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 and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See ER 1.4. Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court's order.

[16] In situations not covered by the mandatory disclosure requirements of paragraph (b), paragraph (d)(6) permits discretionary disclosure when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

[17] Paragraph (d)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See ER 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only when there is a reasonable possibility that a new relationship might be established. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former

client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these ERs.

[18] Any information disclosed pursuant to paragraph (d)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (d)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(7). Paragraph (d)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[19] Paragraph (d) 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.

[20] Paragraph (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). 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 (d) 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 this Rule. See ERs 1.2(d), 4.1(b), 8.1 and 8.3. ER 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See ER 3.3(b).

**Withdrawal**

[21] 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, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

**Acting Competently to Preserve Confidentiality**

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional

safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]-[4].

[23] 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 ER or may give informed consent to the use of a means of communication that would otherwise be prohibited by this ER. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these ERs.

**Former Client**

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 511** **May 8, 2024**

## Confidentiality Obligations of Lawyers Posting to Listservs

*Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.*

## Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.[2]

## Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,[3] ABA Model Rule of Professional Conduct 1.6(a) provides that: "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

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.
[2] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.
[3] This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

out the representation or the disclosure is permitted by paragraph (b)."[4] Comment 3 explains that Rule 1.6 protects "all information relating to the representation, whatever its source" and is not limited to communications protected by attorney-client privilege.[5] A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), "the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer." Among the information that is generally considered to be information relating to the representation is the identity of a lawyer's clients.[6]

Because Rule 1.6 restricts communications that "could reasonably lead to the discovery of" information relating to the representation,[7] lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client's identity or the situation involved.[8] Comment 4 explains, that without client consent, Rule 1.6 prohibits:

> 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.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers "who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another*." (Emphasis added).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "the agreement by a person to a

[4] Comment 2 to Model Rule 1.6(a) emphasizes that 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."

[5] The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [3].

[6] Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client's identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass'n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass'n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10th ed. 2023).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [4].

[8] *See, e.g.*, Colo. Bar Ass'n Formal Op. 138 (2019) ("Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a 'reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.'").

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.[9]

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."[10] Comment 5 to Rule 1.6 explains that "[l]awyers 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." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance. Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.[11]

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[9] Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

[10] Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

[11] Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent…"

**Seeking Advice or Assistance from a Listserv Discussion Group**

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could "reasonably lead to the discovery of" information relating to the representation because there is a "reasonable likelihood" that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers' efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such

as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with "war stories."[12]

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.[13]

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a

[12] Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (discussing the "generally known" exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell "war stories" about a former representation without the former client's consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers' confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

[13] For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client's identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client's identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this "information relating the representation" is prejudicial to the client, Rule 1.6 provides that if the client's identity could be ascertained, it is the client's decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[14] Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.[15]

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

[14] Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

[15] When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

## Conclusion

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

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## ER 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 each affected client gives informed consent, confirmed in writing, and:

(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; and

(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.

**(c)** A lawyer may not represent a party in asserting a claim against another party represented by a firm if the same person or entity holds an ownership interest, directly or indirectly, of 10 percent or more, or has managerial authority comparable to that of a partner, in the lawyer's firm and the other firm.

**Comment [2021 amendment]**

**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 ER 1.8. For former client conflicts of interest, see ER 1.9. For conflicts of interest involving prospective clients, see ER 1.18. For definitions of "informed consent" and "confirmed in writing," see ER 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

nonlitigation matters the persons and issues involved. See also ER 5.1, Comment [2]. 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 ER 1.3, Comment [4] 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 ER 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 ER 1.9. See also Comments [5] and [28].

[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. In these circumstances, the lawyer may 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 ER 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See ER 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 lawyer acts directly adversely to a client if it will be necessary for the lawyer to cross-examine a client who appears as a witness in a lawsuit involving another client. 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] Although directly adverse conflicts arise most frequently in litigation, they also arise in transactional matters. For example, if a lawyer is asked to represent a seller 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. 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 ER 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] 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 ERs 1.8(*l*) and 1.10.

[11] 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 ER 1.8(j).

**Interest of Person Paying for Lawyer's Service**

[12] 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 ER 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**

[13] 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.

[14] 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 ER 1.1 (competence) and ER 1.3 (diligence). In determining whether a multiple-client conflict is consentable, one factor to be considered is whether the representation will be provided by a single lawyer or by different lawyers in the same firm.

[15] 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.

[16] 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 ER 1.0(m)), such representation may be precluded by paragraph (b)(1).

**Informed Consent**

[17] 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 ER 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 [29] and [30] (effect of common representation on confidentiality).

[18] 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. The cost benefits of common representation may be considered by the affected client in determining whether common representation is in the client's interests.

**Consent Confirmed in Writing**

[19] Paragraph (b) requires the lawyer to obtain the informed consent of each client, confirmed in writing. Such a writing may consist of a document executed by the client or oral consent that the lawyer promptly records and transmits to the client. See ER 1.0(b). See also ER 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. 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. The writing need not take any particular form: it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks.

**Consent to Future Conflict**

[20] 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 an unforeseeable conflict may arise, such consent is more likely to be effective, particularly if 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**

[21] 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 co-plaintiffs or co-defendants, 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 co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[22] 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.

[23] 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**

[24] 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].

[25] 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, as when one spouse owns significantly more property than the other or has children by a prior marriage. 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.

[26] 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 of 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**

[27] 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.

[28] 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.

[29] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. 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 ER 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.

[30] 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 ER 1.2(c).

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

**Organizational Clients**

[32] 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 ER 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.

[33] 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.

[34] ER 1.7(c) parallels ER 1.7(b)(3) in barring certain concurrent representations of adverse parties, irrespective of consent. Where there is an overlap of ownership or management between law firms that does not involve effective control, ER 1.7(a) and (b) will determine whether the two firms can concurrently represent adverse parties. Moreover, where a lawyer or other owner of a firm has a financial interest in an opposing party, the interest will ordinarily be considered a “personal interest” as that term is used in ER 1.10(a) that may not be imputed to other lawyers in the firm, unless that personal interest would materially limit the other lawyers' independent professional judgment. Even though the personal interest conflict will not be imputed to other members of the firm, the lawyer must disclose the interest to the firm's client and obtain their informed consent, confirmed in writing, to proceed with the representation.

**ER 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 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 ER 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;

(2) make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities; or

(3) settle such allegations, claims, or potential claims 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.

(l) A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

**(m)** A lawyer wishing to engage in a business transaction with a client must comply with both ER 1.7 and 1.8(a) if:

(1) the client expects the lawyer to represent the client in the transaction; or

(2) 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.

**Comment [2021 amendment]**

**Business Transactions Between Client and Lawyer**

[1] The risk to a client is greatest when the client expects the lawyers 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 requirements of paragraph (a), but also with requirements of ER 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, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the firm or refer clients through a separate entity in which the lawyer has a financial interest, 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 ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[2] 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**

[3] 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 ERs 1.2(d), 1.6, 1.9(c), 1.14, 3.3, 4.1(b), 8.1 and 8.3.

**Gifts to Lawyers**

[4] 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 or a related person a more substantial gift, paragraph (c) does not prohibit the lawyer or related person from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not solicit a substantial gift to be made to the lawyer or related person, or for the benefit of the lawyer or a related person, except where the lawyer is related to the client as set forth in paragraph (c). Nothing in paragraph (c) is intended to interfere with a lawyer's efforts on behalf of a charitable institution, provided that the lawyer or related person has no financial interest in the charitable institution.

[5] 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.

[6] 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 ER 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**

[7] 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 ER 1.5 and paragraphs (a) and (i).

**Financial Assistance**

[8] 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 Lawyer's Services**

[9] 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 ER 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).

[10] 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 ER 1.7. The lawyer must also conform to the requirements of ER 1.6 concerning confidentiality. Under ER 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 ER 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 ER 1.7(b), the informed consent must be confirmed in writing.

**Aggregate Settlements**

[11] 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 ER 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, ER 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 ER 1.0(e) (definition of informed consent). This rule does not apply to lawyers representing governmental agencies or officials unless, in the particular action, there is a potential for a conflict of interest between the jointly represented government agencies or officials on the issue of settlement. 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 Claims**

[12] Agreements prospectively limiting a lawyer's liability for malpractice, whether made at the outset of the representation or at any time when the client is unaware of a claim or potential claim, 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 that lawyer's 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 ER 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.

