ETHICAL PRACTICE IN THE FEDERAL COURTS

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ETHICAL PRACTICE IN THE FEDERAL COURTS

What's the difference between a doctor and a lawyer? One worries if he left anything in, and the other worries if he left anything out.

I. INTRODUCTION

A. Malpractice Trends

While few attorneys on a percentage basis have actually been sued, few of us can claim that we have maintained perfect relationships with all of our clients. Additionally, few of us can claim a complete working knowledge of the ethical boundaries imposed upon us. Such knowledge may be necessary, though, to avoid a legal malpractice claim—42 percent of which result in monetary damages assessed against the attorney. Standing Committee on Lawyers' Professional Responsibility, "Profile of Legal Malpractice Claims 2008–2011" (American Bar Association 2012). Not all lawyers are equally susceptible to malpractice claims. Between 2008 and 2011, over 48 percent of such claims were brought against lawyers practicing real estate, personal injury or family law. Id. Most commonly, legal malpractice claims allege a substantive error relating to representation, with failure to know or properly apply the law accounting for over 13 percent of all malpractice claims. Id. On average, attorneys should expect at least three malpractice claims during their careers. K. Lewinbuk, "What Goes Around Comes Around: Lawsuits Against Lawyers and the 'Professional Responsibility' of Law Schools to Face that Reality," 42 SW. L. Rev. 547, 549 (2013).

Certainly the most prevalent trend in Texas, and one that is gaining traction in most jurisdictions, is the inclusion of a fee forfeiture or Arce v. Burrow claim in virtually every claim. See, Arce v. Burrow, 997 S.W.2d 229 (Tex. 1999).

B. Figures Improving

The good news is that these figures have improved, but insurers are not certain if this is a trend or merely the result of better underwriting. Despite a sharp increase in the number of legal malpractice claims filed in the 1990's, this number appeared to stabilize by the end of 2009. Although the number of such claims is still at an unprecedented level, it is no longer on the rapid upward trend seen since the 1970's. I. Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 1:6 (2014). Gibeaut, "Good News, Bad News on Malpractice" ABA Journal pp. 100-101 (March, 1997).

C. Significance

The true significance of these figures is found by comparison to past data. From 1799 to 1960, there were 700 reported legal malpractice cases. In comparison, the 1970's alone saw 625 malpractice cases. Mallen, "Legal Malpractice: The Legacy of the 1970's," Forum, Vol. XVI, No. 2 (Fall 1980). This dramatic increase in legal malpractice decisions only continued to grow, with the 1980's seeing triple the number of such decisions as the 1970's. The 1990's continued the trend, reporting a 155 percent increase in legal malpractice decisions over the prior decade. Mallen & Smith, supra. Older lawyers (ten years of practice or more) account for over 66% of all claims. Gates, "Charting the Shoals of Malpractice," ABA Journal, July 1, 1987, p. 62. (This figure may not be completely accurate because it probably includes claims made against older attorneys due to errors committed by younger attorneys for whom they are responsible.) Statistically, small firms (one to five attorneys) are the most popular targets (66.02 percent of claims) while large firms (forty (40) or more lawyers) account for only 12.58 percent of the claims. Standing Committee on Lawyers' Professional Liability, supra. Even

those of us who have not been sued are paying for this increase in litigation by virtue of higher insurance premiums. Studies made in 1985 evidenced an increase of two to five times the prior applicable premium rate. National Law Journal, Vol. 7, No. 38 (June 3, 1985); Of Counsel, Vol. 4, No. 5 (May 1985). Over the years, these premiums have only continued to rise.

D. Scope

This article relies upon and cites primarily the ABA Model Rules of Professional Conduct ("ABA Rules"). While it is obvious that these Rules are not universally accepted, the author feels that the principles, or at least the questions raised by those principles, are fairly universal. Also included are certain references to the New Hampshire Rules of Professional Conduct ("New Hampshire Rules"). These rules are patterned after the ABA Rules but are not exactly the same. The New Hampshire comments frequently delineate the difference between the New Hampshire code and the ABA rules. These rules are cited for illustrative purposes and as an example as to how various states have changed or added to the suggested format of the ABA. As of 2014, forty-nine states have adopted the ABA Rules in one form or another. ABA Center for Professional Responsibility, State Adoption of Model Rules (2014).

