South Carolina Bar
Continuing Legal Education Division

VIDEO REPLAY

Ethics Essentials

19-26

Monday, April 15, 2019

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The South Carolina Bar
Continuing Legal Education Division

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SC Supreme Court Commission on CLE Course No. 193323E

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Ethics Essentials

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This program qualifies for 6.25 MCLE credit hours including up to 6.25 LEPR credit hours
SC Supreme Commission on CLE Course #: 193323E

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**
Barbara M. Seymour, Clawson & Staubes, LLC

9:00 a.m. **Law Office Marketing**
Traditional Advertising, Direct Solicitation, Social Media, Third-Party Marketing Services
Stephanie Weissenstein, McDonnell & Associates, P.A.

9:30 a.m. **Avoiding Conflicts of Interest**
Duties to Prospective Clients, Conflicts Checking Systems, Personal Transactions & Relationships, Conflict Waivers & Informed Consent
William O. Higgins, Graybill, Lansche & Vinzani, LLC

10:15 a.m. **Mid-morning Break**

10:30 a.m. **Beginning the Attorney-Client Relationship**
Scope of Representation, Types of Fee Structures, Timekeeping & Billing
Barbara M. Seymour, Clawson & Staubes, LLC

11:30 a.m. **Civility and Professionalism**
Jill C. Rothstein, Greenville County Sheriff's Office

12:00 p.m. **Lunch (on your own)**

1:15 p.m. **Managing Time**
Client Communications, Calendaring & Docket Management, File Storage & Document Retention
Thomas A. Pendarvis, Pendarvis Law Offices, PC

2:00 p.m. **Confidentiality**
Confidentiality vs. Attorney-Client Privilege, Disclosure & Informed Consent, Disclosure Exceptions, Confidentiality & Technology
Michael J. Virzi, University of South Carolina School of Law

2:45 p.m. **Afternoon Break**

3:00 p.m. **Managing People**
Hiring & Firing, Staff Supervision, Unauthorized Practice of Law
Amy L.B. Hill, Gallivan, White & Boyd, PA

3:30 p.m. **Managing Money**
Record-keeping Requirements, Monthly Reconciliation, Detecting Misappropriation & Fraud
Barbara M. Seymour

4:30 p.m. **Ending the Attorney-Client Relationship**
Withdrawal from Pending Cases, File retention, Succession Planning
Barbara M. Seymour

5:00 p.m. **Adjourn**

Ethics Essentials

SPEAKER BIOGRAPHIES
(by order of presentation)

Barbara M. Seymour
Clawson & Staubes, LLC
Columbia, SC
(course planner)

Barbara M. Seymour is Of Counsel at the law firm of Clawson & Staubes, LLC, handling a variety of matters related to legal and judicial ethics and professional discipline. She earned her Bachelor's degree in Management and Marketing from the University of North Carolina at Greensboro in 1990 and her Juris Doctor from the University of Georgia School of Law in 1993. Barbara worked for the Office of Disciplinary Counsel to the Supreme Court of South Carolina for seventeen years, investigating and prosecuting allegations of misconduct, incapacity, and contempt of court by lawyers. She served as the Deputy Disciplinary Counsel from 2007 until 2017. Before joining ODC, Barbara worked as a trial lawyer at Harris & Graves in the upstate. Barbara is a member of the South Carolina Bar, the Georgia Bar, the South Carolina Women Lawyers Association, and the Association of Professional Responsibility Lawyers. She currently serves in the House of Delegates and on the Law Related Education, Unauthorized Practice of Law, Future of the Profession, and Diversity Committees at the South Carolina Bar. In 2006, Barbara was named the Law Related Education Lawyer of the Year. She was a 2006 and 2011 Fellow of the National Institute for the Teaching of Ethics and Professionalism. Barbara was an adjunct instructor in the Professional Legal Assistants Program at Converse College and currently teaches in the Paralegal Degree Program at Midlands Technical College. Her courses have included Ethics, Civil Litigation, Business Law, Torts, Legal Research and Writing, and Law Office Management.

Stephanie Weissenstein
McDonnell & Associates, P.A.
Columbia, SC

Stephanie grew up in Sumter, South Carolina and graduated from the University of South Carolina College of Journalism and the University of South Carolina School of Law (2004). Stephanie has practiced in a whole bunch of different areas of law, including licensing defense (ODC and LLR), family law, residential real estate, civil litigation and appellate litigation. She is also certified by LLR as a continuing education instructor for real estate professionals. Stephanie is a member of the Bar's Ethics Advisory Committee and Professional Responsibility Committee.

William O. Higgins

Graybill, Lansche & Vinzani, LLC
Columbia, SC

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

Jill C. Rothstein

Greenville County Sheriff's Office
Greenville, SC

Jill Rothstein, former Risk Management director of the SC Bar, now serves as both General Counsel to the Greenville County Sheriff's office (the largest law enforcement agency in SC) and as special counsel to the Rothstein Law Firm where she is building a Risk Management and Ethics practice.
Jill is president of the updated Haynesworth/Perry Inn of Court, and is a former fellow of the National Institute of Teaching Ethics and Professionalism.

Thomas A. Pendarvis

Pendarvis Law Offices, PC
Beaufort, SC

Thomas obtained his undergraduate degree in business administration from the University of Georgia in 1984 and his law degree from the University South Carolina in 1992. Thomas and his law firm represent clients on legal malpractice, breach of fiduciary duty claims and other complex civil matters, business disputes and commercial litigation. Thomas also represents lawyers in professional responsibility and ethics matters, as well as defending lawyers in disciplinary matters, and represents lawyers and law firms in lawyer departure and law firm dissolutions matters. Thomas is member of the South Carolina Bar's Professional Responsibility Committee and the South Carolina Association of Ethics Counsel. Thomas is Board Certified in Legal Malpractice by the American Board of Professional Liability Attorneys. Pendarvis Law Offices is located in Beaufort, South Carolina.

Michael J. Virzi

University of South Carolina School of Law
Columbia, SC

Michael Virzi teaches first-year Legal Research, Analysis and Writing I & II and Professional Responsibility. He has also taught upper-level courses in Advanced Legal Writing and Fundamentals of Law Practice and Professionalism. Prior to becoming a full-time faculty member, Mr. Virzi taught as an adjunct professor at the School of Law and taught Business Law I and II as an adjunct professor in the Paralegal Studies program at Midlands Technical College. He came to the School of Law from the South Carolina Supreme Court's Office of Disciplinary Counsel where he investigated and prosecuted attorneys for ethical misconduct. Prior to working for the Disciplinary Counsel, Mr. Virzi practiced in the areas of commercial and business litigation and creditors' rights.

Mr. Virzi received his B.A. in Political Science from the University of South Carolina in 1991 and graduated cum laude from the University of South Carolina School of Law in 2000. He is a member of the South Carolina Bar, the North Carolina Bar (inactive), the U.S. District Courts of North and South Carolina, and the U.S. Court of Appeals for the Fourth Circuit.

Mr. Virzi has served on the South Carolina Bar's Professional Responsibility Committee since 2011 and the Ethics Advisory Committee since 2003, including as Chair from 2007–2010. He is a member of several state and national organizations involving legal ethics and is a frequent CLE speaker and law school guest lecturer on the topics of legal ethics and the lawyer discipline process.

Amy L.B. Hill

Gallivan, White & Boyd, PA
Columbia, SC

Amy Hill practices with the Columbia office of the law firm Gallivan White & Boyd. She is a graduate of Clemson University with a degree in accounting and the University of South Carolina School of Law. With a business and accounting background, Amy's legal practice places an emphasis on commercial litigation with a particular focus on probate litigation, lender liability disputes and FINRA arbitration. Amy also represents attorneys in malpractice claims and disciplinary matters. She has served as chairperson of the South Carolina Bar's Unauthorized Practice of Law Committee as well as chairperson of the Professional Responsibility Committee. She has received the designation of one of the Benchmark Litigation's Top 250 Female Litigators in America as well as a South Carolina Super Lawyer among other awards. In 2013, Amy was proud to receive the Compleat Lawyer Award Silver Medallion from the University of South Carolina School of Law Alumni Association.

Part One – Law Office Marketing

Overview of Advertising and Solicitation in South Carolina
Barbara M. Seymour
(05/16/2018)

Every lawyer in private practice advertises. Some use traditional media, such as television, yellow pages, or billboards. Others use newsletters, firm brochures, sponsorships, websites, and social media. Still others rely on word-of-mouth, in-person marketing, and online professional networks. Regardless of the venue or the vehicle, it is all "communication concerning a lawyer's services" and it is all restricted by the Rules of Professional Conduct. There are five subsections in RPC that cover "advertising" issues. The following materials outline the restrictions and requirements for all forms of lawyer communication in an effort to help you avoid complaints regarding your firm's marketing, regardless of the format you choose.

A. Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.1 addresses "Communications Concerning a Lawyer's Services." It governs everything lawyers say about themselves and their law firms. It applies to media advertising, direct mail solicitation, promotional materials, and in-person statements. Generally, Rule 7.1 prohibits any communication that is "false, misleading, or deceptive," about the lawyer or the lawyer's services. It also provides specific prohibitions, including statements that are truthful, yet misleading; statements that create unjustified expectations or imply that results can be achieved by unethical means; statements that compare the lawyer's services to others that cannot be factually substantiated; testimonials without required disclaimers; and, nicknames or trade names that imply an ability to obtain results for clients.

The Commission on Lawyer Conduct frequently cites Rule 7.1(a) in letters of caution to lawyers for listing the names of unlicensed (out-of-state) lawyers without indicating the geographical limitations on their ability to practice law.[1]

The Court has amended Rule 7.1 to eliminate the blanket restriction on testimonials in lawyer advertising. While testimonials are now permitted, the Rule requires that they be accompanied by a clear and conspicuous disclaimer that "any result the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate similar results can be obtained for other clients." Further, the lawyer must disclose if it is a paid endorsement or if it is made by someone other than an actual client.

The Comment says that statements about results obtained for specific clients (including client testimonials), the amount of prior damage awards, and the lawyer's record in obtaining favorable verdicts are precluded if they are likely to create an unjustified expectation that the prospective client can expect similar results. Further, the Comment says that reports of past

[1] Unlicensed (out-of-state) lawyers are allowed to advertise legal services in South Carolina. However, those communications are governed by Rule 418, SCACR (Advertising and Solicitation by Unlicensed Lawyers), which requires compliance with the lawyer communication provisions of RPC and subjects the unlicensed lawyer to the SC disciplinary process for rule violations.

results, even if true, can be misleading without "reference to the specific factual and legal circumstances of each client's case." The Comment also states that statements of past results should be accompanied by a clear and conspicuous disclaimer that "any result the lawyer or law firm may have achieved on behalf of clients in other matters does not necessarily indicate similar results can be obtained for other clients."