[13] 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. Notwithstanding the provisions of paragraph (h)(3), agreements that purport to limit a person's ability to report professional misconduct are not binding on disciplinary authorities.

**Acquiring Proprietary Interest in Litigation**

[14] 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 ER 1.5.

**Client-Lawyer Sexual Relationships**

[15] 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.

[16] 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 ER 1.7(a)(2).

[17] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization 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**

[18] 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 paragraphs (j) and (*l*) are personal and are not applied to associated lawyers.

**Personal Relationships Between Lawyers**

[19] ER 1.8(*l*) applies to related lawyers who are in different firms. A lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or cohabitant ordinarily may not represent a client in a matter where the other lawyer is representing another party, unless each client gives informed consent. The disqualification arising from the relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See ER 1.10.

# 07-04: Joint Representation; Conflicts; Communication; Informed Consent

## FACTS

The inquiring lawyer seeks to represent multiple plaintiffs bringing claims against a defendant in a single matter and has asked for comment on a proposed written disclosure ("consent form") that each client would be asked to sign. This opinion references the proposed consent form for purposes of illustration only, and is intended to set forth general guidelines that lawyers should undertake in determining whether the representation of multiple clients in litigation is permissible and, if so, the general subject matter of required disclosures under ER 1.7.[1]

## QUESTION PRESENTED

Where a lawyer seeks to represent multiple clients in a single litigation matter, what information must the lawyer adequately communicate to the clients to satisfy ER 1.7's requirement of an "informed consent, confirmed in writing"?[2]

## RELEVANT ETHICAL RULES

### ER 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . .

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

. . .

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

. . .

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

. . . .

**ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

. . . .

**ER 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 each affected client gives informed consent, confirmed in writing, and:

(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; and
(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.

**RELEVANT ARIZONA ETHICS OPINIONS**

Ariz. Ethics Ops. 96-04, 02-06

**OTHER RELEVANT ETHICS OPINIONS**

ABA Formal Op. 06-438; D.C. Bar Op. 327

**OPINION**

The Ethical Rules specifically contemplate that a lawyer may represent multiple clients. *See* ER 1.8, cmt 13. The potential benefits of multiple representation include "reduced legal fees, the avoidance of unnecessary future conflicts, and, in litigation, the opportunity to present a united front." *Sellers v. Superior Court*, 154 Ariz. 281, 286, 742 P.2d 292, 297 (App. 1987). However, representation of multiple clients in a single matter presents a significant risk of materially limiting the interests of individual clients. Both *Sellers v. Superior Court* and Ariz. Ethics Op. 96-04 (February 1996) [3] illustrate the type of conflicts that can arise when a lawyer undertakes to represent multiple clients in the same matter. The ABA/BNA Lawyer's Manual on Professional Conduct cautions that "clients seeking shared representation often do not understand the risks and disadvantages of shared counsel," including that there can be "no secrets inside the joint attorney-client relationship," and that if interests later diverge, the clients may be forced to hire new counsel. ABA/BNA Lawyer's Manual on Professional Conduct §51:305 (2005). Based on these and other inherent risks of joint representation, ER 1.7(b) bars representations involving concurrent conflicts unless the lawyer obtains the clients' "informed consent, confirmed in writing."

Notably, not all conflicts are "consentable." ER 1.7(b)(1) first requires that "the lawyer reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client." Thus, even if the client consent form is comprehensive, the clients' waiver is only effective if the lawyer held a reasonable belief that he or she could competently and diligently represent each of the involved clients. ER 1.7, cmts 2, 14 and 15; *see also* ER 1.0(a), (h) and (i). For example, Comment 28 to ER 1.7 cautions against representation of multiple clients in the same matter where

"contentious litigation or negotiations" between the clients are "imminent or contemplated." The lawyer should evaluate whether other circumstances unique to the particular matter may make the representation impermissible or require special disclosures, such as the limited financial resources of a defendant where multiple plaintiffs are being represented. This standard requires that the attorney be sufficiently familiar with the facts underlying the proposed representation to reasonably make this threshold determination of whether the representation is permissible under the ethical rules. *See, e.g., Felix v. Balkin*, 49 F. Supp. 2d 260, 270 (S.D.N.Y. 1999) ("[a]ccepting a common representation is not a risk-free activity" and "it is incumbent upon the attorney to learn the essential facts in order both to form a professional opinion that interests are, in fact, common and not adverse, and to explain fully to each client the implications of the common representation").

This opinion therefore assumes that the inquiring lawyer is satisfied that the representation is permissible and that the conflict is, indeed, "consentable." *See In re Bentley*, 141 Ariz. 593, 596, 688 P.2d 601, 604 (1984) (applying DR 5-105(C) to hold that representation created an impermissible conflict of interest because "[e]ven with full disclosure, not all conflicts may be waived by consent of the parties"); *In re Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987 ) (similar).

Although the disclosures need not take any particular form, a lawyer seeking "informed consent" to joint representation generally is required to orally discuss the potential risks and advantages of the joint representation to ensure that each client fully appreciates the risks and has an opportunity to ask questions. ER 1.7, cmt 20. ER 1.0 thus provides that the requirement of an informed consent "confirmed in writing," "denotes informed consent that is given in writing... *confirming an oral informed consent*." ER 1.0(b) (emphasis supplied). "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... and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns." ER 1.7, cmt 20. Here, the inquiring attorney's proposed consent form recites that the law firm has explained the potential risks of the joint representation and that the clients have been permitted to ask questions about those issues. In each case, the lawyer undertaking to represent multiple clients must evaluate whether such explanation was in fact adequate to fully inform the clients under the governing Ethical Rules and the general guidelines discussed below.

To obtain any client's informed consent, the lawyer must communicate "adequate information" about the "risks" and "alternatives" of the multiple party representation. The specific disclosures required depend in large part on "the nature of the conflict and the nature of the risks involved" given the facts and circumstances of the particular

matter. ER 1.7, cmt 18. One such circumstance that should be considered is the level of each client's legal sophistication. ER 1.0, cmt 6 ("[i]n determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt c(i) (2000) ("clients differ as to their sophistication and experience, and situations differ in terms of their complexity and the subtlety of the conflicts presented"). Unsophisticated clients, such as clients without independent or in-house legal counsel, may require more detailed explanation than other clients who are experienced in litigation or multi-party representations. Depending on the complexity of the matter, it may be appropriate for the lawyer to advise the client to seek independent counsel to assist in evaluating the potential conflicts, although this is not always required. ER 1.0, cmt 6.

A lawyer "must make reasonable efforts to ensure that the client... possesses information reasonably adequate to make an informed decision." ER 1.0, cmt 6. With respect to the required content of the disclosure, Comment 18 to ER 1.7 indicates that the lawyer must explain the "implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Such information includes disclosing to the client: (1) the conflicting or potentially conflicting interests of the other clients; (2) the potential courses of action that may be foreclosed or limited by the joint representation; (3) the effect of the representation upon the client's confidential information and on the attorney-client privilege; (4) any reservations the lawyer would have about the representation if the lawyer were representing only the client being advised; and (5) the consequences on the representation if one client later withdraws their consent to the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt c(i) (2000); ABA/BNA Lawyer's Manual on Professional Conduct §51:309-311 (2005). The lawyer must explain the conflict in enough detail that the clients can "understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them." DANIEL J. MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK §0.1:415 (2d ed. 2003 with 2006 supp.) (quoting *Sellers v. Superior Court*, *supra*, and discussing "informed consent" requirement of Arizona law).

While the confirming writing "need not take any particular form[,] it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks." [4] ER 1.7, cmt 20. While there is no "one size fits all" template for ER 1.7's required disclosures or for the content of the confirming writing, the proposed consent form provided by the inquiring lawyer for the Committee's consideration illustrates the

following general topic areas that should be addressed, in addition to others that may be required by particular circumstances of the proposed representation:

(1) *Conflicting Testimony*. The implications of testimonial conflicts among jointly represented parties is addressed in *Sellers v. Superior Court*, where the defendants had all consented in advance to the joint representation, with knowledge of testimonial conflicts, yet an argument was made in the context of a motion for disqualification that those conflicts presented an "untenable" conflict at the outset on the facts of that case. Although the inquiring lawyer's consent form appropriately identifies the potential for testimonial and other conflicts, it may be prudent to provide further explanation on how such testimonial conflicts could negatively impact the claims of each individual client, assuming that was not done orally. *Sellers*, 154 Ariz. at 287, 742 P.2d at 298 (on remand following disqualification order, trial court should consider whether the ER 1.7 disclosure "encompass[ed] the divergence of interest among defendants and the potential significance of their testimonial disparities"). Furthermore, any known testimonial conflicts should be evaluated to determine whether the conflict is "consentable."