The author has used the law of a variety of jurisdictions in his discussion of the legal malpractice theories of liability, defenses and damages. The law in any given case is obviously controlled by the substantive state law of the jurisdiction involved. In federal court litigation the choice of law adopted by the court may very well be pivotal. See O'Brien, "Multistate Practice and Conflicting Ethical Obligations," 16 Seton Hall L. Rev. 678 (1986); "Risks of Violation of Rules of Professional Responsibility By Reason of the Increased Disparity Among the States," 45 Bus. Law Rev. 1229 (1990); Gillers, "Conflict of Laws; Real World Rules for Interstate Regulation of Practice," 79 ABA Journal 111 (April 1993).

II. HISTORICAL BACKGROUND OF LEGAL MALPRACTICE AND ETHICAL STANDARDS

A. American Bar Association's Rules Of Professional Conduct

1. Historical Background of the ABA Rules

In 1908 the American Bar Association adopted the Canons of Professional Ethics. They were patterned after the Code of Ethics of Alabama which had been in existence since 1887. The Alabama Code was based substantially upon the works of two authors, David Hoffman and Judge George Sharswood. 2 D. Hoffman, A COURSE OF LEGAL STUDY (2d ed. Baltimore 1830); G. Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (4th ed. Philadelphia 1876). The ABA adopted the Model Code of Professional Responsibility in 1969 and replaced it in 1983 with the Model Rules of Professional Conduct.

2. The Model Rules

The ABA was the first to adopt a "Restatement-type" format consisting of black letter rules and underlying comments. This is the same format that is used now in New Hampshire and many other states. The comments were not intended to broaden the obligations demanded by the Rules, but only to provide guidance for compliance. There are also "research notes" which compare the 1969 and 1983 versions and also provide a few references to other material. These notes are not part of the Rules or corresponding comments.

B. New Hampshire Rules Of Professional Conduct

1. Effective Date

The current rules went into effect on January 1, 2008. In addition to the actual Rule, the online version of the rules includes both the New

Hampshire and ABA comments. The New Hampshire comments primarily point out the differences between the New Hampshire and the ABA rule. The New Hampshire Supreme Court has not adopted either commentary.

2. Chapters

There are eight chapters divided into the following topics:

I. Client-Lawyer Relationship
II. Counselor
III. Advocate
IV. Transaction with Persons Other Than Clients
V. Law Firms and Associations
VI. Public Service
VII. Information About Legal Services
VIII. Maintaining the Integrity of the Profession

There are a varying number of rules under each chapter heading. There is also a Statement of Purpose and a specific New Hampshire commentary discussing its refusal to incorporate the ABA's Preamble and Scope. There is also a section entitled "Definitions (Rule 1.0)" which defines many of the frequently used terms.

3. Comments

Each rule is presented in a Restatement format. It is followed by comments which aid in the interpretation of the Rule. These comments do not add to the obligations of the rules.

4. Use in Federal Court

The Local Rules (Rule 83.5) of the District of New Hampshire adopt the New Hampshire Rules of Professional Conduct and subsequent amendments.

5. First Circuit

Rule IV of the Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit provides:

> Standards for Professional Conduct.
>
> a. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.
>
> b. Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility, either of the state, territory, commonwealth or possession of the United States in which the attorney maintains his principle office; or of the state, territory, commonwealth or possession of the United States in which the attorney is acting at the time of the misconduct; or of the state in which the circuit maintains its Clerk's Office, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of the attorney-client relationship. The Code of Professional Responsibility means that code adopted by the highest court of the state, territory, commonwealth or possession of the United States, as amended from time to time by that court, except as otherwise provided by specific Rule of this Court after consideration of

comments by representatives of bar associations within the state, territory, commonwealth or possession of the United States. Failure to comply with the Federal Rules of Appellate Procedure, the Local Rules of this Court, or the orders of this Court may also constitute misconduct and be grounds for discipline.