B. Rule 7.2 (Advertising)

Rule 7.2 covers lawyer communications that are commonly considered “advertising,” but also covers all communication (including written or recorded solicitation) that is not in-person or real time. The rule includes all advertising of services “though written, recorded, or electronic communication, including public media.” Don’t let the heading of the rule mislead you into thinking it is limited to media advertising. While the term advertising is not specifically defined in the Rules, the Comments refer to "organized information campaigns" and "an active quest for clients."

A recent amendment to this rule emphasizes the importance of restricting law firm advertising to the dissemination of factual information in order to preserve the integrity of the legal profession. Rule 7.2(a) now states that "[a]ll advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication."

Comment 4 expounds on this theme:

> Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in an objective and understandable fashion so as to facilitate a prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without the use of techniques intended solely to gain attention and which demonstrate a clear and intentional lack of relevance to the selection of counsel, as such techniques hinder rather than facilitate intelligent selection of counsel. A lawyer's advertisement should reflect the serious purpose of legal services and our judicial system. ... This rule is intended to preserve the public’s access to information relevant to the selection of counsel, while limiting those advertising methods that are most likely to have a harmful impact on public confidence in the legal system and which are of little or no benefit to the potential client.

Rule 7.2 contains several specific substantive requirements. Subsection (d) states that the communication must include the name and office address of at least one lawyer responsible for its content. The Commission on Lawyer Conduct interprets this to mean the full name of a responsible lawyer; therefore, the firm name is not sufficient unless it contains at least one lawyer's full name. If there is a complaint about a lawyer communication or advertisement and the full name of at least one lawyer is not included, an investigative file may be opened on each of the partners in the firm. At a minimum, that complaint will result in a letter of caution citing Rule 7.2(d) for failing to include the responsible lawyer’s full name.

In addition, subsection (h) requires that written and recorded communications regarding a lawyer's services disclose the city or town where the legal services will actually be performed. This alerts potential clients in smaller markets when their cases will actually be handled out of an office in another geographical location. A firm might have a satellite office in a particular town, but the lawyers and files are located elsewhere. This must be disclosed.

Subsection (f) requires lawyers to include an explanation of how costs will be charged to the client in all communications that contain information about legal fees. For example, a lawyer can state that there will be "no fee unless we win" in a phone book ad, but whether expenses will be charged regardless of the outcome has to be disclosed. Another example is when a lawyer includes a flat rate for services, such as filing a bankruptcy petition or an uncontested divorce. If the lawyer quotes the fee, the ad must indicate whether or not that fee includes costs. In addition, if a lawyer advertises a specific rate or fee, subsection (g) requires the lawyer to honor that rate or fee for ninety days after dissemination in a periodical (such as a newspaper) or for a full year after dissemination in an annual publication (such as the phone book). If a rate or fee is advertised on the Internet, the lawyer must honor that rate or fee for ninety days after the last day that information was available. Setting a shorter coupon-style "expiration date" (such as "Only three days left on our $500.00 traffic ticket representation!") will not be sufficient to overcome the requirement of this rule. In fact, stating an expiration date or term of offer less than the period established by the rule could be considered misleading or false advertising.

Rule 7.2 also contains administrative requirements.[2] First, the lawyer responsible for the content of the communication must review it prior to dissemination in order to ensure that it is compliant with the Rules of Professional Conduct. Second, each lawyer is required to maintain copies of all marketing materials and a record of when and where all 7.2 communications were disseminated for a period of two years. If a grievance is filed about an advertisement, a copy of the lawyer's ads, solicitation letters, Internet materials, and record of dissemination will be requested in the course of the investigation. Failure to maintain or produce those records can result in discipline, even if there is no substantive violation of RPC's content restrictions.

Finally, Rule 7.2 governs the use of third parties, including other lawyers, to advertise legal services. Lawyers are prohibited from giving anything of value in exchange for a recommendation of legal services, except for paying the reasonable cost of advertising, paying usual charges for participating in a legal services plan or not-for-profit lawyer referral service, and purchasing an existing law practice. A lawyer may only participate in a legal service plan or nonprofit referral service if the service is in compliance with RPC. In addition, if one lawyer advertises with the intent to refer cases to another lawyer or firm, that fact must be disclosed in the advertisement, including the relationship between the two lawyers/firms and the name and address of the "nonadvertising" lawyer/firm.

C. Rule 7.3 (Solicitation)

[2] In October 2005, the Supreme Court of South Carolina adopted a rule that required lawyers to file copies of all Rule 7.2 communications with the Commission on Lawyer Conduct. In June, 2010, the Court amended the rule to eliminate the filing requirement.

A communication to a specific potential client that is not initiated by the potential client (solicitation) is governed by the general provisions of Rule 7.1 and the specific provisions of Rule 7.2, discussed above. In addition, there are a number of restrictions and requirements that are unique to solicitations, found in Rule 7.3.

Most importantly, all direct, in-person contact is prohibited unless the person contacted is another lawyer, a family member, a close personal friend, or a former client. A lawyer cannot visit a potential client personally, call a potential client on the phone, or contact a potential client with real time electronic communication (such as a chat room or instant message). Even if you are otherwise permitted by Rule 7.3 to solicit a potential client, you are prohibited from contacting anyone (in-person or by written or recorded communication) who has made a desire not to be solicited known to you; from using coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence; or, from contacting someone who is already represented by an attorney or who is likely to be unable to exercise reasonable judgment as a result of a physical, emotional, or mental condition. The rule also prohibits using any means to contact someone in connection with a personal injury or wrongful death within thirty days of the incident.

Solicitation of members by prepaid or other legal service insurance plans is addressed in subsection (j). A lawyer is allowed to participate in this type of plan; however, the lawyer must insure that the plan's marketing practices conform to Rules 7.1, 7.2, and 7.3(b). The exception is that the plan may solicit potential members or customers in-person and through real time communication. The plan may not, however, contact any individual known to be in need of legal services in a particular matter.

Although communication with a potential client by direct mail (including email) or by recording is permitted, Rule 7.3 includes a number of content and format restrictions. For example, subsection (d)(1) requires that the envelope and the front of every page of written communication must contain the words "ADVERTISING MATERIAL" in prominent type and in all caps. Recorded communication must include a clear statement that it is an advertisement at the beginning and the end. This disclaimer requirement also applies to email correspondence. The Rule specifically provides that the words "ADVERTISING MATERIAL" in prominent type and in all caps be included in the subject line of an electronic communication and appear at the beginning and end of the message.

In addition, there are three disclaimers in Rule 7.3(d)(2) and (3) that must be copied or read verbatim in the communication. These disclaimers alert the potential client to options other than retaining the lawyer, to the risk of unjustified expectations, and to the fact that complaints about the communication can be filed with CLC. Each disclaimer has specific type size and style requirements that must be followed.

Direct mail can only be sent regular mail, not certified or registered (subsection (e)) and the envelope cannot reveal the nature of the potential client's legal problem (subsection (h)). Direct mail cannot be "made to resemble legal pleadings or … documents" (subsection (f)). Any written solicitation must disclose how the lawyer found out about the potential client's legal problems (subsection (g)). Finally, if someone other than the lawyer signing the letter is likely to be handling the potential client's case, whether it's another attorney in the firm or an outside

referral, that fact has to be disclosed in the letter (subsection (i)).

Like advertising, lawyers must also keep a record of solicitations for a period of two years.[3] This record must include the basis for the lawyer's belief that the potential client was in need of legal services and the factual basis for any statements made in the communication.

D. Rule 7.4 (Communication of Fields of Practice and Specialization), Rule 7.5 (Firm Names and Letterhead), and a Note about Firm Announcements.

One of the most common rule violations that results in letters of caution from CLC is use of some form of the words "expert," "specialist," "certified," or "authority" in violation of Rule 7.4(b). The Supreme Court's Commission on CLE and Specialization certifies lawyers in several fields of practice[4] through rigorous application and testing processes. The Commission also vets other certifying bodies, known as Independent Certifying Organizations (ICO), to permit the issuance of certificates of specialization to South Carolina lawyers.[5] Only lawyers who are certified in this way may use the terms expert, specialist, certified, or authority or any form of those terms in communications regarding their services. Lawyers who are not certified specialists may relay information regarding their fields of practice in advertising, solicitation, and other communications regarding their services. However, such statements must be "strictly factual" and all forms of the prohibited words must be avoided.

Rule 7.5 governs the use of firm names and other professional designations. A firm name may not be misleading. If a firm or lawyer uses a trade name, it may not imply an affiliation with a government agency, a public legal services organization, or a charitable legal services organization (subsection (a)). Further, a firm cannot use the name of a lawyer holding public office if that lawyer is not actively or regularly practicing with the firm (subsection (c)). A lawyer can state or imply a partnership with other lawyers only if there is in fact a partnership (subsection (d)).

With regard to letterhead, subsection (b) of Rule 7.5 allows firms with offices in more than one state to use the same name in South Carolina that they use in other states. However, if individual lawyers who are not licensed here are identified on the letterhead, the firm must indicate the jurisdictional limitation on those lawyers' ability to practice.

There is some confusion among the members of the Bar about how firm announcements fit in with the regulation of lawyer communications. Firms frequently issue announcements about formation, new partners and associates, changes to practice areas, relocation of the office, opening a new office, etc. Lawyers use a variety of different vehicles to make such announcements, such as newspapers, trade or bar magazines, television, and direct mail. There are several things to keep in mind when issuing such an announcement. First, it is a communication concerning a lawyer's services and, therefore, subject to the limitations set forth

[3] In August 2011, the Supreme Court eliminated the filing requirement for lawyer solicitations from Rule 7.3.
[4] The Commission on CLE and Specialization currently certifies lawyers in the fields of Bankruptcy & Debtor/Creditor Law; Employment & Labor Law; Estate Planning & Probate Law; and, Taxation Law.
[5] The Commission on CLE and Specialization currently recognizes three ICOs: American Board of Professional Liability Attorneys; National Board of Trial Advocacy; and, National Elder Law Foundation.

in Rule 7.1, including the prohibitions on misleading or false statements and limitations on the use of testimonials, comparative statements, past results, and nicknames or monikers. It is also an advertisement, subject to the specific requirements of Rule 7.2. In particular, it must be included in the record of dissemination, as discussed above. Also, the announcement cannot contain any of the stated words in Rule 7.5 unless the lawyer is, in fact, certified as a specialist by the Supreme Court. There is one instance where a firm announcement is not subject to the same requirements as other communications regarding the lawyer's services. The Comment to Rule 7.3 states that such an announcement does not constitute communications soliciting professional employment from a client known to be in need of legal services. That means that the specific disclaimer provisions of Rule 7.3(d) that otherwise apply in such circumstances do not apply to firm announcements sent through the mail. However, a solicitation letter cannot be disguised as a firm announcement in order to avoid the disclaimer provisions of the Rule.