(2) *Conflicting Settlement Positions*. The consent form appropriately discloses that there may be conflicts among clients with respect to settlement, including that "there may be different possibilities of settlements of the claims." It recites the clients' understanding that "a lump sum settlement offer to all plaintiffs" is "not permissible," that the law firm may reject such an offer and demand individual settlement offers, and that each plaintiff is free to accept or reject its individual settlement offer. This opinion assumes that the inquiring lawyer, in discussing the topic of settlement, orally discussed the advantages and disadvantages of the various settlement approaches, including the possible disadvantages of requiring individual offers (as opposed to aggregate offers). Additionally, because individual offers are being required, it should also be made clear to each client that information on the individual settlement offer it receives, and any response thereto, cannot be kept confidential from the other jointly represented plaintiffs. *See* ER 1.8, cmt 13 (noting that ER 1.8 is a corollary of ER 1.7 and requires that "before any settlement offer... 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... is accepted"); *see also* ABA Formal Op. 06-438 (February 10, 2006) (with respect to aggregate settlement offers under ER 1.8, lawyer must provide each client with detailed information on every other client's participation in the proposed settlement, along with explanation of how costs will be allocated).[5]

(3) *Attorney-client Privilege*. Lawyers undertaking a joint representation must carefully explain to each client the effect of the joint representation on the attorney-client privilege. As the comments to ER 1.7 reflect, the lawyer must disclose that there is no attorney-client privilege between jointly represented clients during the pendency of the matter, and the implications that arise from the absence of any such privilege. ER 1.7, cmts 29, 30 and 31; *see Federal Deposit Ins. Corp. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (privilege is "inapplicable to disputes between joint clients"). Additional disclosures also should be made on the topic of confidentiality and the possibility that withdrawal may be required in the future if untenable conflicts arise, as further discussed below.

(4) *Withdrawal of the lawyer in the case of a conflict*. The inquiring lawyer should disclose that the firm may be forced to withdraw if an untenable conflict arises during the representation, and the delays and expense that could result should such withdrawal be required. ABA/BNA Lawyer's Manual on Professional Conduct §51:309-311 (2005) (lawyer should disclose that withdrawal may be required if one joint client asks the lawyer not to reveal information to another); Ariz. Ethics Op. 02-06 (September 2002) ("Aggregate representation also is ethically proper if the disclosure to each client includes an explanation that the lawyer may have to withdraw from representing *each* client if a conflict arises *among* the clients") (emphasis in original); ER 1.7, cmt 30 ("The lawyer should . . . 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").[6]

(5) *Confidentiality*. Disclosures should be made concerning the impact of the joint representation on the confidentiality of each client's communications with the lawyer. As noted in Ariz. Ethics Op. 02-06, "information shared by one co-client that is necessary for the representation of the other joint clients will be shared with the other co-clients because there is no individual confidentiality when a joint representation exists." Hence, the clients should be advised that all information provided by them in connection with the representation will be available to the other clients and that the normal confidentiality obligations of the lawyer do not apply as between the jointly represented clients. *See* ER 1.7, cmt. [30]; ER 1.6(a) (lawyer shall not reveal confidential information "unless the client gives informed consent"). As noted above, it also should be explained that if one joint client instructs the lawyer not to share material information with other joint clients, a conflict is created that may require the lawyer's withdrawal from the joint representation. *See* D.C. Bar Op. 327 (March 2005) (addressing lawyer's obligation to share otherwise confidential information with all clients in a joint representation).

**CONCLUSION**

The adequacy of any disclosure under ER 1.7 ultimately depends on the particular risks posed by the facts and circumstances of each case. This opinion sets forth general procedures and guidelines for determining whether representation is permissible under ER 1.7, and the content of the required disclosures. The inquiring lawyer is best suited to determine whether the consent form, along with oral disclosures, is adequate based on those facts and circumstances. Additionally, at the time any settlement offer is received, the inquiring lawyer should re-evaluate whether additional disclosure and consent is required under ER 1.8. *See* ABA Formal Op. 06-438. Finally, in cases of joint representation, lawyers must evaluate on an ongoing basis whether future developments in the case create issues that require additional disclosures and consent to the multiple representation or possible withdrawal.

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[1] As the opinion makes clear, the disclosures required to obtain an informed consent, and the content of the confirming writing, will depend on the unique facts and circumstances of each matter. Depending on the nature and complexity of the matter, different disclosures may be appropriate or required under the Ethical Rules or the general guidelines set forth in this opinion.

[2] This opinion addresses only the information that must be disclosed to obtain an informed consent under ER 1.7, and does not address other information that must be contained in a client representation agreement under other provisions of the Ethical Rules.

[3] *Sellers* involved a trial court order disqualifying defense counsel, who represented 11 defendants in a civil case. The Court of Appeals ruled that the disqualification had been prematurely ordered. Ariz. Ethics Op. 96-04 discussed conflict-of-interest and fee issues that arise when a law firm represents both a driver and passenger in a personal-injury case against another driver.

[4] As the comments to ER 1.7 reflect, the purpose of the confirming writing is both to emphasize the seriousness of the client's consent and to avoid later disputes and ambiguities about what was disclosed. [ER 1.7, cmt 20 ("[T]he 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.")]

[5] ABA Formal Op. 06-438 states that the special disclosure requirements of ER 1.8 apply whenever "any two or more clients consent to have their matters resolved together." The opinion notes that an aggregate settlement within the meaning of ER 1.8 can take a variety of forms, and may include an offer that specifies the amount to be paid to each individual client. The inquiring lawyer should evaluate any settlement offer received to determine whether it is, in substance, an aggregate offer that would trigger the additional disclosure requirements of ER 1.8.

[6] In limited circumstances a lawyer may be able to obtain informed consent allowing each client to keep certain information confidential. *See* ER 1.7, cmt 30.

## ER 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 ERs 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 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, 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 ER 1.11.

[2] The scope of a "matter" for purposes of this Rule may depend 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 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 wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment 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 prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that is relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

**Lawyers Moving Between Firms**

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by ERs 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See ER 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of

clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See ERs 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See ER 1.0(e). With regard to the effectiveness of an advance waiver, see ER 1.7, Comment [21]. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see ER 1.10.

## ER 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 services to perpetrate a crime or fraud;

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

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

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

(7) other good cause for withdrawal exists.

(c) A lawyer shall 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 documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

## 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 ERs 1.2(c) and 6.5. See also ER 1.3, Comment [4].

### Mandatory Withdrawal

[2] 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 ER 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 ERs 1.6 and 3.3.

### Discharge

[4] 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 ER 1.14.

**Optional Withdrawal**

[7] 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 also may 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.

**Assisting the Client Upon Withdrawal**

[9] Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client already has received one copy of them.

[10] Even if the lawyer has been discharged by the client, the lawyer must take all reasonable steps to avoid prejudice to the rights of the client.

[11] Lawyers may fulfill their ethical obligations with respect to client files by returning the file to the client.  File retention policies should be disclosed to the client, preferably in writing and at the inception of the relationship.

## ER 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, except as would be permitted by ER 1.6 or by ER 1.9 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) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(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 prospective client, including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the prospective client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the prospective client about the screening procedure; and

(3) the personally disqualified lawyer and the partners of the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its 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 consultations 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] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client ." Lawyers should employ reasonable measures to alert persons that a) they should not convey information about a legal matter unilaterally to the lawyer, and b) unilateral communications may not be kept confidential.

[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 ER 1.6 and as permitted by ER 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] Any information obtained from a prospective client who consults the lawyer in an attempt to disqualify the lawyer or make contact for some purpose other than seeking representation is not information relating to representation and disclosure is not prohibited.

[5] 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 consultation 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 ER 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[6] A lawyer may condition a consultation 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 ER 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.

[7] 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 against the prospective client in the matter.

[8] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in ER 1.10, but, under paragraph (d), 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 all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See ER 1.0(k) (requirements for screening procedures). Paragraph (d)(1) 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.