6. Ethics Advice

The New Hampshire Bar Association's Ethics Committee provides two different mechanisms to receive ethics advice. A New Hampshire lawyer can obtain answers to vexing ethical questions by requesting a formal opinion. One can request such an opinion by emailing or writing:

New Hampshire Bar Association
Attn.: Rosemarie Atwood
2 Pillsbury Street, Suite 300
Concord, NH 03301

Responses generally take two to three months. Informal inquiries can also be made by contacting Ms. Atwood by email (ratwood@nhbar.org) or by phone (715-3214).

III. DISCIPLINARY ACTION AND CIVIL LIABILITY

A. Basis for Disciplinary Action

1. ABA Rules

The violation of an ABA Rule is designed to be an action subjecting one to the possibility of disciplinary action. ABA Rule 8.4 controls. One cannot technically violate an ABA Comment. Actually one cannot violate the ABA Code at all, but instead one can only violate one's own state's rules.

2. State Rules

NH Rule 8.4, modeled after ABA Rule 8.4, sets out a comprehensive restatement of various forms of conduct that will subject a lawyer to disciplinary action. Other states have similar rules.

3. Federal Courts

Federal District Courts have adopted various rules concerning conduct and courtroom etiquette. These are found in the respective local rules. As noted above, the District of New Hampshire and the First Circuit have adopted the New Hampshire state rules.

4. Non-Lawyer Activities

One's activities upon which disciplinary sanctions are based do not have to be acts done as a lawyer. See, e.g., In re Usher, IV, 987 N.E.2d 1080 (Ind. 2013) (attorney disciplined for email created to shame a social acquaintance); Ky. Bar Ass'n v. Dixon, 373 S.W.3d 444 (Ky. 2012) (attorney disciplined for actions taken as an escrow agent); In re Disciplinary Proceedings Against Michael, 805 N.W.2d 110 (Wis. 2011) (attorney disciplined for actions taken while operating a bed and breakfast).

5. Services

Law-related services may be subject to ethical rules. See, e.g., In re Rost, 211 P.3d 145 (Kan. 2009) (retired attorney subject to professional rules even when only providing law-related services). See also Patullia, "Separating Customer and Client--Law Related Services May Not Be Exempt From Ethical Rules," ABA Journal p. 78 (Dec. 1995).

6. Non-Lawyer Representatives

Rule 8.5(c) applies the New Hampshire Code to non-lawyers who are permitted to represent individuals before its courts.

B. Jurisdiction under the ABA Model Rules (Rule 8.5) and Under the NH Rules (Rule 8.5)

1. Admitted to practice in the jurisdiction.

2. Specially admitted for a particular proceeding.

3. Conduct committed in another state by a NH attorney.

4. A lawyer admitted to the Bar of another state is subject to New Hampshire rules if he or she is practicing in New Hampshire.

5. Choice of Law (contained in ABA and NH Rule 8.5).

   a. If conduct in connection with court proceeding, prevailing law will be of the jurisdiction in which the court sits.

   b. All other conduct governed by jurisdiction where the conduct occurred or the jurisdiction where the conduct has the predominant effect.

   c. A lawyer will not be subject to sanctions if he or she reasonably believes the conduct to be permissible in the jurisdiction where the predominant effect will occur.

C. Grounds for Disciplinary Action - ABA and NH Rule 8.4

1. Violation of or attempting to violate the rules of conduct or knowingly assisting or inducing another to do so. ABA and NH Rule 8.4(a).