E. Disclaimers and Disclosures.

Many of the provisions of the Rules of Professional Conduct related to advertising and solicitation require a disclaimer or disclosure of certain information. In 2014, the Supreme Court amended Rule 7.2 to add subsection (i), which provides detailed guidance about the format of those disclaimers and disclosures. In addition to the specific requirements set forth in each subsection that requires a disclaimer or disclosure, the new rule mandates that all disclosures and disclaimers that appear in an advertisement or unsolicited written communication "must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the viewer." If the disclosure or disclaimer is televised or broadcast in an electronic or video medium, it must be displayed for a sufficient time to enable the viewer to both see and read it. If the disclosure or disclaimer is spoken aloud, the new subsection requires that it be plainly audible to the listener. Statement made on a lawyer's website, online profile, Internet advertisement, or other electronic communication must be accompanied by the required disclosure or disclaimer on the same page as the statement being disclosed or disclaimed.

F. Guidance.

The requirements and restrictions set out in the Rules of Professional Conduct for communications concerning lawyers' services are not complicated. The vast majority of the violations come not from any intent to violate the rules, but rather from failure to consult the rules at all. Simply reviewing the rules comments and taking care to examine all communications regarding legal services offered before dissemination will resolve most ethical problems. If the rules and comments don't answer your question, review decisions from the Supreme Court and the Ethics Advisory Committee for additional guidance. (Keep in mind that these opinions are a snapshot in time and their value might have diminished somewhat if the relevant rules have been revised since they were issued.) If a lawyer has concerns about a particular activity or advertisement and review of the rules and opinions doesn't resolve those questions, there are attorneys who will review proposed advertising and solicitation communications and give a legal opinion about ethical compliance.

Beginning and Ending the Attorney-Client Relationship
Barbara M. Seymour
(06/28/16)

Determining the Scope of Representation

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

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

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

It is not enough that you take a case and provide the minimum services to your client. The Court has applied Rule 1.2 in situations where a lawyer failed to "take meaningful action" in a case and failed "to provide meaningful representation" to his client.[6] In addition, Rule 1.2 has been cited in a number of disciplinary opinions as somewhat of a catchall provision. For instance, lawyers have been sanctioned under this Rule for:

- Repeated, unnecessary requests for continuances[7]
- Failure to take the necessary steps to conclude a legal matter[8]
- Failure to comply with client's demand for payment[9]

In at least one case, the Court has even gone so far as to apply this Rule when the existence of a lawyer-client relationship was not entirely clear. In the case In re Murphy, the lawyer was held to have violated Rule 1.2 when he exceeded his authority as personal representative of a deceased relative's estate.[10]

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

There are circumstances in which a lawyer may limit the scope of representation of a particular client. You do not have to do all of the things the client would like to hire you to do. However, if your representation is going to be limited to one case or one particular course, you must relay that to the client and obtain the client's consent.

For example, if a client hires you to handle a civil trial and you do not want to handle the appeal, you must inform the client at the outset of the representation that you will not handle the appeal. The client's consent must be based on reasonably adequate information and an explanation of the risks and alternatives to hiring you for limited representation.

Another example is when you are hired to handle a separation or divorce matter and the client files a grievance because you would not pursue a rule to show cause against an offending spouse. If the client reasonably expects such proceedings to be part of the scope of your representation and you refuse to handle it, you could be cautioned or sanctioned for violation of Rule 1.2. So if that's not part of the deal, make sure the client knows and understands that from the beginning. Of course, the best way to ensure that your clients understand any limitations on the scope of your representation is to use a clear, concise, and appropriate written fee agreement in every case, even if you are not required to have a written fee agreement under Rule 1.5.

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

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

In addition, before the lawyer can engage in the provision of limited legal services, the rule requires that he obtain informed consent from the client. "Informed consent" is defined in Rule 1.0(g) as "the agreement by [the client] after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The Comment to Rule 1.5 (Fees) also suggests some limitation on a lawyer's ability to limit the scope of the representation based on the amount of the fee. It states that a lawyer should avoid entering into an agreement that includes terms that "might induce the lawyer improperly to

curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client 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."

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

Setting the Fee and Collecting the Bill

There are two essential considerations in setting your fee structure in any given case: the practical and the ethical. With regard to the practical consideration, you need to carefully determine the fee structure that will ensure that you get paid for the work that you do. This varies depending on the nature of the case and the particular circumstances faced by each client. Regardless of the fee structure you choose, the fee must be reasonable. Reasonableness of the fee is both an ethical and legal determination. With regard to the ethical consideration in setting your fee, you must give careful attention to the requirements of Rule 1.5 of the Rules of Professional Conduct.

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

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

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

Questions of reasonableness are generally resolved by the Resolution of Fee Disputes Board or a

civil court, rather than by the Supreme Court in a disciplinary action. More often, the Court addresses questions of improper billing in cases where a lawyer fails to adequately explain the fee structure to the client or deliberately inflates a bill. A lawyer can only charge a client for the work that is actually performed for that client. "A lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf. Accordingly, a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended by her." American Bar Association Formal Opinion 93-379. Double-billing (charging more than one client for the same work) and padding bills are stealing, just as if the lawyer removed funds from a client trust account. Hourly billing systems and minimum billing requirements for both lawyers and paralegals sometimes foster cheating. Lawyers in law firms that set annual or monthly minimum billing requirements must resist the urge to over-bill or fudge on time records.

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

A lawyer may charge hourly rates for services rendered by nonlawyer employees. However, the lawyer has a duty to communicate basis or rate of those charges, preferably in writing, before or within a reasonably time after commencing the representation. (See Rule 1.5(b)). "[A] lawyer has a duty to disclose to a client the amount to be charged for the services rendered by … nonlawyer employees. The lawyer may not include such services within the time billed by the lawyer without disclosing that the services were performed by nonlawyers. The client should be informed of the rate for each lawyer, paraprofessional, and other nonlawyer who will work on the client's case." SC Ethics Advisory Opinion 94-37; (Adopted by the Court in Matter of Jennings.) "Such services should be separately itemized on the billing to the client and are normally billed at rates lower than the rates for services of a lawyer. [It] would be a fraudulent misrepresentation to the client that legal services had been rendered by a lawyer if the billing for … nonlawyer services were represented as attorney time." New Mexico Advisory Opinion 1990-4.

Fees and expenses submitted to a court in connection with an attorney's fee petition must be accurate and must reflect the fees and expenses actually charged to the client.[11] In addition to communicating the basis or rate of your fees at the outset of the representation, you must also set forth the anticipated expenses and how they will be collected. Subsection (a) also requires that expenses you charge to the client must be reasonable. The Comment states that you "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 [you] incurred."

Contingency fees ensure collection of the fee because the client does not have to come out of

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

pocket; however, there are risks. Set the percentage too high and the clients will go elsewhere; set the percentage too low and you won't be compensated for the actual work you do. Rule 1.5(c) requires contingent fee agreement to be in writing, specifically setting forth "the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated." The rule also requires that the agreement "clearly notify the client of any expenses the client will be expected to pay." This written fee agreement must be signed by the client. When the case is over, you are required to provide the client with a written statement "stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

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

Hourly fees, in theory, ensure that your pay covers the work you do; however, not all clients can afford hourly rates and even those who can often don't want to pay. When using an hourly fee structure, you should always collect a retainer up front to ensure that you are paid. The retainer should be enough to cover a good portion of the work you anticipate, but not so much that the client decides to go elsewhere because he can't afford it. One downside to hourly billing is that it is time consuming. Not only to you have to keep track of your time, you should also routinely send monthly billing statements to the client. While not required by the rules, regular billing (even if no money is actually due) helps you avoid grievances. Regular billing constantly reminds the client of the work that you are doing for him. Also, if fees are due, collecting them in smaller amounts more frequently is better than trying to collect a large sum at the end of the representation. Surprising a client with a huge, unexpected bill is asking for an ethics complaint. In addition, regular monthly bills help you defend a grievance or a fee dispute or support a civil claim for fees because they serve to document the reasonableness of the fee based on the amount of work done. The most efficient way to create time records and accurate, detailed invoices is to use practice management software that has a time-keeping and billing feature.

Another downside to the hourly fee structure is the risk of abuse. The Comment to Rule 1.5 cautions against exploiting an hourly fee arrangement by using "wasteful procedures." You must be honest in your timekeeping. If you have supervisory authority over other lawyers or over nonlawyers you should make sure that you have written policies regarding hourly billing and that you periodically audit time records to ensure that there is no overbilling or padding.

A flat or fixed fee structure is the choice for lawyers in many practice areas because it hedges the risks presented by other fee arrangements. You should determine flat fees on a case-by-case basis so that you can ensure that you receive adequate compensation for the work that you perform. Some lawyers confuse a flat fee with a "nonrefundable" fee and assume that it can be deposited directly into the firm's operating account and it is not subject to refund. Regardless of whether or not you charge a flat fee or a retainer in an hourly billing case, funds received from clients for fees for work that has not been done must be held in trust until earned. There are only

two ways that you can earn a fee: by actually doing the work or by the client's agreement that the fee is earned when paid.

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

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

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

Fee Sharing & Splitting

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

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

This means that the lawyers and the client have a choice about how to divide the fee. One option is to simply divide the fee proportionately to the work performed by each lawyer. Under these circumstances, you would need to have two written statements from the client. The first would be a fee agreement signed at the outset of the representation or association that states that the fee will be divided according to the work done by each lawyer. You could not assign percentages at that point because you would not know how much work would be done by whom. That can only be determined at the end of the representation, which is when you would need the client to sign a statement setting forth the share that each lawyer will received.

The second option for fee sharing with another lawyer is to determine the division of the fee at the outset of the representation. This does not necessarily have to relate to the proportion of the

work actually performed by each lawyer. Under such an arrangement, the client must agree in writing to the fee division. That writing should acknowledge that each lawyer assumes responsibility for the representation as a whole. The Comment explains that "joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter." The joint responsibility requirement discourages the payment of referral fees and advertising for cases that you know you will be passing on to a non-advertising lawyer. If you are going to be paid based on anything other than the amount of work you actually perform, you are obligated to remain involved throughout the case, including staying informed and responding to client inquiries. In fact, payment of a referral fee – even to another lawyer – is specifically prohibited by Rule 7.2(c).