[9] 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. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

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

## ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See ER 1.2(d).

**Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

**Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interest. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by ER 1.6. Therefore, unless authorized to do so the lawyer may not disclose such information. The lawyer may disclose information otherwise protected by ER 1.6 to the extent such disclosure may be required by law. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

**Emergency Legal Assistance**

[9] In an emergency where the health, safety or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent 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 the lawyer's relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

## ER 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**

**Scope of Advice**

[1] A client is entitled to straightforward 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.

**Offering Advice**

[5] 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 ER 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 ER 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.

## ER 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 may include a good faith and nonfrivolous 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.

### Comment

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

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

[3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense attorney must not file frivolous motions.

[4] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting an appeal that otherwise would be prohibited by this Rule.

## ER 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

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

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

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

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

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

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

### Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See ER 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause; the lawyer must not mislead the tribunal by false statements of law or fact or evidence that the lawyer knows to be false.

#### Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare ER 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an

affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in ER 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with ER 1.2(d), see Comment [10] to that Rule. See ER 8.4(b), Comment [2].

**Legal Argument**

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

**Offering Evidence**

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

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

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. Counsel first must attempt to persuade the accused to testify truthfully or not at all. If the client persists, counsel must proceed in a manner consistent with the accused's constitutional rights. See State v. Jefferson, 126 Ariz. 341, 615 P.2d 638 (1980); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). The obligation of the advocate under the Rules of Professional Conduct is subordinate to such constitutional requirements. See also Comment [9].

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

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of

evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

**Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by ER 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

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

**Preserving Integrity of Adjudicative Process**

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

**Duration of Obligation**

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

**Ex Parte Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

**Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

# Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-20-0007

## FACTS

The inquiring Attorney, who was not identified in the original opinion due to State Bar of Arizona, Rules of Professional?Conduct Committee confidentiality rules, represented Client in an unemployment compensation proceeding. Client's employer had discharged Client, accusing Client of specified wrongdoing. Denying the allegations, Client sought unemployment benefits. An examiner denied Client any unemployment benefits on the basis of dishonesty and committing a criminal offense against the employer. Client has never been charged with any criminal offense arising from the employer's allegations. Client retained Attorney to appeal the denial of the unemployment claim. Attorney and Client participated in an appeal before a Department of Economic Security single-member "appeal tribunal." See generally A.R.S. § 23-671 (describing appeal process from examiner's decision).

The employer introduced certain evidence on appeal supporting its allegation of Client's dishonesty. Attorney, through Client's testimony, countered that evidence and offered additional evidence supporting Client's case. The appeal tribunal ultimately ruled that the employer did not prove wrongdoing on Client's part and awarded Client unemployment benefits. Subsequent to the hearing, a third party told Attorney that Client had not been truthful with Attorney or in testimony before the appeal tribunal. Attorney confronted Client about the alleged perjury, and Client admitted the perjury and other material facts to Attorney, establishing that false evidence had been presented to the tribunal. After Attorney privately remonstrated with Client about the need to correct the record, Client discharged Attorney. Attorney believes that although the employer has appealed the hearing officer's decision, Client has found other employment and is no longer receiving unemployment compensation.

## QUESTION PRESENTED

Must an attorney take reasonable remedial measures upon learning of a former client's false testimony to an unemployment compensation hearing officer, and, if so, what measures must be taken?[1]

## RELEVANT ETHICAL RULES[2]

### ER 1.0 Terminology

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(m) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

**ER 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 or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

**ER 1.9 Duties to Former Clients**

(c) A lawyer who 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.

**ER 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]

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

the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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

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

**RELEVANT ARIZONA ETHICS OPINIONS**

Opinions 2002-02, 2001-14, 93-10, 92-2, 91-02, 80-27.

**OPINION**[3]

This opinion addresses the continuing quandary of an attorney's ethical obligations upon learning that a client has testified falsely before a civil tribunal.[4] Under the previously used Arizona Code of Professional Responsibility, the ethical rules generally did not require or permit an attorney to reveal confidential information learned from a client even in the face of knowledge that the client committed perjury. See generally Ariz. Op. 80-27 (noting that under DR 7-102(B)(1) (as in effect on December 12, 1980), an attorney was not ethically required to reveal a client's fraud on a tribunal if to do so would violate the client's confidential communication to the attorney as defined by then-existing DR 4-101).

Under the present Arizona Rules of Professional Conduct, however, the balance has shifted away from preserving client confidences and towards the attorney's duty of candor to the tribunal. ER 3.3(c) explicitly requires the disclosure of a client's false testimony notwithstanding that the attorney "knows" of the false testimony via a client's confidential communication. The Rules make the policy determination that insuring the integrity of the decision-making process trumps, in some instances, a lawyer's traditional duty to protect a client's confidences. Ariz. Op. 93-10, at 3-4 (recognizing that the "tension" between an attorney's duty to a client and to the court has been resolved in favor of the court in the context of a client giving false evidence); Geoffrey C. Hazard, Jr., et al., 2 The Law of Lawyering § 32.11, at 32-25 (4th ed. Supp. 2015) [hereinafter, Hazard, The Law of Lawyering].

**Ethical Duty Under ER 3.3**

ER 3.3(a)(3) plainly requires an attorney to refrain from knowingly offering false evidence. Further, when an attorney later learns that he or she has offered false material evidence to a tribunal, including evidence offered directly by a client or former client,[5] the attorney must take "reasonable remedial measures, including if necessary, disclosure to the tribunal." ER 3.3(a)(3); see also Hazard, The Law of Lawyering, § 32.20, at 32-59 (discussing analogous section of the Restatement (Third) of the Law Governing Lawyers (2000) which provides that duty of candor to the tribunal survives termination of the attorney-client relationship). The duty to take remedial measures lasts until "the conclusion of the proceeding." ER 3.3 cmt. [13]. A proceeding is deemed concluded when the result of the proceeding has been upheld on appeal or the time for the appeal has otherwise expired. Id. In this case, then, the Committee must examine (1) whether Attorney "knows" that false evidence was presented, (2) whether the purportedly false evidence was offered to a "tribunal," (3) whether the evidence was "material," (4) what "reasonable remedial measures" are necessary under the circumstances, and (5) the duration of Attorney's obligation to take such measures.[6]

1) Attorney's Knowledge

Attorney here first received an indication of Client's false testimony from a third party. Attorney then privately confronted Client about the third party's allegations, and Client admitted the perjury in addition to other material facts. To Attorney, these admissions conclusively established the falsity of Client's prior testimony. Thus, here there is no dispute that Attorney now "knows" that Attorney unwittingly offered Client's false testimony. See ER 1.0(f) (stating that "actual knowledge of the fact in question" satisfies ER's knowledge requirement); Ariz. Op. 93-10, at 4 (stating that attorney's "knowledge" of client's false testimony is "ordinarily based on the client's own admissions to the attorney"). Cf. Hazard, The Law of Lawyering, § 32.21, at 32-60 to 32-61 (emphasizing that knowing of a client's false testimony means more than a mere suggestion or suspicion that the client has committed perjury).

2) Definition of Tribunal

The duty found in ER 3.3 applies to all "tribunals," not just courts of law. ER 1.0(m) defines tribunal in broad terms. It includes any administrative agency acting in an adjudicative capacity involving a neutral decision-maker who receives evidence and/or legal argument from opposing parties and is then to render a legally binding judgment affecting the parties' interests. The appeal hearing process described earlier fits this definition of a "tribunal." See A.R.S. § 23-671 (describing "appeal tribunal" process including requirements that tribunal be impartial, conduct a fair hearing at which "all interested parties" have an opportunity to be present and heard, and to render a decision); see also Hazard, The Law of Lawyering, § 32.03, at 32-9 (discussing intended

breadth of "tribunal"). Cf. Ill. Ethics Op. 99-04 (finding that a hearing before an Administrative Law Judge of the Social Security Administration was a "tribunal" under Illinois version of ER 3.3).

3) Material Evidence

It seems equally clear that the false testimony in this case was "material evidence." Without recounting so much of the facts that it would in all likelihood identify Attorney and Client, Client made specific false denials under oath to directly refute the employer's evidence. Attorney unwittingly used this false testimony to discredit the employer's proof of Client's dishonest behavior. Although the Committee cannot know with certainty that this evidence swayed the appeal tribunal's decision, it must have been considered "material" to it because the false evidence went directly to points in dispute and was relevant to the proceedings and decision. See Ariz. Op. 93-10, at 4 (deeming client's inconsistent and irreconcilable testimony in two separate proceedings material evidence).