2. Commit a crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness. ABA and NH Rule 8.4(b).

3. Conduct involving fraud, dishonesty, deceit or misrepresentation. ABA and NH Rule 8.4(c).

4. State or imply ability to improperly influence a government agency or official. ABA and NH Rule 8.4(d).

5. State or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law. ABA and NH Rule 8.4(e).

6. Knowingly assist a judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. ABA and NH Rule 8.4(l).

7. Respondeat superior liability is present under ABA and NH Rules 5.1, 5.2 or 5.3. The New Hampshire version emphasizes that these responsibilities are non-delegable and are shared by all managers.

8. Failure to comply with ABA and NH Rule 8.1 regarding false statements of material fact during the Bar admission, reinstatement or disciplinary process.

D. Scope of Possible Sanctions

1. ABA Rules specifically avoid commenting on what sanction should be levied for any specific violation. The scope of the ABA rules suggests such sanctions should depend on the facts and circumstances of the violation.

2. Sanctions vary depending on the state but may include the following:

   a. Disbarment;

   b. Suspension;

   c. Interim suspension by district court pending final outcome;

   d. Reprimand by grievance committee or court—public or

private;

e. Restitution; or

f. Costs including attorney fees.

E. Exclusionary Rule

Some courts have implied that evidence obtained in a manner contrary to the applicable ethical standards can be excluded. See, e.g., State v. Gilliam, 748 So.2d 622 (La. Ct. App. 1999) (defendant's statement inadmissible due to violation of Rule of Professional Conduct); but see Keen v. State, 85 S.W.3d 405. (Tex. App.—Tyler 2002, pet. ref'd) (violation of Rules of Professional Conduct did not affect admissibility of evidence). Numerous federal courts have excluded evidence obtained through unethical means or accidental production. See, e.g., ABA Formal Opinion 11–460 "Duty where Lawyer Receives Copies of a Third Party's email Communications with Counsel" (August 2011).

F. Federal Courts

All federal courts have the power to admit and to sanction lawyers practicing in their courts. See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32 (1991); In re Sunshine Jr. Stores, Inc., 456 F.3d 1291 (11th Cir. 2006); In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175 (3d Cir. 2002); Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 86 F.3d 464 (5th Cir. 1996).

G. Bankruptcy Court

Ethical violations are relevant to fee determinations. In re Entm't, Inc., 225 B.R. 412 (Bankr. N.D. Ill. 1998); but see In re Devers, 12 B.R. 140 (D.C. 1981).

H. Basis For Civil Liability for An Ethical Violation

1. State law controls any question of civil liability.

2. Violations of the ABA Rules. A violation of the ABA Rules does not give rise to civil liability. The ABA Rules carry a disclaimer in its Preamble and Scope (¶ 20):

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

3. The New Hampshire Rules specifically state that the Rules "are not designed to be a basis for civil liability." New Hampshire RPC – Statement of Purpose. Violation of a Rule should not itself give rise to a cause of action against a lawyer

nor should it create any presumption in such a case that a legal duty has been breached. Id.

4. The Statement of Purpose, however, specifically suggests that a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

The Code may be admissible as evidence in a trial for negligence and/or professional misconduct and its effect on a jury is significant. Innes v. Howell Corp., 76 F.3d 702 (6th Cir. 1996); Gary A. Munneke and Anthony E. Davis, "The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?," 22 J. Legal Prof. 33 (1998); C. Wolfram, Modern Legal Ethics § 2.61 at 52 (1986); Wolfram, "The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation," 30 S.C.L. Rev. 281, 286-95 (1979); see also Dillard v. Broyles, 633 S.W.2d 636 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.), (holding that the admissibility of testimony regarding violations of the Texas' prior Canon of Ethics was discretionary).

It should be noted that the use of a New Hampshire or ABA Rule as evidence in a malpractice trial would be very effective. At least one court has held that evidence of a Disciplinary Rule violation creates a rebuttable presumption regarding whether an attorney breached the judiciary duty owed to a client. Avianca, Inc. v. Harrison, No. 94-7053, 1994 WL 605521, at *2 (D.C.C. Oct. 24, 1995). Similarly, an Illinois court has held that the attorney disciplinary rules "establish minimum standards of conduct" and may be quoted in jury instructions. Brannen v. Seifert, 1 N.E.3d 1096 (Ill. App. Ct. 2013).