While fee sharing is permitted and even encouraged, fee splitting is not. The term "fee splitting" usually refers to the payment of a portion of a legal fee to a nonlawyer. This is specifically prohibited by Rule 5.4 of the Rules of Professional Conduct. This prevents you from rewarding a staff member with a percentage of invoices collected, a portion of a fee earned, or a bonus based on success in a particular case. The rule also limits the ownership of law firms to lawyers. Subsection (b) says that a lawyer "shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Subsection (d) prohibits a lawyer from practicing "with or in the form of a professional corporation or association authorized to practice law for a profit, if ... (1) a nonlawyer owns any interest therein... ; (2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

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

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

> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
> (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provision of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
> (4) a lawyer or a law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

Resolving Fee Disputes

It doesn't matter what type of fee you charge, or whether or not you have a written fee agreement, or how regular, accurate, and thorough your invoices are – at some point you are going to have a client who won't pay or who demands a refund. In most cases, it is best to work out some sort of compromise with the client. Filing a civil action to collect an unpaid fee or refusing to refund any portion of a fee paid in advance is likely to result in a grievance, even if you are fully compliant with the Rules of Professional Conduct. If you can't reach a compromise that satisfies you and the client, another option is the fee dispute arbitration process administered by the South Carolina Bar through its Resolution of Fee Disputes Board.
The procedures for and requirements of the fee dispute process are set forth in detain in Rule 416, SCACR. If you would like to have the Resolution of Fee Dispute Board resolve your disagreement with the client over your fee, then you have to have the client's written consent that he will be bound by the decision of the board. If, on the other hand, a client files a fee dispute claim, you are required to participate in the investigation of that claim and comply with any final decision issued as a result.

While the fee dispute resolution process is essentially binding arbitration, the rule also provides for mediation at the option of the board member assigned to investigate the dispute. While you are required to respond to the inquiries of the investigating member, you are encouraged to take the opportunity to work out an agreement with the client with the assistance of that member acting as a mediator.

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

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

Even if you are able to establish one or more of these circumstances to the satisfaction of the circuit court judge, he does not have to vacate or amend the award. The judge can simply remand the matter back to the board where you will start all over again. Ultimately, you are likely to expend more time and costs than the amount of the award anyway. In addition, nothing prevents a client who is upset about your fee and your decision to fight the fee dispute process

from filing a grievance against you on other grounds. Remember also that if the board member who is investigating your fee dispute believes that you engaged in other misconduct, such as failing to adequately communicate with your client or failing to diligently pursue your client's legal matter, that board member can report you to the Commission on Lawyer Conduct regardless of the determination as to the reasonableness of your fee.

Duties Related to Termination of Representation

Rule 1.16 that pertains to your ethical obligations at the end of the lawyer-client relationship. Subsection (d) requires that you take reasonable steps to protect your client's interests upon termination of the representation. Those steps might include giving reasonable notice to the client of your withdrawal from the matter or of the end of the representation, giving the client time to find another lawyer if necessary or appropriate, surrendering papers and property that belong to the client, and returning any unearned fees. Of course, if the client's matter is pending in court, you must follow proper procedures to be relieved before you stop working on behalf of your client. In that case, the representation only ends when a judge says it does.

Note that the requirements of Rule 1.16(d) apply regardless of the reason for the termination and regardless of which party instigated the termination.

A common violation of this rule is a lawyer's refusal or failure to comply with the client's request for the file following termination. Lawyers also violate this rule when they require that the client pay for the file or for a copy of the file. The file belongs to the client. The lawyer can retain a copy at his own expense. This does not mean, however, that you are required to provide your client with multiple copies from the file at your own expense. If you have previously provided the client with copies from the file at no cost to the client, you may require payment of reasonably costs for additional copies.

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

Several disciplinary cases issued in the past twenty years have set forth the circumstances under which a lawyer may ethically assert this legal right.[12] Those cases set out a distinct and effective process for evaluation of the appropriateness of assertion of a lien on a client file to secure the payment of fees. Generally, a lawyer may not assert a retaining lien on client papers and property if the lawyer was discharged for good cause. If the lawyer was not discharged for good cause, the factors to be considered in determining whether assertion of a retaining lien on client papers and property is proper include the following:

(1) the financial situation of the client;

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

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

While not prohibited from doing so, if you withhold a client's file or property in order to collect unpaid fees, you do so at your own peril. The same could be said for the lawyer who refuses to return a fee or portion thereof claiming the fee was nonrefundable. A lawyer can charge a nonrefundable retainer; however, the fee must pass muster under the Rule 1.5 reasonableness factors and any unearned portion must be returned.

It is unpleasant when a lawyer-client relationship ends on bad terms. Don't allow a premature termination of your representation to result in disciplinary action because you failed to take the steps reasonably necessary to protect your client's interests. Promptly turn over the file and unearned fees, advise the client of any information necessary to protect his own interests, give the client time to find another attorney, and seek to be relieved when necessary.

Part Three – Conflicts of Interest

Screening for Conflicts and Obtaining Waivers
Barbara M. Seymour
(10/24/17)

The following written materials consist of a paraphrasing of the relevant Rules of Professional Conduct and official Comments. This outline is for your reference only and should be the beginning of the inquiry into your obligations in a potential conflict of interest situation, not the end. The following is not a verbatim recitation of the Rules or Comments and, therefore, is not a substitute. Do not make a decision regarding a conflict of interest without actually reading the Rules and Comments applicable to your particular situation. Consultation with a knowledgeable attorney is also recommended.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

You shall not represent a client if:

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

Unless:

(1) you reasonably believe that you will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by you in the same litigation or other proceeding before a tribunal; and,
(4) each affected client gives informed consent, confirmed in writing.

Resolution of a conflict of interest problem under this Rule requires you 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 and obtain their informed consent, confirmed in writing.

The only effective way to identify conflicts of interest is to have in place a conflicts checking system – "reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved." You will not be excused from engaging in a conflict of interest if you fail to recognize it due to your failure to have a conflicts checking system in place.

When do you have a conflict of interest?

Direct Conflicts.

Multiple Representation in Civil Litigation. Obviously, you cannot represent opposing parties in the same litigation, regardless of the clients' wishes. A conflict might also arise when representing two clients on the same side. The risks of this arrangement include:

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

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

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

> A feeling of betrayal on the part of the original client that results in harm to the lawyer-client relationship that will likely to impair effective representation of the client.
> The new client might reasonably fear that you will pursue his case less effectively out of deference to the original client, i.e., that the representation may be materially limited by your interest in retaining the current client.
> A conflict might arise when you have to cross-examine a client who appears as a witness in a lawsuit involving another client.

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

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

Relevant factors in making the determination include:

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

Conflicts in Class Action Suits. When you represent the plaintiffs or defendants in a class-action suit, unnamed members of the class are ordinarily not considered to be your clients for purposes of applying the conflicts rule. Under most circumstances, you don't need to get the consent of an unnamed class member before suing him in an unrelated matter on behalf of another client. The reverse is also true. If your client in an unrelated matter is an unnamed class member, you don't need his consent to represent the opposing party in the class action suit.

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

Organizational Clients Although your representation of an organization does not necessarily mean that you also represent a constituent or affiliate of that organization, you cannot accept a case that is adverse to an affiliate in an unrelated matter if:

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

If you are a member of your organization client's board of directors, you should determine whether the responsibilities of your two roles conflict or could potentially conflict in the future. Consideration should be given to:

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

If the arrangement creates a "material risk" that your independence of professional judgment will be compromised, you should:

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

General Considerations in Common Representation.

If (when) common representation doesn't work out, you have to withdraw from representing all of the clients. You can't just pick one and cut the others loose. This can cost you time and money and can, potentially, prejudice one or more of the common clients' interests. You should be very cautious about undertaking dual or multiple representation in any case.

The Comment provides some considerations in making your decision:

>Is contentious litigation or negotiations between the clients imminent or contemplated?
>Is it likely that your impartiality among the clients cannot be maintained?
>Has the relationship between the clients already assumed antagonism?
>Is there a likelihood that the clients' interests cannot be adequately served by common representation?
>Will you subsequently represent both or one of the parties on a continuing basis or in future matters?
>Does the situation involve creating or terminating a relationship between the parties?
>What effect will the common representation have on the attorney-client privilege? (Note: As between commonly represented clients, the attorney-client privilege does not attach.)

Confidentiality & Communication Issues in Common Representation. What effect will the common representation have on client confidentiality? What happens when one client asks you not to disclose to the other client information relevant to the common representation? You must consider this possibility before you take on multiple clients in the same matter.

Factors to consider include:

> You have an equal duty of loyalty to each client;
> Each client has the right to be informed of anything bearing on the representation that might affect that client's interests;
> Each client has the right to expect that you will use whatever information you have to that client's benefit.
> At the outset of the common representation and as part of the process of obtaining each client's informed consent, you should advise each client that information will be shared and that you will have to withdraw if one client decides that some matter material to the representation should be kept from the other.
> When seeking to establish or adjust a relationship between clients, you should make clear that your role is not that of partisanship normally expected in other circumstances and that the clients might 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 must be fully explained to the clients at the outset of the representation.

Indirect Conflicts.

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

> "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of a lawyer's other responsibilities or interests. For example, if asked to represent several individuals seeking to form a joint venture a lawyer are likely to be materially limited in a lawyer's ability to recommend or advocate all possible positions that each might take because of a lawyer's duty of loyalty to the others. The conflict in

effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with a lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

Transactional Conflicts. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of your relationship with the client or clients involved, the functions being performed by you, 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.

The Comment gives some examples:

> If you are asked to represent the seller of a business in negotiations with a buyer you also represent in another, unrelated matter, you could not undertake the representation without the informed consent of each client. However, generally adverse economic interests in unrelated transactions or litigation don't ordinarily constitute conflicts of interest.
> If you are asked to prepare wills for more than one member of the same family, depending upon the circumstances, a conflict of interest might arise.
> If you are asked to represent an heir or a personal representative in an estate matter, the identity of the client might be unclear.

Whether a conflict in a non-litigation setting is consentable depends on the circumstances. If the interests of the clients are generally aligned, you can seek consent to take on or continue the multiple representation, even though there is some difference in interest among them. In that case, if all clients agree, you could try to establish or adjust the relationship between the clients on an amicable and mutually advantageous basis. In that way, you can resolve potentially adverse interests by developing the clients' mutual interests. Otherwise, each client would have to obtain separate lawyers. This leaves open the possibility of additional cost and/or complications. With full disclosure of all of the risks and advantages, the clients might decide they are better off if you represent all of them.

Personal Conflicts. Your own personal interests could have an adverse effect on your representation of a client. Some examples include:

> discussing possible employment with your client's opponent or opposing counsel;
> referring clients to an enterprise in which you have an undisclosed financial interest;
> being paid from a source other than the client, when such an arrangement presents a significant risk that your representation of the client will be materially limited by your own interest in accommodating the person paying your fee.

When is it appropriate to seek a conflicts waiver from a client? Ordinarily, clients may consent to representation notwithstanding a conflict, as long as it is informed consent and, where required, confirmed in writing signed by the client. Certain conflicts are nonconsentable (unwaivable - you cannot properly ask for consent or provide representation on the basis of the client's consent):

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

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

To determine whether a conflict is consentable, ask yourself "Will the interests of the client(s) be adequately protected if the client(s) give informed consent to representation burdened by a conflict of interest?" If, under the circumstances, you cannot reasonably conclude that you will be able to provide competent and diligent representation, you should not seek the client's consent and should not proceed with the representation.