4a) Reasonable Remedial Measures – Generally

Given Attorney's actual knowledge of having unwittingly offered false material evidence resulting from Client's deception, Attorney now has an ethical duty under ER 3.3(a)(3) to take "reasonable remedial measures." The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and no broader than necessary to undo the effect of the tainted evidence. See ER 3.3 cmt. [10] (stating that purpose of reasonable remedial measures is to "undo the effect of the false evidence"). Cf. ER 1.6(b).

Normally, the first remedial measure should be to confidentially approach and attempt to persuade the client that the client should cooperate in seeking to withdraw the false evidence. Such private remonstration should also include the advice that the attorney is ethically bound to take remedial measures, including, if necessary, disclosure to the tribunal of the false evidence. If the client agrees to seek withdrawal of the false evidence, the attorney should proceed accordingly by moving to withdraw the tainted evidence from the record but without disclosing the fact of the client's misconduct.[7] In most circumstances this should be a sufficient reasonable remedial measure, if the timing of the withdrawal allows the tribunal to react to the change in evidence (e.g., the proceeding is still pending). If pressed for a reason why the evidence is being withdrawn, the attorney should cite client confidentiality, attorney-client privilege, and, if appropriate, the client's Fifth Amendment right against self-incrimination. See ABA Formal Op. 98-412, at 2 & n.5 (recommending as one course of action the attorney's withdrawal of the false evidence and reliance on the cited privileges).

Even if the client does not agree to the withdrawal of the evidence, the next reasonable measure generally would be for the attorney to move to withdraw the evidence from the tribunal's consideration without the client's consent. If an attorney can refuse to offer evidence the attorney reasonably believes to be false,[8] see ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence. Again, whether this might be a sufficient remedial measure depends on whether the tribunal could effectively react if it grants the motion to withdraw the evidence.[9]

In cases unlike this one, where the false evidence has not been offered, but the client so intends and cannot be dissuaded from that course, another possible reasonable remedial measure might be seeking to withdraw from the representation of the client. See generally ER 1.16(b) (listing grounds for termination of the representation). Arguably, however, in some circumstances mere withdrawal from the representation may be insufficient under the present version of the Rule.[10]

When an attorney withdraws from the representation (or, as here, is discharged), the attorney may reasonably conclude that the termination of the representation will not undo the effect of the tainted evidence and so further remedial measures might be necessary. In that circumstance, the attorney should advise the client that retention of successor counsel would be in the client's best interests because the withdrawing (or discharged) attorney has a duty to take reasonable remedial measures including possibly informing the tribunal of the false evidence.[11]

If neither withdrawal of the evidence nor termination of the representation would effectively remediate the fraud, the attorney should consider disclosing the client's misconduct to the tribunal. This drastic step should be taken only after all other reasonable measures have first been tried and failed or carefully considered and rejected. The Committee believes that in most instances an attorney's motion to withdraw evidence should be sufficient to remediate the fraud because such a motion is reasonably calculated to sufficiently warn the tribunal of the situation concerning the unreliability of the false evidence and "the tribunal [would] no longer be powerless to defend itself against" it. Hazard, The Law of Lawyering, § 32.19, at 32-52. Disclosure of the client's misconduct (as opposed to putting the tribunal on notice that certain evidence should not be considered as part of the record) would seem to be rarely, if at

all, necessary to undo "the effect of the false evidence," the goal behind requiring remedial measures.

Thus, and unless the ethical obligation under ER 3.3 has run its time limit, an attorney is ethically obligated to "make such disclosure to the tribunal as is reasonably necessary to remedy the situation" even if to do so would otherwise contravene ER 1.6. ER 3.3 cmt. [10]. Further, the fact that a client may ultimately face a prosecution for perjury is not a reason for an attorney to withhold disclosure. See ER 3.3 cmt. [11]; see also Ariz. Op. 93-10, at 4 (stating that if a lawyer has "knowledge" of a client's perjury in a proceeding in which the lawyer represented the client, then ER 3.3 requires disclosure to the tribunal if intermediate remedial measures prove ineffective).

4b) Reasonable Remedial Measures In This Case

Assuming Attorney's duty under ER 3.3 has not terminated because the proceedings have concluded (see 5b infra), Attorney has some reasonable remedial measures still available. As noted earlier, Attorney has already privately remonstrated Client. This effort was unsuccessful. Despite Attorney's appropriate efforts to convince Client to take proper remedial measures, Client rejected that advice and discharged Attorney. The fact of that discharge limits the remaining available remedial measures.

First, because Attorney is no longer counsel of record, Attorney cannot move the tribunal to withdraw the tainted evidence from the proceedings even without Client's consent. Second, Attorney can no longer move to withdraw from the representation. Even if withdrawal of the representation were possible in this case, however, it would not be a "reasonable remedial measure" because Attorney's withdrawal by itself would not cure the fraud by undoing the effect of the tainted evidence.

In these circumstances, the Committee believes Attorney should consider as an option enlisting the aid of Client's present legal counsel, if any. See Restatement (Third) of the Law Governing Lawyers § 120, cmt. h (2000) ("If a lawyer is discharged by a client or withdraws . . . the lawyer's obligations [of candor to the tribunal] under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel."). Although this would not relieve Attorney of Attorney's own ethical obligations to the tribunal under ER 3.3, the combined efforts of former and successor counsel in private remonstrance with Client may persuade Client to consent to seek withdrawal of the false evidence. In addition, because Attorney is no longer Client's counsel of record, only successor counsel of record, if any, can move to withdraw the tainted evidence without Client's consent. Should this step succeed either because the Client ultimately relents and allows any successor counsel to move to withdraw the false evidence or because any successor

counsel so moves even without Client's consent, Attorney would have taken a reasonable remedial measure sufficient to undo the effect of the tainted evidence and, thus, satisfied Attorney's personal obligations under ER 3.3(a)(3) notwithstanding that Attorney did not personally inform the tribunal.[12]

If there is no successor counsel of record, Attorney's only apparent option is to inform the tribunal by letter (with a copy to Client) that specific evidence is unreliable.[13] Again, such a step should normally not include an express revelation of Client's misconduct. The Committee is of the opinion that in this case such a communication would be an effective remedial measure while not disclosing more than what is necessary to undo the effect of the false evidence.[14]

This case also presents the related question of the proper "tribunal" Attorney should notify. The Committee believes that the proper entity is that entity which has jurisdiction of the proceeding at the time the disclosure is made. Thus, Attorney must determine, by examining the appropriate statutes, rules, and case law, whether the original examiner, hearing officer, or any subsequent entity is the appropriate "tribunal" to which to make any disclosures.

5a) Duration of Ethical Obligation – Generally

ER 3.3(c) makes clear that the ethical obligation to take reasonable remedial measures survives the end of the attorney-client relationship. The ethical obligation terminates only when the tainted proceedings have concluded. If the time for appeal or other review has not yet expired and there has not yet been a final decision on the matter, then the ethical obligation to inform the tribunal exists. ER 3.3(c) & cmt. [13]. Otherwise, the duty to take remedial measures no longer exists because the proceedings would be deemed to have concluded.

5b) Duration of Ethical Obligation In This Case

In this particular instance, Attorney must learn whether the proceedings have reached their "conclusion." Whether proceedings have concluded is ultimately a legal question. Certainly, if the original appeal of the tribunal decision to award compensation is still under active review, either by the Unemployment Insurance Appeals Board or the judiciary, the proceeding is not concluded and Attorney's ethical obligation to take reasonable remedial measures continues.

If that decision is no longer under review, but Client is still receiving benefits which can be modified at any time, then the proceeding may not be concluded, and Attorney's ethical obligation may continue. See Kan. Op. 98-01 (requiring a lawyer to take remedial

measures where the lawyer learned of a client's false testimony made in a workmen's compensation proceeding and the client was still receiving benefits which could be modified at any time).

If however, as Attorney believes, Client is no longer receiving unemployment compensation and the unemployment case is now closed, Attorney's ethical duties have terminated regardless of whether the proceeding could be re-opened at any future time or a new and separate proceeding could be instituted against Client for the recovery of previously paid compensation. Otherwise, there would never be a conclusion to these types of administrative proceedings, and the Committee believes that such an open-ended ethical obligation would be inconsistent with the "practical time limit" intended by ER 3.3(c). See ER 3.3 cmt. [13].