5. Fee Forfeiture

It is a trend for any proven claim for a breach of fiduciary duty to result in a fee forfeiture. Arce v. Burrow, 997 S.W.2d 229 (Tex. 1999) (a breach of fiduciary duty can give rise to a fee forfeiture). A lawyer's conduct in federal court can give rise to the court penalizing a lawyer through fee forfeiture. Toon v. Wackenhut Corrections Corp., 250 F.3d 950 (5th Cir. 2001); see also Huber v. Taylor, II, 469 F.3d 67 (3d. Cir. 2006).

6. Permanent and Temporary Prohibition From Practicing in Federal Court

a. Federal courts can prohibit a lawyer from practicing in their courts. See, e.g., In re Burton, 442 B.R. 421 (Bankr. W.D.N.C. 2009) (indefinite period of suspension imposed for violation of disciplinary rules).

b. The court can also disqualify someone from participating in a certain type of case. Toon v. Wackenhut Corrections Corp., 250 F.3d 950 (5th Cir. 2001).

IV. THE ATTORNEY-CLIENT RELATIONSHIP

A. Establishment of Attorney-Client Relationship

1. Principal - Agency Relationship

The relationship of attorney and client is one of principal-agent. See, e.g., Wilkins v. Stephens, 560 F. App'x 299 (5th Cir. 2014); Cadet v. Fla. Dep't of Corr., 742 F.3d 473 (11th Cir. 2014); In re George, 28 S.W.3d 511 (Tex. 2000). It is governed by the general rules covering agency. Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, aff'd, 179 S.W.2d 946 (1944). It is created by consent and, with some major exceptions, before any duties arise from the relationship, the attorney and client must have

consented to the relationship.

2. Implied Relationship

The attorney-client relationship can be implied from the conduct of parties. A written contract and/or a payment of a retainer is not necessary. See, e.g., Rosenbaum v. White, 692 F.3d 593 (7th Cir. 2012); In re Adobe Energy Inc., 82 F. App'x 106 (5th Cir. 2003); Span Enter. v. Wood, 274 S.W.3d 854 (Tex. App.—Houston [1st Dist.] 2008, no pet.). For example:

a. Giving notice of appeal at conclusion of trial made counsel attorney of record for appeal.

b. Gratuitous services can establish an attorney-client relationship.

c. There is no implied attorney-client relationship for putative class members before a class is certified.

3. Fiduciary Duties

The fiduciary obligations and responsibilities an attorney has are predicated on the existence of the attorney-client relationship. Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201 (10th Cir. 2007); Meyer v. Cathey, 167 S.W.3d 327 (Tex. 2005). However, an attorney's obligations can extend to prospective clients. See, e.g., Barton v. U.S.D. for the Cent. Dist. Of Cal., 410 F.3d 1104 (9th Cir. 2005) (stating that a fiduciary relationship extended to a prospective client).

4. Other Relationships

The existence of other relationships does not alter the existence of or reduce an attorney's responsibilities. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978). But the fact that an attorney and "client" have had business dealings does not establish an attorney-client relationship. See, e.g., Stephenson v. LeBoeuf, 16 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (attorney's role as trustee for Deed of Trust did not create attorney-client relationship).

5. Question of Fact

The existence of an attorney-client relationship is a question of fact. Kiger v. Balestri, 376 S.W.3d 287 (Tex.App.—Dallas 2012, pet. denied).