What is Informed Consent? Rule 1.0(f) definition – "a person agrees to a course of conduct after communication by the lawyer of reasonably adequate information and explanation about the material risks and reasonable alternatives."

You have to explain to the client:

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

What Constitutes Confirmed in Writing? Rule 1.0(b) definition – "there is a writing that confirms that the person has given informed consent;" A writing is "a tangible or electronic record of a communication … including handwriting, typewriting, printing, photostating, photography, audio or video recording and email."

Confirmed in writing may consist of a document signed by the client or one that you promptly record and transmit to the client following an oral consent.

A writing alone will not suffice. You have to have the conversation with the client. You have to give the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The purpose of the written document is not to make the disclosure, but rather to impress upon the client how serious the decision is and to avoid disputes that might arise in the future if you don't have it in writing.

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

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

> "Whether revoking consent to the client's own representation precludes a lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable

expectations of the other clients and whether material detriment to the other clients or you would result."

What about Potential Conflicts? You can prospectively obtain a waiver of a potential conflict, as long as that potential conflict is consentable. The Comment in this regard is quite useful:

> "The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation."

What if You Can't Proceed Due to the Conflict? If the affected client or clients don't consent or if the conflict is not consentable, you must:

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

Other rules might also require that you return the client's property, deliver the file to the client, refund any fees paid, etc.

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

Rule 1.8(a)*: Transactions with Clients: You may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms are fair and reasonable to the client;

(2) the client is advised in writing of:

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

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

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

> the existence of reasonably available alternatives.

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

(4) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and your role in the transaction, including whether you are representing the client in the transaction.

Examples of transactions subject to this rule include:

>a loan or sales transaction or your investment on behalf of a client
>the sale of goods or services related to the practice of law, (e.g. the sale of insurance or the provision of investment or fiduciary services)
>the purchase of property from an estate you represent
>acceptance of an interest in the client's business or other nonmonetary property as payment of all or part of a fee

Transactions that are not subject to this rule include:
>ordinary fee arrangements between you and the client
>"standard commercial transactions" between you and the client for products or services that the client sells to the public (e.g. banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services)

Representing the Client in the Transaction When You Are a Party to the Transaction.

The provisions of this Rule are in addition to the provisions of Rule 1.7 if you are representing the client in the transaction itself or when your financial interests creates a risk that your representation of the client will be materially limited. In this circumstance, your disclosure must explain to the client the risks associated with your dual role as both legal adviser and participant in the transaction. For example, you have to tell the client that there is a risk that you will structure the transaction or give legal advice in a way that favors your interests at the expense of the client. If your interests outweigh the client's interests to the extent that you cannot pass the "reasonable belief" test of Rule 1.7, then the conflict is "nonconsentable".

Rule 1.8(c)*: Solicitation of Gifts from Clients You may not solicit a substantial gift from a client who is not related to you. You may not prepare an instrument for a client that gives a substantial gift to you or a relative of yours (spouse, child, grandchild, parent, grandparent or other relative or individual with whom you maintain a close, familial relationship). This includes a bequest to yourself or your relative in a will. The only exception is when the client is also a relative of yours.

You are allowed to accept an unsolicited gift from a client if the gift and the circumstances are fair to the client. According to the comment, "a simple gift such as a present given at a holiday or as a token of appreciation is permitted." Be careful about accepting a more substantial gift. It is permitted, but the Comment says that it "may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent."

If you decide to accept a more substantial gift from a client, make sure that the circumstances don't imply that it was solicited.

Although a lawyer is allowed to prepare a will or other instrument (such as a deed) for a relative that gives herself a gift, the better practice is to not do it. Advise your family to engage an independent attorney to assist them. When you draft a will, deed, or other instrument for a relative, you are establishing an attorney-client relationship with that relative, which exposes you to potential ethical and civil liability.

According to the Comment, the rule against solicitation of gifts from clients does not prohibit you from having yourself or a partner or associate named as personal representative of the client's estate or to another "potentially lucrative fiduciary position." However, you must comply with Rule 1.8. This arrangement also kicks in the general conflict of interest provision in Rule 1.7 (significant risk that your interest in being the PR will materially limit your independent professional judgment in advising the client about who should be the PR, other than you). Informed consent to this conflict requires that you explain (1) the nature and extent of your financial interest in serving as PR or other fiduciary and (2) the availability and advisability of someone else to serve in that capacity.

Rule 1.8(d)*: Literary Rights. While you are representing a client, you may not make or negotiate an agreement that gives yourself literary or media rights to a portrayal or account based on the client's legal matter or your representation of the client. Because a course of action that is in the best interest of the client might make the publication value of movie or book or whatever go down, the risk is that you might give the client bad advice to make the story more exciting or interesting.

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

> (1) you can advance litigation expenses with reimbursement contingent on the outcome of the case; and,
>
> (2) you can pay court costs and expenses of litigation on behalf of an indigent client.

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

Rule 1.8(f)*: Accepting Compensation from Someone Other than the Client. Sometimes someone other than the client is paying your bill (such as a family member in a criminal case or an insurance company in a civil case). This presents a conflict of interest because the person paying the bill often has interests that conflict with those of the client. You may only accept compensation for representing a client from someone other than the client if:

> (1) the client gives informed consent;
>
> (2) the person who pays the fee does not interfere with your independent professional judgment or with your relationship with the client; and,
>
> (3) you keep information relating to representation of the client confidential.

Although this rule does not require a written conflicts waiver, other rules requiring a writing might apply in these circumstances. For example, this circumstance might also create a conflict of interest under Rule 1.7 if your representation of the nonpaying client will be materially limited by your own interest if getting paid depends on making the paying party happy. Another example is when you represent co-clients and only one of them is paying the entire bill. If those parties' interests are diverse or potentially conflicting, informed consent of both co-clients must be confirmed in writing.

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

Common representation presents a risk when differences in willingness to make or accept an offer of settlement arise between the clients. This is one of the risks that you need to discuss with the clients before you accept the dual representation.

Your disclosure to the clients has to include the existence and nature of all the claims/pleas involved and of the participation of each person in the settlement. Each client has the right to have the final say in deciding whether to accept or reject an offer of settlement or in deciding whether to enter a plea in a criminal case. Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, you 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.

The Comment says that lawyers representing a class of litigants might not have a full lawyer-client relationship with each member of the class. However, class action counsel still has to comply with applicable rules regarding class member notification and other procedural requirements that protect the entire class.

Rule 1.8(h)*: Limiting Malpractice Liability. You are not allowed to make an agreement that prospectively limits your liability to a client for malpractice unless the client is independently represented in making the agreement.

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

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

Agreements that attempt to limit your liability for malpractice prospectively are prohibited unless the client is independently represented in making the agreement. Such agreements can undermine competent and diligent representation. The other concern is that the client might be unable to evaluate whether or not making such an agreement is a good idea when a dispute hasn't arisen yet.
The Comment specifically allows for:

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

You are allowed to enter into an agreement to settle a claim or a potential claim for malpractice. However, there is a risk that you could take unfair advantage of the client. Therefore, you are required to advise the client in writing to seek independent representation in connection with the proposed settlement and to give the client a reasonable amount of time to find and consult with the other attorney.

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

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

This rule is designed to avoid giving you too great an interest in the client's case. Also, it is more difficult for the client to terminate the representation if you have an ownership interest in the subject of the representation.

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

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

This rule addresses primarily administrative proceedings in which you might serve as an advisor to a public administrative body that in front of which you also prosecute cases. It does not prevent you from prosecuting an administrative matter where another lawyer in your office is the advisor to the administrative body, but you have to be careful not to communicate with each other or share information about that particular case. Such communication would be an indirect ex parte communication with the hearing officer. The two of you must operate as if you are in separate firms, even though you are employed by a common employer. Because of the nature of public employment of lawyers, however, some accommodation must be made to permit the sharing of responsibilities among lawyers of a

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

common employer. Use of a screen that prevents sharing of information among the public service lawyers allows the agency to efficiently carrying out its administrative functions, but also protects the rights of people involved in the proceedings.

Examples from the Comment:

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

Rule 1.8(m) Sex with Clients: You are not permitted to have sexual relations with a client if:

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

Your relationship with your clients is supposed to be one of trust and confidence. A sexual relationship with a client presents a significant danger of harm to client interests and should be avoided, except in a few, limited circumstances, such as when your client is your spouse.

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

(1) A question may arise as to the voluntariness of the client's consent to a sexual relationship. Lawyers are in a position of extraordinary trust and may not use that power and influence to entice a vulnerable client into an otherwise undesired sexual relationship.
(2) Sexual relationships are inappropriate when the existence of the relationship could prejudice a client's legal interests, especially when the client is involved in a domestic relations case.
(3) A lawyer engaged in an intimate sexual relationship with a client may not be able to exercise the proper degree of professional judgment and independence required to fully represent the client. In any of these circumstances, a sexual relationship between lawyer and client is not appropriate, and the client's own emotional involvement renders it unlikely that a client can give adequate informed consent to the relationship.

RULE 1.9: DUTIES TO FORMER CLIENTS

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

Rule 1.9(a) Duties to Your Former Clients. When you formerly represented a client, you are not allowed to represent someone else the same or a substantially related matter when that person's interests are materially adverse the former client unless you obtain informed consent, confirmed in writing from the former client.

If you were directly involved in a specific client's legal matter, subsequent representation of other clients with materially adverse interests in that same matter is clearly prohibited.

Examples from the Comment:

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

On the other hand, when you regularly handled a particular type of problem for a former client, you are not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The key is whether you were so involved in the matter that the subsequent representation can be justly regarded as changing sides.

"Substantially related" means the two matters involve the same transaction or legal dispute or there otherwise is a substantial risk that confidential factual information you would ordinarily have obtained representing the former client would materially advance the subsequent client's position.

Examples from the Comment:

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

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

The Comment says that certain information is not ordinarily disqualifying:

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

IMPORTANT: A former client is not required to reveal the confidential information you obtained in order to establish a substantial risk that you have 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 you provided the former client and information that you would ordinarily learn by providing such services.

Rule 1.9(b) Duties to the Clients of Your Former Firm. When you leave a law office, you cannot knowingly represent a person against a former client of your old firm in the same or a substantially related matter without informed consent, confirmed in writing when:

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

The conflicts question becomes more complicated when you change firms. The reality is that many lawyers today practice in firms rather than operate solo, many lawyers to some degree have practices that are limited to a particular field, and many lawyers change jobs several times in their careers. The Comment cites several competing considerations:

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

The Comment says, "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."