Accordingly, Attorney should ascertain the present procedural posture of Client's award and then consult applicable statutes, rules, and case law to determine if the proceeding is concluded. See generally Casillas v. Arizona Dep't of Econ. Security, 739 P.2d 800, 802 (Ariz. Ct. App. 1986) (discussing the finality of DES decisions); Rogers v. Arizona Dep't of Econ. Security, 644 P.2d 292, 293 (Ariz. Ct. App. 1982) (same).

**CONCLUSION**

Unless the proceedings are deemed concluded (e.g., an appeal ended or the time to take an appeal has expired), an attorney in a civil proceeding must take reasonable remedial measures upon learning that he or she has unwittingly offered false material evidence due to a client's deception. The duty to take such measures applies only when the attorney has actual knowledge of the false evidence and the evidence is material. Reasonable remedial measures are to be taken in steps and should be no broader than necessary to undo the effect of the tainted evidence. The first step should normally be a private consultation with the client explaining the need to withdraw the tainted evidence and advising that the attorney has a duty to take remedial steps even if the client refuses.

Failing that attempt at counseling, the attorney's second step should be to seek withdrawal of the evidence from the tribunal's consideration without the client's consent. The attorney can cite ethical obligations as the reason for seeking withdrawal of the evidence, but should normally not inform the tribunal of the client's misconduct (e.g., that the client committed perjury), if such a withdrawal of the evidence would undo the effect of the false evidence. In that circumstance, an attorney must also consider whether he or she has a conflict of interest with the client necessitating an attempt to withdraw from the representation.

As a last step and only if no other steps would undo the effect of the false evidence, an attorney must make an explicit disclosure of the client's misconduct to the tribunal. In addition, if an attorney has terminated, or been discharged from, a representation and the former client has retained successor counsel, the former attorney should consider whether involving successor counsel would be part of an appropriate remedial measure.

Pursuant to Rule 42.1(l) Opinion as Defense. Reliance on a final Committee opinon may be raised as a defense in any disicipline proceeding.

[1] This opinion does not address a lawyer's option to voluntarily reveal client confidences reasonably necessary to prevent a client from committing certain crimes or frauds. See ER 1.6(d) (1) – (2).

[2] All citations to the Ethical Rules and related Comments are to 17A Ariz. Rev. Stat. Ann., Rules of the Supreme Court, Rule 42 (West 2004).

[3] This opinion does not address whether an attorney has any legal duty to protect confidential client communications. See A.R.S. § 12-2234 (establishing attorney-client privilege in civil proceedings); A.R.S. § 13-4062(2) (establishing attorney-client privilege in criminal proceedings). Opinions on the law are beyond the Committee's jurisdiction.

[4] This opinion does not concern an attorney's ethical duties upon learning of a client's false testimony made during the course of a criminal proceeding. Criminal proceedings present legal and constitutional issues not applicable in civil matters. See generally Nix v. Whiteside, 475 U.S. 157 (1986); ER 3.3 cmt. [7] ((citing State v. Jefferson, 126 Ariz. 341 (1980), and Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978), and recognizing that some courts have held that the duties imposed by ER 3.3 "is subordinate" to constitutional considerations present in criminal proceedings)); Geoffrey C. Hazard, Jr., et al., 2 The Law of Lawyering §§ 32.16 to 32.18 – (4th ed. Supp. 2015) (discussing client perjury in context of criminal case representation); Ariz. Op. 2002-02, at 6-8 (same).

[5] An attorney owes similar ethical duties of confidentiality to former clients as to existing clients. ER 1.9(c).

[6] Because each of the five elements must be present to trigger the duty under ER 3.3(a)(3), each element is potentially a "threshold" element, i.e., an element which if not present renders it unnecessary to determine the existence of the remaining elements. Because the Committee seeks to provide guidance to members on all the elements, the Committee chooses to discuss all of them notwithstanding that in this case Attorney's duty may have lapsed due to the "conclusion" of the proceedings." See Parts 5a and 5b, infra.

[7] The Committee envisions in most cases such a motion being made to the tribunal with notice to all appropriate parties. This opinion does not condone inappropriate ex parte communications with a tribunal. See ER 3.5(b) (prohibiting unauthorized ex parte communications).

[8] This right to refuse to offer such evidence does not extend to the testimony of a criminal defendant. See ER 3.3(a)(3).

[9] Whether the lawyer's withdrawal of evidence without the client's consent creates a conflict of interest under ER 1.7(a)(2) is something the lawyer placed in that situation must determine on a case by case basis. See ER 1.16(b) (describing when an attorney may terminate a representation).

[10] The Committee recognizes that an argument could be made that even if an attorney had forewarning of a client's intent to perpetrate a fraud on a tribunal, mere withdrawal may be insufficient. ER 3.3(b) requires an attorney to "take reasonable remedial measures" when the attorney "knows that a person intends to engage" in "criminal or fraudulent conduct related to the proceeding." Under a prior version of the rule, a simple withdrawal would have been sufficient because the rule only forbade an attorney from "assisting a criminal or fraudulent act by the client." ER 3.3(a)(2) (1998). Thus, mere withdrawal was sufficient under that Rule because the attorney was no longer "assisting" the client. See ABA Formal Op. 98-412. Under present ER 3.3(b), however, an attorney is no longer simply required to "avoid assisting" the client but appears to have an affirmative duty to warn the court of the impending fraud if mere withdrawal would not deter the client. Because Attorney has already been discharged in this case, however, this opinion need not address this issue.

[11] In cases involving the termination of the representation and notwithstanding that an attorney may have concluded that further reasonable remedial measures are necessary under ER 3.3(a)(3), the attorney nonetheless owes the former client ethical duties under ER 1.9 and ER 4.3 (if no successor counsel is retained) to the extent those duties are not superseded by ER 3.3(a)(3).

[12] The facts of any given case may lead to the reasonable conclusion that <u>not</u> involving successor counsel and, instead, informing the tribunal directly would be the remedial measure that undoes the effect of the tainted evidence while doing the least harm to a former client. Thus, attorneys who have terminated, or been discharged from, a representation should consider whether contacting any successor counsel or directly informing the relevant tribunal best fulfills the ethical obligations under ER 3.3 while doing the least damage to the former client's case.

[13] Whether the tribunal chooses to inform the opposing counsel and party remains a decision for the tribunal and subject to any legal and ethical requirements operating on the tribunal.

[14] There is no talismanic language for the contents of such a letter. So long as the letter is reasonably calculated to put the tribunal on notice that certain evidence is unreliable and that Attorney would not have offered the evidence if Attorney had known of certain facts at the time Attorney introduced the evidence, the Committee believes that Attorney's ethical obligations are satisfied.

## ER 4.1. Truthfulness in Statements to Others

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

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

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

### Comment

### Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see ER 8.4.

### Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

### Crime or Fraud by Client

[3] Under ER 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in ER 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the

representation.  Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like.  In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud.  If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by ER 1.6.  If disclosure is permitted by ER 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime or fraud.

## ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

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

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

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

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

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

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

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

### Comment

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

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

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

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also ER 4.2.

## ER 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 ER 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.

### Comment [2013 Amendment]

[3] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client’s behalf.

## ER 4.4. Respect for Rights of Others

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

(b) A lawyer who receives a document or electronically stored information and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

### 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 others. It is impracticable to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from others and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document ~~s~~ or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this ER requires the lawyer to stop reading the document, to make no use of the document, and 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 document or electronically stored information, is a matter of law beyond the scope of these ERs, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this ER does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this ER, "document or electronically stored information" includes , in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. A receiving lawyer who discovers metadata embedded within a document or electronically stored communication and who knows or reasonably should know that the metadata reveals confidential or privileged information has a duty to comply with the procedures set forth in ER 4.4(b).

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See ERs 1.2 and 1.4.

## ER 5.1. Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

**(a)** A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these Rules of Professional Conduct.

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

**(b)** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person who is being supervised and the amount of work supervised. Whether a lawyer has supervisory authority may vary given the circumstances.

**(c)** A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

## ER 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

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

### Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under ER 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

## ER 5.3. Responsibilities Regarding Nonlawyers

**(a)** A lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and those who have access to attorney-client information, is compatible with the professional obligations of the lawyer. Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling, or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and

(2) to ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of a lawyer comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all lawyer client information protected by ER 1.6.