B. Areas of Concern When Consulting a Potential Client

1. Consultation v. Attorney-Client Relationship

"Mere" consultation does not create an attorney-client relationship. Green v. State, 667 S.W.2d 528 (Tex. Crim. App. 1984); see also Fitzpatrick v. Harrison, 854 F. Supp. 2d 1334 (S.D. Ga. 2010) ("receiving advice cannot alone form the basis of an attorney-client relationship"). However, you must be careful to point out that you are not representing the prospective client. See, e.g., SMWNPF Holdings, Inc. v. Devore, 165 F.3d 360 (5th Cir. 1999); Moore v. Yarbrough, Jameson & Gray, 993 S.W.2d 760 (Tex. App.—Amarillo 1999, no pet.).

2. Consultation Duties

Nevertheless, some duties do attach during a consultation:

a. An attorney must still maintain the requirements of confidentiality. NH Rule 1.18. See, e.g., Barton v. U.S.D. for the Cent. Dist. of Cal., supra; Banner v. City of Flint, 99 F. App'x 29 (6th Cir. 2004); Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982).

b. An attorney must be wary to avoid current and future conflicts such as when two parties are

involved or when a corporation and one of its officers is involved. D. Perschbacher and R. Perschbacher, "Enter at Your Own Risk: The Initial Consultation and Conflicts of Interest," 3 Geo. J. Legal Ethics 689 (1990). One should also keep the question of possible issue conflicts in mind. Id.

c. A consultation and certainly an investigation may impose additional duties such as advising the "client" of limitations. See, e.g., Hodges v. Armada, 342 B.R. 616 (Bankr. E.D. Wash. 2006); Dixon Ticonderoga Co. v. O'Connor, 248 F.3d 151 (3d Cir. 2001).

d. At least one state has held lawyers liable for negligently investigating the claim. This was true even though the lawyer refused to take the case. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

e. Further confusion may result from a continuing or gratuitous relationship one may have with a client. Bresette v. Knapp, 159 A.2d 329 (Vt. 1960).

f. Be careful what you hear - you could be unwittingly conflicting yourself out of a matter. See, e.g., Zalewski v. Shelroc Homes, LLC, 856 F. Supp. 2d 426 (N.D.N.Y. 2012) (statements made regarding prospective attorney-client relationship sufficient to disqualify counsel from representing adverse party); but see Clark Capital Mgmt. Group, Inc. v. Annuity Investors Life Ins. Co., 149 F. Supp. 2d 193 (E.D. Pa. 2001) (telephone conversations regarding prospective attorney-client relationship did not disqualify counsel from representing adverse party); see also Garwin, "Beware of Beauty Contests," ABA Journal, p. 84 (January 1992), the cases cited therein, and ABA Formal Op. 358 (1990). At least one court has disqualified a law firm because of a conversation the attorney had recommending other counsel. Georgia Int. Brokerage v. Stroker, No. 1-92-CV-0175 JOF (N.D. Ga. 1993).

A lawyer shall not represent a client adverse to a prospective client in the same or substantially related matter if the lawyer received and reviewed prospectively harmful information. NH Rule 1.18.

g. A New Hampshire law firm can avoid disqualification if the prospective client agrees in writing or if the disqualified lawyer is screened and notice is promptly given.

C. Restrictions Upon Representation

1. By Settlement

a. Restrictions upon the right to practice are controlled by NH Rule 5.6.

b. A lawyer is prohibited from agreeing not to represent someone as part of another's settlement. NH Rule 5.6(b) Comment. See also ABA Formal

Opinion 95-394 (July 1995) (which applies to governmental entities); ABA Formal Opinion 93-371 (1993) (which applies to private parties).

2. By Partnership Agreement

a. NH Rule 5.6(a) prohibits a lawyer from offering or making an agreement which restricts the right of a lawyer to practice law after termination of a relationship, except as part of a retirement benefit agreement or as part of the sale of a law practice which is governed by NH Rule 1.17.

b. Financial disincentives such as non-competition clauses can be void and unenforceable restrictions upon the practice of law. Whiteside v. Griffis & Griffis, 902 S.W.2d 739 (Tex. App.—Austin 1995, no writ). See Jones and Fairman, "Cash or Clients: The Ethics of Financial Disincentives in Attorney Non-competition Agreement," Texas Bar Journal, p. 576 (June 1996).