When you change firms, you are only disqualified when you have actual knowledge of information protected by the rules. If you did not acquire knowledge or information relating to a particular client of your former firm, neither you nor your new firm is disqualified from representing another client with competing interests in the same or a related matter

Evaluation of disqualification depends on the particular facts of your situation. If you had general access to files of all clients of a law firm and regularly participated in discussions of their affairs; it will be inferred that you in fact were privy to all information about all the firm's clients. On the other hand, if you had access to only a limited number of your old firm's files and did not participate in discussions of

the affairs of other clients; without specific information to the contrary, it would be inferred that you were privy only to information about the particular clients for whom you actually handled files. IMPORTANT: The burden of proof rests with the lawyer and the firm facing disqualification.

Regardless of whether your firm is disqualified, you have a continuing duty to preserve confidentiality of information about a client formerly represented.

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

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

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

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

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

Compare the two examples from the Comment:

> Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, but that lawyer will do no work on the case and the personal beliefs of that lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.
> If a lawyer in the firm has on ownership interest in an entity that is the opposing party in a case, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of that lawyer would be imputed to all others in the firm.

After you leave, the lawyers in your former firm can represent a person with interests materially adverse to those of a client represented by you and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has confidential information material to the matter.

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

(1) The two lawyers are timely screened from access to confidential information of the other client;

(2) Neither lawyer participates in the other one's case; and
(3) Each lawyer retains authority over the objectives of the representation of her own client.

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

What is a "Screen"? A screen is defined in Rule 1.0(l) as isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obliged to protect.

What About Imputed Disqualification of Nonlawyer Employees? According to the Comment, your firm is not prohibited from represent a client when your nonlawyer employee is disqualified. This also includes lawyers in the firm who are disqualified based on work they did as law clerks before they became lawyers. Disqualified nonlawyers and former law clerks, however, must be screened to prevent their personal participation in the matter and to prevent their communication of confidential information obtained in the prior representation.

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

General Considerations. As a current or former government lawyer, you are personally subject to the Rules of Professional Conduct. You also could be subject to specific statutes or government regulations regarding conflict of interest. This Rule applies regardless of whether you are adverse to a former client. This is not only to protect the former client, but also to prevent you from exploiting public office for the advantage of another client.

The Comment provides two examples:

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

Former Government Lawyers. If you are a former public officer or government employee, you are prohibited from:

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

This conflict disqualification is imputed to your new firm, unless:

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

If you have information that you know is confidential government information about a person acquired when you were a public officer or employee, you may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

"Confidential government information" means information that has been obtained under governmental authority and that the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

You are not prohibited from receiving a salary or partnership share established by prior independent agreement, but you may not receive compensation directly related to the fee from the case in which you were disqualified.

Your notice to your former government agency should describe your prior involvement in the matter and the proposed screening procedures and should be given as soon as you recognize the conflict.

Current Government Lawyers. If you are a current public officer or government employee, you are subject to the conflicts provisions of Rule 1.7 and 1.9 and you are prohibited from:

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

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

A "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties;
(2) any other matter covered by the conflict of interest rules of the appropriate government agency; or
(3) a matter that continues in another form, depending on the extent to which the successive matters involve the same basic facts, the same or related parties, and the time elapsed.

Your Disqualification is Not Imputed to Your Co-Workers. According to the Comment "[b]ecause of the special problems raised by imputation within a government agency, [the rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated

government officers or employees, although ordinarily it will be prudent to screen such lawyers."

Moving From One Government Employer to Another. When you make a move from agency to agency, you should treat the second agency as another client for purposes of this Rule; however, the agency is not required to screen you as a law firm employer would be required to do.

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

If you "personally and substantially" participated in as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, you cannot:

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

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

Your disqualification under this rule is imputed to your firm unless:

(1) You are timely screened from any participation in the matter and you get no part of the fee; and
(2) Written notice is promptly given to the parties and any appropriate tribunal.

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

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

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

RULE 1.13: ORGANIZATION AS CLIENT

When you are employed or retained by an organization, you represent the organization acting through its duly authorized constituents.

You must act in the best interest of the organization. According to the Comment,

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

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

But what do you do if you come to know that a constituent of the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization? You are required to refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law, unless you reasonably believe that it is not necessary in the best interest of the organization to do so.

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

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

If the offender refuses to comply with your advice, then you will have to take go to a higher authority in the organization. Of course, if the situation is urgent and very serious, you might have to go straight to the higher without communicating with the offender first.

This Rule requires that when you know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, you must proceed as is reasonably necessary in the best interest of the organization. "Knowledge" is defined in the rules to include information inferred from circumstances. In the words of the Comment, "You cannot ignore the obvious."

Factors to consider in determining how to proceed:

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

Client Confidentiality. Regardless of how you decide to proceed, you must minimize the risk of revealing confidential information to people outside the organization to the extent possible. When one of the constituents of an organizational client communicates with the organization's lawyer in the constituent's organizational capacity, the communication is protected by client confidentiality. What if, despite your efforts, the "highest authority" insists upon, or fails to address in a timely and appropriate manner, a clear a violation of law? If you "reasonably believe" that the violation is "reasonably certain

to result in substantial injury to the organization," then you are permitted to reveal confidential client information, but only if and to the extent necessary to prevent substantial injury to the organization.

However, you cannot reveal information relating to your representation of an organization if your representation included investigation of an alleged violation of law, or defending the organization or a person associated with the organization against a claim arising out of an alleged violation of law.

The Comment provides an example:

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

Termination of the Representation. If you reasonably believes that were fired because of your actions required by this rule, or you quit because of the circumstances that required or permitted you to take action under this rule, you must proceed as you reasonably believe necessary to assure that the organization's highest authority is informed of your discharge or withdrawal.

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

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

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

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

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

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

When the Client Organization is a Government Agency - Comment:

> "Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority."

Part Four – Client Confidentiality

Understanding Your Confidentiality Obligation
Barbara M. Seymour
(06/28/16)

Maintaining client confidentiality is so basic to the concept of the lawyer-client relationship that a thorough understanding of it is often taken for granted. Confidentiality is an issue that should be addressed from a system-wide perspective. The legal team should ask itself: Do we fully understand what confidentiality means? Do we have adequate protections in place to safeguard confidential client information? Are we maintaining our filing, communication, and technology systems in a manner adequate to ensure that our ethical obligations are met with regard to client confidentiality?

Rule 1.6 - Confidentiality

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

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act;
> (2) to prevent reasonably certain death or substantial bodily harm;
> (3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (5) to secure legal advice about the lawyer's compliance with these Rules;
> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (7) to comply with other law or a court order.

Unfortunately, client confidentiality is an easy rule to break simply because the definition of client confidences is often misunderstood by lawyers and legal assistants alike. Many presume that confidential information consists only of secrets told to the lawyer in confidence. However, confidential information is not just client "secrets" of which third parties have no knowledge. Confidential information is ANY INFORMATION about the client or the client's legal matter - regardless of whether it is secret and regardless of its source.

Confidentiality vs. The Lawyer/Client Privilege

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

Metadata, Disclaimers, and Inadvertent Disclosure

The primary concern with email related to client matters is protection of confidential information. Because email and text messaging have become the primary method of day-to-day communication, in both the social and professional setting, clients expect to be able to relay information to and receive information from their lawyers electronically. Inherent in electronic communication is the risk of both inadvertent misdirection and intentional interception. While it would be difficult to completely avoid establishing regular communication with your clients via email, it is important to set limitations and expectations at the outset of the representation. First, clients should be instructed not to submit any highly confidential or potentially detrimental information by email. Documents or information that could be damaging to the client's legal interests should always be conveyed in person. Second, clients should have a clear expectation of your availability and accessibility through email. If you or a staff member does not check your email in the evening or on the weekends or when you are in court or otherwise out of the office, the clients need to be aware of that fact so that they do not expect immediate responses to their email inquiries. Finally, if any information related to the legal representation is going to be discussed or shared electronically, you need to instruct your client to take security precautions, such as a frequent password changes and avoidance of shared computers.

Email is easily misdirected. Most email software will save previously used email addresses for you and will automatically fill in an address as you type it. If you are not paying attention, you are likely to include unwanted addresses in your message. This feature should be turned off on all office computers. Even without the automatic address feature, the Reply and Reply-All buttons oftentimes result in delivery of messages to unintended recipients. In 2005, the Supreme Court of South Carolina amended Rule 4.4 of the Rules of Professional Conduct to address the growing concern about the inadvertent disclosure of confidential file material. Subsection (b) states that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 to the Rule states, in part, that it is a recognition of the fact that "lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers." The Comment says that the purpose of the Rule is to permit the sender to take protective measures. The Comment goes on to say that "[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending

person." The Comment specifically identifies email communication as a "document" under the Rule.

Even if the document transmitted electronically is delivered to the intended recipient, it may contain information that should not be disclosed. Electronic documents contain hidden information, including previous drafts, edits and the identity of who made them, and electronic comments that the sender might believe have been deleted prior to transmission. While the vast majority of this 'metadata' is completely innocuous and of no interest to anyone, there is a real risk of disclosure of information that could harm your client's case. The simplest way to avoid inadvertent disclosure of metadata is to deliver electronic documents in .pdf format. This is delivery of a picture or image of the document as opposed to the document itself. Without purchasing specific conversion software, we used to have to print and scan the document prior to sending. However, most current versions of email and word processing software contain a feature that will convert documents to .pdf with a few clicks of the mouse.

Electronic Storage of Client Data

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

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

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

Confidentiality and Closed Files

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

> Absent any obligation to retain a client's file which is imposed by law, court order, or rules of a tribunal, a lawyer shall securely store a client's file for a minimum of six (6)

years after completion or termination of the representation unless:

(1) the lawyer delivers the file to the client or the client's designee; or

(2) the client authorizes destruction of the file in a writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

If the client does not request the file within six (6) years after completion or termination of the representation, the file may be deemed abandoned by the client and may be destroyed unless there are pending or threatened legal proceedings known to the lawyer that relate to the matter. A lawyer who elects to destroy files shall do so in a manner which protects client confidentiality.

The suggested method of file destruction in the Comment to Rule 1.15(i) is shredding. Lawyers should take care in selecting a document shredding contractor for destruction of client files. The service provider should have written policies regarding confidentiality, security, and the ultimate depository of the shredded material. Also, shredding should always be done on-site in order to avoid inadvertent disclosure of confidential client information in transit or while awaiting processing at the shredding facility.

Staff Supervision

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

It is incumbent upon the lawyer-employer to discuss confidentiality issues with legal assistants and staff both at the time they are hired and then periodically, throughout the course of the employment. It should not be presumed that even the educated or experienced paralegal has a complete grasp of confidentiality issues. Education and training of nonlawyers on this issue should include thorough review of the Rule and its exceptions, discussion of specific hypotheticals and examples, and the opportunity to ask questions. To further emphasize the importance of these issues, employees should be required to sign a statement of understanding of the confidential nature of the work both at the time they are hired and when this issue is reviewed. Written policies and procedures about the handling of confidential matters and communication regarding clients and their files are essential to ensure compliance.