**(b)** A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct when engaged in activities assisting lawyers in providing legal services is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm to assist the lawyer's delivery of legal services, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

**(c)** A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer has managerial authority in the firm and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**(d)** When a firm includes nonlawyers who have an economic interest or managerial authority in the firm, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

**Comment [2021 Amendment]**

[1] The rule in paragraph (d) recognizes that lawyers may provide legal services through firms that include nonlawyers as economic interest holders, owners, managers, shareholders, officers, or other nonlawyers who hold decision-making authority. Any such alternative business structure (ABS) as defined in Rule 31 must be licensed in accordance with ACJA § 7-209. Any lawyer who provides legal services through an unlicensed ABS is engaged in the unauthorized practice of law.

# Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-19-0004, EO-19-0005, and EO-19-0007

Based upon the language of ER 1.15(f), Comments to the Rule, and lawyers' ethical obligations to their clients, the Committee concludes notice under the Rule, in this context, is sufficient if it includes:

- a description of the property, including the amount of funds if any;
- the client's name;
- the name of the tortfeasor and the tortfeasor's insurance carrier (if known);
- an acknowledgment that disputed property is in the lawyer's possession;
- the mailing address, telephone number, and email address where the third party can provide notice to the lawyer of the commencement of an action by the third party asserting an interest in the property;
- date of the third-party recovery; and
- the proposed distribution of the disputed property (e.g., to the client).

The notice must be sent promptly after the lawyer receives the disputed property under ER 1.15(d). However, where the lawyer does not have possession of any disputed property, a lawyer is not required by ERs 1.4, 4.4, or 1.15 to respond to requests for information by third parties who may have an interest in any future recovery being sought by the client.

**ISSUE PRESENTED:**

1. What information is required in a notice served under ER 1.15(f) in the context of a disputed health care provider lien?

2. Must a lawyer who does not have possession of any disputed property respond to requests for information from interested third parties with possible claims against a future recovery?

**FACTUAL BACKGROUND:**

A lawyer has a client who has been injured by a tortfeasor. The client has either obtained a recovery from the tortfeasor, which is in the lawyer's possession, or the lawyer is seeking to obtain such a recovery for the client.

As a result of the client's injury, healthcare services were provided to the client by a duly licensed healthcare provider. The healthcare provider has asserted and perfected a health care provider lien against the client's third-party recovery under A.R.S. §§ 33-931 – 33-936.

Under this statute, a licensed healthcare provider may file a lien against a third-party recovery to secure amounts owed to the provider for the injury-related health care. See Blankenbaker v. Jonovich, 205 Ariz. 383, 387 ¶¶ 17-18, 71 P.3d 910, 914 (2003). The lien is enforceable against the tortfeasor or the tortfeasor's insurance carrier, and the healthcare provider has two years to file suit to enforce such a lien. See A.R.S. § 33-934.

The client disputes the validity or enforceability of the health care provider's lien, and the lawyer would like to distribute the recovery to their client without filing an action concerning the dispute. After consultation with the client, the lawyer provides notice pursuant to ER 1.15(f) that, unless the third party commences an action within 90 calendar days of service of the notice, the recovery will be distributed to the client.

There is some controversy over what information must be contained in a notice under the Rule. Some healthcare providers have argued an ER 1.15(f) notice must include the name of the tortfeasor, the name of the tortfeasor's insurer, the amount of any applicable recovery, and date of settlement.

There is also a dispute over whether a lawyer who is seeking a recovery for a client must respond to requests for information from health care providers before any recovery being obtained by the client. Some healthcare providers have filed complaints with the State Bar of Arizona, pursuant to ERs 1.4, 4.4, and 1.15, against lawyers who have not responded to requests for information. The Committee agreed to address these disputes in EO-19-0005 and EO-19-0007.

**RELEVANT ETHICAL RULES:**

**ER 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 ER 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.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

**ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).
(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

(1) 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;

(2) to 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;

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

(4) 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

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

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

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

**ER 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 maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

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

(e) When in the course of representation a lawyer possesses property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer. The lawyer shall promptly distribute any portions of the

property as to which there are no competing claims. Any other property shall be kept separate until one of the following occurs:

(1) the parties reach an agreement on the distribution of the property;
(2) a court order resolves the competing claims; or
(3) distribution is allowed under section (f) below.

(f) Where the competing claims are between a client and a third party, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(1) The notice shall be served on the third party in the manner provided under Rules 4.1 or 4.2 of the Arizona Rules of Civil Procedure, and must inform the third party that the lawyer may distribute the property to the client unless the third party initiates legal action and provides the lawyer with written notice of such action within 90 calendar days of the date of service of the lawyer's notice.

(2) If the lawyer does not receive such written notice from the third party within the 90-day period, and provided that the disbursement is not prohibited by law or court order, the lawyer may distribute the funds to the client after consulting with the client regarding the advantages and disadvantages of disbursement of the disputed funds and obtaining the client's informed consent to the distribution, confirmed in writing.

(3) If the lawyer is notified in writing of an action filed within the 90-day period, the lawyer shall continue to hold the property separate unless and until the parties reach an agreement on distribution of the property, or a court resolves the matter.

(4) Nothing in this rule is intended to alter a third party's substantive right.

**Comment [2014 Amendment]**

[1] New paragraph (f) allows a lawyer to distribute funds or property in the lawyer's possession after providing notice to third persons known to claim an interest. Notice under paragraph (f) must be sufficient to allow the third person to take appropriate action to protect its interests. Although there is no one form of notice that will be acceptable, the notice should generally include at least the following: (a) a description of the funds or property in the lawyer's possession; (b) the name of the client claiming an interest in the funds and other information reasonably available to the lawyer that would allow the third person to identify the claim or interest; (c) a mailing address, telephone number, and email address where the third party can provide notice to the

lawyer of the commencement of an action asserting an interest in the fund or property; and (d) the proposed distribution of the funds or property. . . .

**ER 4.4. Respect for Rights of Others**

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

(b) A lawyer who receives a document or electronically stored information and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

## OPINION

The Rules of Professional Conduct are rules of reason, not to be hyper-technically construed to their logical extremes. See Arizona Rules of Professional Conduct, Preamble, ¶ 14. When interpreting rules, "[u]sually, the plain meaning of the text is the best reflection of intent and [courts] look no further unless the language is ambiguous or the plain meaning would lead to an absurd result. Ruben M. v. Arizona Dep't of Econ. Sec., 230 Ariz. 236, 240, 282 P.3d 437, 441 (App. 2012).

Under ER 1.15(d), a lawyer must promptly notify any third person with interest in the property in the lawyer's possession and deliver the property to that person if their interest is undisputed. Under ER 1.15(e), a lawyer must hold any property to which there are competing claims until the competing claimants agree upon a disposition or a court resolves the claims. ER 1.15(f), however, allows a lawyer to distribute disputed property to the lawyer's client, without being deemed to have violated their ethical obligations to competing claimants, so long as the lawyer gives those claimants notice and an opportunity to take appropriate action to protect their interests.

In other words, ER 1.15(f) creates an ethical safe harbor for a lawyer to disburse property that is subject to a disputed claim with a third party. Subject to the client's approval, ER 1.15(f) provides lawyers the option of serving a written notice upon the third party of the lawyer's intent to distribute the property to the client unless the third party provides the lawyer with written notice that a legal action was initiated within 90 calendar days of the date of service of the lawyer's notice.

Nothing in ER 1.15 itself provides any specific guidance regarding what must be included in the notice. Comments, however, provide additional context to the rules. See, e.g., Smart Indus. Corp., Mfg. v. Superior Court In & For Cty. of Yuma, 179 Ariz. 141, 147, 876 P.2d 1176, 1182 (App. 1994); In re Estate of Fogleman, 197 Ariz. 252, 257, 3 P.3d 1172, 1177 (App. 2000). The Comment to ER 1.15, states notice must be "sufficient to allow the third person to take appropriate action to protect its [claimed] interests." ER 1.15 cmt. 1 (2014 amendment).

In the context of a health care provider lien asserted under A.R.S. § 33-931 through A.R.S. § 33-936, the identity of the tortfeasor and the tortfeasor's insurance carrier, if any, is needed to file suit to enforce a lien. See Blankenbaker, 205 Ariz. 383, 71 P.3d 910. Therefore, the Committee determines that "sufficient" notice under ER 1.15(f) requires the lawyer to provide the identity of the tortfeasor and tortfeasor's insurer, if any.