V. APPLICABLE ETHICAL STANDARDS AND THE ESTABLISHMENT OF THE ATTORNEY-CLIENT RELATIONSHIP

A. Ethical Considerations and Legal Fees

1. Controlling Rules

ABA and NH Rule 1.5 requires fees to be reasonable. Further, both authorities prohibit an attorney from billing an unreasonable amount of expenses.

2. Factors To Be Considered

a. Time and labor required, the novelty and difficulty of task and skill requisite to perform it;

b. Likelihood, if apparent to the client, that it will preclude other employment by lawyer;

c. Similar fees in locality;

d. The amount involved and the results obtained;

e. Time limitations imposed by client;

f. Nature and length of professional relationship with client;

g. Experience and ability of lawyer; and

h. Whether fee is fixed or contingent. Other jurisdictions add "uncertainty of collection before legal services are rendered."

3. Division of Fees

a. ABA Rule 1.5(e) - A lawyer cannot divide a fee with another attorney (not a member or employee of his firm) unless: (1) the client consents; (2) the division is (a) made in proportion to services rendered, (b) made with a forwarding lawyer, or (c) made by written agreement with the client, with a lawyer who assumes joint responsibility for the representation; and (3) the total fee is not unconscionable. One cannot share a fee with a

non-attorney, see ABA Rule 5.4, but the non-attorney may be able to enforce the fee agreement even if it was unethical for the attorney to enter into it. Atkins v. Tinning, 865 S.W.2d 533 (Tex. App.—Corpus Christi 1993, writ denied).

b. New Hampshire rules regarding division of fees (or referral fees, as they are known in most jurisdictions) are not as restrictive as the ABA rules. Fees may be divided with a lawyer not in the same firm if the division is made: (1) in a reasonable proportion to the services performed or the risk taken; or (2) based upon an agreement with a referring lawyer. The client must agree in writing and the total must be reasonable and must not have been increased by virtue of the arrangement.

4. Contingent Fees

Contingent fees are permissible under both the ABA and NH Rules. Contingent fees are not to be used in criminal cases (ABA Rule 1.5(d)(2); NH Rule 1.5(e)) and are rarely justified in domestic relation cases. See ABA Rule 1.5(d)(1) for limitations; see, e.g., Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1995); but see Ballesteros v. Jones, 985 S.W.2d 485 (Tex. App.—San Antonio 1998, pet. denied) (contingent fee permissible in divorce action). NH Rule 1.5(d) prohibits a fee arrangement which is contingent on: (1) securing a divorce; (2) establishing or modifying child support or a property division; or (3) obtaining any non-financial relief. It does allow contingent fees for: (1) enforcing a property division or an accrued child support or alimony obligation; (2) enforcing any financial order; or (3) obtaining a division of hidden assets. The ABA has an Informal Opinion, No. 86 - 1521, wherein it states that it is unethical for a lawyer not to offer a prospective client different fee arrangements before accepting a case on a contingent fee basis. Austern, "Ethics," Trial, p. 17 (Oct. 1987); Reich, "The Right Choice," ABA Journal p. 109 (Dec. 1988); see also Grimes, "The Contingent Fee Contract," The Houston Lawyer, vol. 28, p. 41 (July-August 1990). Under both the ABA and NH rules, contingent fees must:

a. Be in writing;

b. State how the fee is to be determined;

c. If different percentages exist at different stages, each must be explained;

d. Specifically address what expenses are to be deducted and whether they are to be deducted before or after the fee is calculated; and

e. Upon conclusion a written statement must be provided and if there is a recovery show the remittance to client and how it is calculated.

No contingent fees to witnesses. ABA Rule 3.4 Commentary 3.