Practical Tips for Protecting Client Confidences

As tempting as it may be to talk about work with colleagues, friends, and family, client confidences must not be revealed, even hypothetically. With regard to communications outside the office, members of the legal team should never discuss clients or cases at home or in social settings. Additionally, discussing clients or cases with co-workers outside the office should be avoided in the event such conversations could be overheard.

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

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

Again, it cannot be assumed that members of the legal team will already know how to handle client information. Addressing these issues in advance is much more pleasant that explaining inadvertent lapses in security to the client or violations of confidentiality to the Court. As with all ethical considerations, client confidentiality should be approached with thoughtfulness and common sense. When considering habits and policies regarding client communications and client files, lawyers should err on the side of caution and even take extra steps to maintain confidentiality. Lawyers should also be cognizant of the example that they set. Even with training, education, and well-written policies and procedures, members of the team will follow the leader who fails to comply with his or her own rules.

Part Five – Trust Accounting

Trust Accounting and Financial Recordkeeping in South Carolina
Barbara M. Seymour
(05/15/2018)

When lawyers are entrusted with money or property from, on behalf of, or for clients or third parties, they must preserve the integrity and safety of it. There are two rules that set out the requirements regarding how that money is to be maintained, accounted for, and distributed. The first is Rule 1.15 of the Rules of Professional Conduct (RPC), Rule 407, SCACR. This safekeeping of property rule has six basic requirements for receipt and maintenance of client funds:

- Client funds must be kept separate from your own funds
- Client funds must be maintained in the state where your office is located, unless the client consents to other arrangements
- Client funds must be specifically identified and safeguarded
- Complete records regarding the funds must be created and preserved for six years
- You must promptly notify the client or third party of the receipt of the funds and promptly deliver the funds to the client or a third party with a legitimate interest in the funds
- You must promptly and fully account for all funds received and disbursed

The second set of requirements for handling client funds is found in Rule 417, SCACR. Rule 417 contains a list of financial records that you are required to maintain regarding your law practice. It also sets forth limitations on the use of trust accounts and procedures for monthly reconciliation. A violation of Rule 417 subjects a lawyer to disciplinary action.[13] The Supreme Court adopted this rule in January 1997. Since that time, the Court has issued dozens of disciplinary opinions imposing sanctions on lawyers who did not comply with it. A significant number of those cases resulted in disbarment.

The Court has held that when there is clear and convincing evidence of trust account violations or other inadequate recordkeeping, the lawyer must produce records sufficiently detailed to overcome that evidence.[14] In other words, a lack of adequate records creates a presumption of trust account mismanagement. You and all staff members handling funds or preparing financial records should be well versed in the requirements of Rule 417, SCACR. If you have not met with your accountant or bookkeeper to review and explain the requirements of Rule 417, you should do so immediately to confirm that you are in compliance.

Commingling

A lawyer who receives funds on behalf of a client has to keep those funds in a trust account until distribution. Money held in trust on behalf of clients must be kept separate and apart from the operating funds of the law firm and your personal funds. Combining client trust money with your own money is called commingling and is prohibited by Rule 1.15, RPC. Subsection (c) requires that you deposit into your client trust account all unearned legal fees and expenses that have been paid in advance. You may

[13] See Rule 1.15, RPC,(a), which states that a lawyer "shall comply with Rule 417, SCACR."
[14] In re Myers, 321 S.C. 93, 467 S.E.2d 446 (1996); In re Miles, 335 S.C. 242, 516 S.E.2d 661 (1999).

only withdraw those funds as fees are earned or expenses are incurred. Once a fee is earned, it must be withdrawn from the trust account. To leave it in the trust account is commingling.

Advance Fees

Only fees that the client agrees are earned when paid may be placed directly into the general (or 'operating') account. Rule 1.5(f), RPC, sets out limited circumstances in which a lawyer is not required to deposit fees into trust until the legal work is actually performed. Under this provision, so-called advance fees (sometimes referred to as 'flat fees' or 'nonrefundable fees') may be treated as immediately earned if the client agrees in advance in a written fee agreement.[15] That written fee agreement must notify the client:

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

The best practice is to avoid using the term 'nonrefundable' in reference to advance fees so as to avoid misleading the client. Even if you call your fee 'nonrefundable', a fee is always subject to refund, whether you hold an advance fee in trust or not.

Resolution of Fee Disputes

The Supreme Court has created procedures for resolution of fee disputes with clients, set forth in Rule 416, SCACR. This Rule established the Resolution of Fee Disputes Board of the South Carolina Bar. Lawyers and clients with disputes regarding fees of less than $50,000 can submit the matter to the Board for binding arbitration. The lawyer is compelled to cooperate and pay any award of refund to the client by Rule 7(a)(1), RLDE, Rule 413, SCACR. The Fee Dispute process is an efficient and effective way for lawyers to resolve issues with clients over fees without having to resort to litigation.

Trust Account Cushions

A lawyer might be tempted to keep a cushion in the trust accounts to avoid bouncing checks. This practice is prohibited because it is commingling. While a nominal amount sufficient to cover incidental bank charges (such as check orders or chargeback fees) is permitted by Rule 1.15(b), RPC, any amount over that is commingling.[16] You may deposit your own funds in your client trust account for the sole purpose of paying bank charges on that account, but only in an amount necessary for that purpose. The better practice is to make arrangements with your bank to have any service charges on the trust account drafted from your operating or general account.

Except in limited circumstances, you are not supposed to issue a trust account check until funds have

[15] Rule 1.5, RPC, was revised by the Supreme Court of South Carolina by order dated April 10, 2014, to permit deposit of fees paid in advance into the firm account in limited circumstances.
[16] Matter of Rogol, 355 S.C. 627, 586 S.E.2d 593 (2003).

been received and collected by your bank. Additionally, lawyers and their bookkeepers should be meticulous in their record keeping and calculating so that mathematical errors resulting in insufficient funds are avoided. Therefore, there should never be a circumstance in which you must rely on a cushion of your own money in your client trust account.

Prompt Notice, Accounting, and Delivery

Rule 1.15(d), RPC, requires that a lawyer take prompt action upon receipt of funds or other property in which a client or third person has an interest. The primary obligation is to promptly deliver the funds to the appropriate person. Prompt delivery of funds, once deposited and collected, depends on the circumstances. Lawyers are expected to act with reasonable diligence to disburse funds from trust to the rightful owner. Even if the lawyer is not able to disburse the funds immediately upon deposit and collection (if, for example, the client and a third party have a dispute over a lien) the lawyer has a separate obligation to promptly give notice of receipt of the funds to whomever has an interest in those funds. Further, upon request by the client or third person with an interest in the funds, the lawyer is required to "promptly render a full accounting." What form that "accounting" might take – and what information might be contained in it – depends entirely on the circumstances. Regardless, the accounting must demonstrate to the interested party the amount and whereabouts of the funds, giving reasonable assurance that the funds are being kept safe until such time as disbursement can be accomplished. The obligation to provide a prompt accounting of funds upon request does not end upon disbursement. A client or third party might be entitled to a full accounting of how funds were disbursed as well.

Lawyers often find themselves with unclaimed funds in the form of checks that cannot be delivered or have never been negotiated by the payee. Comment 12 to Rule 1.15, RPC, makes it clear that the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq. applies to such funds. A lawyer is required to review the trust account every year to determine if it contains unclaimed funds. The UUPA requires law firms to conduct due diligence to try to deliver funds to the owner. If such efforts are not successful after five years, the UUPA sets forth specific requirements for the reporting and escheatment of those funds to the State Treasurer's Office. Lawyers are advised to keep close tabs on unnegotiated checks by reviewing an outstanding check report every month during the routine reconciliation process in order to avoid running afoul of the UUPA. Lawyers should also keep in mind that law firms are subject to routine compliance review by the State Treasurer's Office.

Deposit and Collect Prior to Disbursement

One frequent rule violation that results in overdrafts (and discipline) is disbursement of funds prior to deposit. You must deposit funds before disbursing them. Delivering checks to payees prior to deposit of funds received for that purpose is a violation of Rule 1.15,(f)(1), RPC. For example, funds received in connection with a real estate closing or personal injury settlement must be physically deposited with your bank before you can hand out checks to the client or other payees. A significant number of trust account overdrafts reported to the Commission on Lawyer Conduct result from intentional violations of this rule.

In addition to the requirement that you deposit funds prior to disbursement, Rule 1.15, RPC, requires that you wait until funds are actually collected by your bank before issuing checks in most

circumstances. RPC does provide a 'good funds' exception that allows you to disburse some items upon deposit without waiting for actual collection.[17] The 'good funds' rule allows a lawyer to treat certain negotiable instruments as cash that can be disbursed after deposit, but before actual collection by the bank.

Ordinarily you may not disburse funds from your trust account unless the funds are actually collected funds, meaning the check has cleared and your account has been credited for the deposit. However, subsection (f)(2) permits you to treat cash, verified and documented electronic fund transfers, or other deposits treated by the depository bank as equivalent to cash as collected funds. Certain negotiable instruments, once deposited, can be disbursed without verification that the accounted has been credited. Those instruments include properly endorsed government checks, certified checks, cashier's checks, insurance company checks (not exceeding $50,000.00). The good funds provision also includes "any other instrument payable at or through a bank, if the amount of such instrument does not exceed $5,000.00 and the lawyer has reasonable and prudent belief that the deposit of the instrument will be collected promptly."

If it turns out that the funds are not collected, the lawyer is required to deposit replacement funds in the account as soon as practical, but no later than five business days after notice that the funds have not been collected. A failure to collect even good funds will result in an investigation if the bank pays the trust checks on insufficient funds.

Client Funds for Personal Gain

Rule 1.15(g), RPC, prohibits a lawyer from using the balance in a trust account to obtain credit. Client or third-party funds may not be used as collateral and may not be reported to a lender or creditor as assets for purposes of obtaining a loan or credit. Additionally, a lawyer may not use funds in a trust account for the lawyer's personal benefit or for the benefit of someone other than the client or third party to whom the funds belong.

Mandatory Overdraft Reporting

Rule 1.15(h), RPC, contains a mandatory overdraft or insufficient funds reporting requirement. Under this provision, you are required to file written instructions with your bank directing that it report to the Commission on Lawyer Conduct when any instrument drawn on your trust account is presented for payment against insufficient funds or when the trust account is overdrawn. There is no particular form required. If your banker does not have a prepared form for your use, a simple letter including the language from Rule 1.15(h), RPC, will suffice. It is important that you keep a copy of your bank directive with your financial records as evidence of your compliance with this provision of the rule. If your bank refuses to accept the directive or fails to comply with it, you have to find another bank.