Also, the Committee determines that an adequate notice should include information regarding the amount of the recovery. Without information about the amount of the recovery, the third person lacks sufficient information to enable them to determine what action may be necessary and appropriate to protect their claimed interest. For example, the amount of the recovery is likely to be material to the decision whether it is worthwhile to commence an action to assert an interest in that recovery, and a notice that does not contain this information leaves the third party without adequate information to make an informed decision regarding whether and how to proceed. This interpretation of the rule is supported by the language of the comment providing that the notice should generally include at least "a description of the funds or property in the lawyer's possession" that is "sufficient to allow the third person to take appropriate action to protect its interests." ER 1.15, cmt. 1 (2014 Amendment).

Clients must, of course, give consent to the lawyer to share confidential information in the notice, but it will typically be in the client's interest to do so as taking advantage of ER 1.15(f) can speed up the process of getting the property disbursed promptly and without additional expense. Also, since ER 1.15 does not alter a third-party's legal rights, see ER 1.15(f)(4), clients must also be advised, as required by ER 1.15(f)(2), as to the advantages and disadvantages of receiving the disputed property, and lawyers must obtain the client's informed consent, confirmed in writing, to the disbursement.

However, the Committee determines that, where a lawyer does not have possession of any disputed property, a lawyer is not required by ERs 1.4, 4.4, or 1.15 to respond to requests for information by third parties who may have an interest in any future recovery being sought by the client.

Likewise, nothing inERs 1.4, 4.4, or 1.15 requires a lawyer to respond to requests for a "status" or "reasonable requests for information" from a third-party claimant. A lawyer's obligation to safeguard property in which a third party claims an interest, and provide the claimant with notice, only arises when the property comes into the lawyer's possession. See ER 1.15(d),(e) (specifying that the lawyer must act "[u]pon receiving funds or other property in which a client or third person has an interest."). Prior to a lawyer receiving a recovery, there is no ethical duty owed to the third party. Indeed, sharing information about a lawyer's representation of a client is prohibited by ER 1.6 unless the client has consented.

**Pursuant to Rule 42.1(l) Opinion as Defense.** Reliance on a final Committee opinon may be raised as a defense in any disicipline proceeding.

**ER 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in Arizona shall not:

(1) engage in the regular practice of Arizona law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Arizona law.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in Arizona that involve Arizona law and which:

(1) are undertaken in association with a lawyer who is admitted to practice in Arizona and who actively participates in the matter.

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in Arizona or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Arizona or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.

(e) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, and registered pursuant to Rule 38(a) of these rules, may provide legal services in Arizona that are provided to the lawyer's employer or its organizational affiliates and are not services for which pro hac vice admission is required.

(f) Any attorney who engages in the authorized multijurisdictional practice of law in Arizona under this rule must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(g) Attorneys not admitted to practice in Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in Arizona, must also comply with Rules of the Supreme Court of Arizona governing pro hac vice admission. *See* Rule 39.

(h) Any attorney who engages in the multijurisdictional practice of law in Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in Arizona.

**Comment**

[1] Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. For Arizona's definition, see Rule 31(a)(2)(A). Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (a) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] Other than as authorized by these Rules or other law or this Rule, a lawyer who is not admitted to practice in Arizona violates paragraph (b)(1) if the lawyer engages in the regular practice of Arizona law in Arizona. A lawyer who is not admitted to practice in Arizona violates paragraph (b)(2) if the lawyer fails to state in any advertisement or communication that targets or specifically offers legal services to Arizona residents that: (1) the lawyer is not licensed to practice Arizona law and (2) the lawyer's practice is limited to federal legal matters, such as immigration law, tribal legal matters, or the law of another jurisdiction. See ERs 7.1(a) and 7.5(b).

[3] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in Arizona that involve Arizona law under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[4] There is no single test to determine whether a lawyer's provision of legal services involving Arizona law are provided on a “temporary basis” in Arizona, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides legal services in Arizona that involve Arizona law on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

## ER 8.3. Reporting Professional Misconduct

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

**(b)** A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

**(c)** A lawyer who knows that a legal paraprofessional or certified Alternative Business Structure entity has committed a violation of the applicable codes of conduct that raises a substantial question as to the person or entity's compliance with the codes shall inform the appropriate authority.

**(d)** This Rule does not require disclosure of information otherwise protected by ER 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it related to the representation of a client.

**Comment [2003 Amendment]**

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

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

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

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

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such a program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule therefore

provides that a lawyer may not report pursuant to paragraphs (a) and (b) information that would be protected by ER 1.6 if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer.

**Comment to 2002 Amendment to ER 8.3(d)**

Information about a lawyer's or judge's misconduct or fitness may be gained by a lawyer participating in an approved lawyers' assistance program. For purposes of this rule, lawyers 'participating' shall mean lawyers seeking assistance, program staff and volunteers, including members of MAC, as well as any other Arizona lawyer whose assistance is requested or approved by the MAP Director or MAC Chair(s) or Vice Chair(s). Treating information gained in this context as confidential encourages lawyers to seek the diverse services provided by such programs. It also ensures that lawyers assisting or providing services to the program as staff or volunteers are not subject to discipline for failure to disclose information that would otherwise be subject to reporting under paragraphs (a) and (b) of the rule. Without confidentiality, lawyers may hesitate to utilize program services, which may result in additional harm to clients, the public, or themselves, and may discourage lawyers from providing assistance and services offered by the program.

**Comment to 2021 Amendment to ER 8.3(c)**

The duty to report misconduct of a legal paraprofessional that raises a substantial question as to that individual's compliance with their code of conduct as set forth in ACJA § 7-210 does not apply to a lawyer who is retained to represent the legal paraprofessional. Similarly, the duty to report misconduct by an Alternative Business Structure (ABS) entity that raises a substantial question as to the entity's compliance with the code of conduct in ACJA § 7-209 does not apply to a lawyer retained to represent the ABS but does apply to lawyers who work in or have ownership interests in an ABS.

## ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Code of Judicial Conduct or other law.

(g) file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

### Comment

**COMMENT [AMENDED EFFECTIVE DEC. 1, 2002]**

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even one of minor significance when considered separately, can indicate indifference to legal obligation.

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

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

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

**COURT COMMENT TO EXPERIMENTAL 2001 AMENDMENT TO ER 8.4(G)**

Arizona is one of only a few states that allow by judicial rules a party to notice a change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice. Historically, the reasons for exercising a challenge were not inquired into. Just as peremptory challenges of jurors lead to abuses of race or gender based disqualification, however, the peremptory notice of judge has been abused by some to obtain trial delay.

The rule was amended in 2001 on an experimental basis to make clear that filing a notice of change of judge for an improper purpose, such as trial delay or other circumstances enumerated in Rule 10.2(b), is unprofessional conduct. The Court adopted this amendment and the amendments to Rule 10.2. Rules of Criminal Procedure, in an effort to address abuse of Rule 10.2. If such abuse is not substantially reduced as a result of the amendments at the conclusion of the one-year experiment on June 30, 2002, the Court at that time will abolish the peremptory change of judge in most criminal cases as recommended in a proposal by the Arizona Judicial Council. See R-00-0025.

**COMMENT [EFFECTIVE DEC. 1, 2003]**

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age,

sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

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

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

**COURT COMMENT TO 2004 AMENDMENT**

Arizona is one of a minority of states that allow a party to file a notice of change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice.

Arizona's rule permitting peremptory change of judge has historically been viewed as "salutary" on the grounds that "it is not necessary to embarrass the judge by setting forth in detail the facts of bias, prejudice or interests which may disqualify him nor is it necessary for judge, litigant and attorney to involve themselves in an imbroglio which might result in everlasting bitterness on the part of the judge and the lawyer." Anonymous v. Superior Court, 14 Ariz. App. 502, 504, 484 P. 2d 655 (1971).

However, just as peremptory challenges of jurors led to abuses of race or gender-based disqualification, the peremptory notice of judge has been subject to abuse, including attempts through "blanket" challenges to bring pressure upon judges and thereby undermine judicial independence. State v. City Court of City of Tucson, 150 Ariz. 99, 722 P. 2d 267.

The rule was amended in 2004 to make clear that filing a notice of change of judge for an improper purpose, such as trial delay or other circumstances enumerated in Rule 10.2(b), is unprofessional conduct. The Court adopted this amendment and the amendments to Rule 10.2, Rules of Criminal Procedure, in an effort to address abuse of Rule 10.2 while preserving the traditional benefits of the right to peremptory change of judge.