The overdraft reporting rule has been in effect since October 2005. The Commission on Lawyer Conduct receives an average of about100 bank notices each year. The Commission refers these matters to the Office of Disciplinary Counsel, which investigates all reports. The reporting requirement is not limited to returned checks. It includes any incident in which a check is presented on insufficient funds. This includes circumstances when a lawyer's trust account check bounces or the trust account balance

[17]See Rule 1.15,(f)(2), RPC.

falls below zero. Your bank may elect to honor a check even if there are not sufficient funds in the account to cover it, but a report to the Commission is still required.

The overdraft notification process helps disciplinary authorities identify financial mismanagement and misappropriation before significant client, law firm, and bank losses occur. While many overdrafts and NSF items result from inadvertence or accounting errors, a significant percentage are caused by a failure to comply with the Rules of Professional Conduct either by the lawyer or by a member of the law firm staff.

Recordkeeping

The recordkeeping rule (Rule 417, SCACR) clearly sets forth the minimum required financial records that you must prepare and maintain. Oftentimes, bookkeeping and banking responsibilities are delegated to paralegals or other nonlawyers in the office. Each member of the legal team is likely at some point to create, receive, or process financial records. Therefore, everyone must be familiar with the recordkeeping requirements. It is your obligation under Rule 5.3, RPC, (Supervision of Nonlawyers) to educate your staff about the recordkeeping requirements and to adequately supervise the process to ensure strict compliance.

There are two primary reasons why strict financial recordkeeping is important. First, if there is ever a question about the integrity of client funds or about financial mismanagement, disciplinary authorities will subpoena your financial records. If you are unable to produce complete records in full compliance with Rule 417, SCACR, you will be subject to sanction even if ultimately there is no mismanagement or other ethical violation. Second, the only way to detect fraud or misappropriation of client funds or law firm funds is diligent and comprehensive recordkeeping and financial review.

Required Records

Pursuant to Rule 417-1, financial records relating to client transactions must be maintained by the lawyer for a period of six years from the date of termination of the representation. This means that you cannot necessarily destroy financial records by record date. This is particularly true of documents that contain information about more than one client, such as bank statements and accounting journals. You must retain any given document for six years beyond the end of your representation of any client referenced in that document.

The rule allows a lawyer to maintain financial records in a form other than paper, such as electronic or digital media; however, they must be readily accessible to the lawyer and the lawyer must be able to produce printed copies.

Rule 417-1 provides a list of trust account records that must be prepared and maintained. Those records include:

- **(a)** receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement;
- **(b)** ledger records for all client trust accounts showing, for each separate trust client or

beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(c) copies of retainer and compensation agreements with clients as required by Rule 1.5 of the South Carolina Rules of Professional Conduct;

(d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(e) copies of bills for legal fees and expenses rendered to clients;

(f) copies of records showing disbursements on behalf of clients;

(g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn, and the date and the time the transfer was completed;

(i) copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer; and

(j) copies of those portions of client files that are reasonably related to client trust account transactions.

The Reconciliation Process

Rule 417, SCACR requires that you reconcile your trust account every month. This is a relatively simple process of comparing your records to the bank's records as reflected on your monthly statement. Most banks provide a form with the monthly statement that you can use to balance your account by hand. Bookkeeping software can do this for you; however, someone has to enter the data when the monthly statement arrives. Proper reconciliation of a trust account is a three-part process. The comment to Rule 417-1(i) explains the reconciliation requirement as follows:

> The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement.

If you have someone else reconcile your account every month, such as a staff person or outside accountant, you must ensure that they understand the fiduciary aspects of trust accounting. For example, even an experienced accountant might not be familiar with the concept of deriving a trial balance from the individual client ledgers then reconciling it with the journal balance and bank statement balance.

In addition, you should provide your accounting and bookkeeping professionals with a list of warning signs that might indicate an innocent error or deliberate misappropriation. When an error is discovered, you should prepare a written memorandum of what occurred and how the problem was resolved. Some

of those warning signs include:

- Deposits in your records not reflected on the statement or not credited within one business day of the date in your records
- Checks that have not cleared the bank within a month
- Deposits or checks with amounts that differ from your records
- Checks written significantly out of sequence
- Skips in check sequence without documentation of a voided check
- Unexplained debits or credits to the account through funds transfers
- NSF or overdraft charges
- Unexpected bank charges not covered by funds deposited for that purpose

Safeguarding Trust Accounts

Rule 417-2 also contains several provisions specifically designed to safeguard client funds. First, only a lawyer admitted in South Carolina or someone under the direct supervision of a lawyer admitted in South Carolina may disburse funds from a trust account. Although not prohibited by the rules, giving signatory authority or electronic access to your trust account to a nonlawyer is not advisable. Most of the misappropriation cases in recent years involve trusted, longtime staff members stealing client money using access granted by the responsible lawyer, either by check or electronic transfer. While Rule 417 does permit nonlawyers to be authorized on a trust account, if you choose to do so, you must proceed with caution.

Second, you must deposit all funds received intact. In other words, you cannot split a deposit between the trust and operating accounts. If you receive a client check that includes both payment on a fee invoice and an advance payment of costs, you cannot split the deposit by placing the fee portion in the operating account and the costs portion in the trust account. The entire amount must be deposited into the trust account and then a check payable to the operating account for the amount of the earned fees paid should be written out promptly upon collection.

Third, records of deposit into the trust account must be "sufficiently detailed to identify each item," including the client name, matter number, or other identifier (or some combination thereof if the client has more than one matter with the firm). Lawyers often produce carbon deposit slip books in response to financial mismanagement allegations that do not contain the required information. The source of cash, money orders, cashier's checks, and even regular checks is not noted. Many times, even when the lawyer does include a client reference, it is not sufficiently identifiable ("Smith" for example). You can deposit more than one check or multiple cash receipts with the same deposit slip, but when you do, you should list each item separately with an adequate client/case identifier for bookkeeping purposes. The client reference, whether a name or number, must match the client reference in your books. Also, 'records of deposit' include deposit receipts in addition to copies of deposit slips. The deposit slip is not sufficient documentation that a deposit was actually made. Don't forget to attach the original deposit receipt to the carbon of the deposit slip and make a copy to attach to each client ledger. If you make deposits electronically using a scanner and the Internet, you must reduce the proof of deposit to a record (electronic or paper) and include it with your other Rule 417 records. You should not rely on online records available from your bank, as those records may only be accessible for a limited period of time.

Fourth, withdrawals may be made only by check to a named payee or by authorized electronic funds transfer. A lawyer may not withdraw cash at the counter or use an automated teller machine or debit card. A lawyer may not write a check from the trust account in blank or payable to 'cash' or 'bearer'. If the client does not have an account or other means to negotiate a check, the lawyer should assist the client in getting the trust account check cashed at the lawyer's bank. That check must be written payable to the client or other named payee. The lawyer cannot disburse funds to a client or a third party in cash.

Rule 417-5 provides a limited set of circumstances in which funds can be disbursed electronically. If authorized by the client, a lawyer may transfer funds from the trust account without the use of a paper check under the following circumstances:

(a) money required for payment to a client or third person on behalf of a client;
(b) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation;
(c) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; and,
(d) money transferred from one client trust account to another client trust account.

As Internet banking becomes a common bookkeeping tool for busy lawyers, opportunities to run afoul of this restriction increase. The advent of remote deposit, electronic transfer of funds between accounts, and mobile electronic access to funds makes the necessity of accurate and detailed records even more important. While it might not be the most efficient method of banking, the best practice is to physically deliver deposits to the bank and obtain a paper receipt and to disburse all funds from the trust account by check, even if you are moving earned fees from your trust account to your operating account. It might be easier to transfer your earned fees from the trust account to the operating account or a personal account electronically, but it is risky. If you do it that way, you must keep meticulous records and maintain in writing all of the information that you would have if you had made the transfer by check.

Misappropriation

It should be self-evident that a lawyer must never convert client funds to his own use. Unfortunately, each year the Court must address this situation in disciplinary cases. Misappropriation also subjects the lawyer to civil and criminal liability. Partners of a lawyer disbarred for misappropriation might spend years recouping their losses and might even be held ethically accountable. Associates who work for a lawyer disbarred for misappropriation lose their jobs. All lawyers, whether partners or associates, must be conscious of the financial situations in their law offices. Getting innocently caught up with a lawyer who steals client money can significantly hamper your career.

Incidents involving paralegals, office managers, and other nonlawyer assistants who steal client or law firm funds are not uncommon. Lawyers should carefully check the background of each potential employee before making a hiring decision. Once a nonlawyer is hired, reasonable supervision is necessary. A lawyer who gives diligent attention to the processing of client and firm funds and to financial recordkeeping will be alerted to financial misconduct of nonlawyer employees.[18] A lawyer who does not will be held financially and ethically accountable for the wrongful conduct of the

[18] Se RPC Rule 5.3, Rule 407, SCACR.

nonlawyer employee. Further, all lawyers should provide formal, documented ethics and trust accounting training to staff to both lessen the risk and defend against an allegation of inadequate supervision.

There are several warning signs that a member of the legal team might be misappropriating money:

- Blank or incomplete check stubs or deposit slips
- Missing checks
- Accounts that do not balance
- Checks returned for insufficient funds
- Unidentified counter withdrawals or electronic transfers
- Checks clearing out of sequence
- Records of excessive voided checks
- Checks made payable to an unfamiliar vendor
- Excessive checks to a particular vendor
- Possessiveness, secretiveness, defensiveness
- Lack of monthly reconciliations of bank accounts
- Unopened bank statements or unopened bills or past due law office bills
- Frequent trips to the bank
- Vendors/third parties not timely paid or not receiving a check that had been issued
- Operating account or personal account checks written to the trust account
- Monthly checks for the same amount (such as a car or mortgage payment)
- Unusual urgency about resolving a case (settlement, closing, etc.)
- Signs of a lifestyle beyond means
- Signs of depression or substance abuse

While there may be a logical explanation for each of these circumstances, many cases of misappropriation of large sums of client or firm funds could have been avoided if these warning signs had been heeded.

Conclusion.

Preservation of the safety and integrity of client funds and other property must be a priority for lawyers. Even those who are not adept at accounting and delegate responsibility for financial recordkeeping to others must study the rules that govern trust account management. The financial recordkeeping rules are not designed to make a lawyer's life more difficult, but rather to protect the lawyer from costly mistakes. In a recent disbarment opinion,[19] the Supreme Court held that the recordkeeping rules in RPC "protects lawyers who obey the rule because they always have detailed records to show how client funds and the funds of others were maintained and distributed." The Court went on to point out, however, that a lack of compliance would not shield a lawyer from discipline by stating that the "recordkeeping provision also prevents lawyers who disobey the rule from claiming they made a simple mistake." A thorough understanding of, and strict compliance with, Rule 1.15, RPC, and Rule 417, SCACR, can help ensure that client funds are kept safe from errors and misappropriation and that you won't find yourself in disciplinary trouble.

[19] In the Matter of Jordan, 421 S.C. 594, 809 S.E.2d 409 (2017)