5. Third Party Payment of Fees

Under some circumstances someone else may pay a client's legal fees as long as the client consents, it does not interfere with the lawyer's independent judgment and Rule 1.6 concerning confidentiality is observed. ABA Rule 1.8(f); ABA and NH Rule 1.7 Commentary (13); Reich, "Ethics," ABA Journal p. 112 (Nov. 1988). While one certainly owes a duty to the client, in certain jurisdictions you may have to consider the one who pays for future conflict purposes. Kennedy v. Miller, No. 87 2568 (D.D.C. 1990).

6. Bankruptcy

A bankruptcy court has the power to insure attorneys' fees are reasonable. See In re Windman, 442 F. App'x 359 (9th Cir. 2001). This is based upon the Bankruptcy Code and not state law. See 11 U.S.C. § 329 (2014). Keep in mind a debtor's legal malpractice claim is one belonging to the bankruptcy estate. Douglas v. Delp, 987 S.W.2d 879 (Tex. 1999). Further, the statute of limitations is tolled as long as the attorney represents the client in the bankruptcy. Eiland v. Turpin, Smith, Dyer, Saxe & McDonald, 64 S.W.3d 155 (Tex. App.—El Paso 2001, no pet.).

B. Make the Fee Agreement Crystal Clear

Eighteen (18) to twenty-five (25) percent of all grievances involve fee disputes. There are at least fifteen different fee agreements. Comm. On Lawyer Bus. Ethics, "Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements," Business Lawyer, Nov. 1998. Regardless of structure, the agreement must comply with ethical guidelines.

1. Written Fee Agreements

Put your fee agreements in writing as early as possible. ABA and NH Rule 1.5(b). Rule 1.5(b) requires the basis or rate of fee to be communicated to a client not regularly represented before or within a reasonable time after commencing the representation—preferably in writing. All uncertainties should be addressed. Always bill periodically, even if you are working against a retainer. ABA Rules require that the writing contain specific information as to how the fee is to be determined and also require that any changes in rate or basis be communicated in writing. ABA and NH Rules also require a written statement at the conclusion of a contingent fee matter. ABA and NH Rule 1.5(c).

2. Conditioning Your Performance

Condition your initial work on the payment of a fee. Under the rules of several jurisdictions, you cannot withhold services for non-payment of fees although you could withdraw. ABA Rule 1.5 Comment 5 states that a lawyer should not enter into an agreement whereby he will provide services up to a certain amount when it is foreseeable that more extensive services may be required. NH Rule 1.16(b)(5) provides that a lawyer may withdraw if the client fails to fulfill an obligation to the attorney, including an obligation to pay the lawyer's fee as agreed and a reasonable warning has been given that the lawyer will withdraw unless the obligation is fulfilled. Once agreed to, a lawyer cannot abuse a fee agreement. Make it clear how far the extent of your services will go, i.e., will you handle an appeal. R. Rotunda and J. Dzienkowski, "Legal Ethics: A Lawyer's Deskbook on Professional Responsibility," R. 1.5 (2013–2014 ed.).

In some jurisdictions, a fee agreement changed during the course of representation is presumed to be fraudulent with the burden of proof of its fairness placed upon the attorney. Jampole v. Matthews, No. 01-96-00028-CV, 1997 WL 414637 (Tex. App.—Houston [1st Dist.] July 24, 1997, no pet.). Should a fee dispute arise, be sure and document the resolution if an agreement is reached. Garwin, "Paper Trails - Tracking Fee Matters In Writing May Minimize Disputes With Clients," ABA Journal, p. 92 (Jan. 1996). Silence by a client in response to a settlement overture by his own counsel may not indicate agreement. In re Haar, 667 A.2d 1350 (D.C. Ct. App. 1995).

3. Disclaimers

A sentence in the fee agreement disclaiming all warranties, representations and guarantees might be appropriate, but remember one cannot have a client agree in advance to a limit on the lawyer's liability for malpractice. ABA and NH Rule 1.8(h). You can limit the scope of your representation. ABA Rule 1.2(c); NH Rule 1.2

(and sample form); see also Comment, "Expansion of Implied Warranty Coverage Under the DTPA: Service Contracts," 17 Tex. Tech L. Rev. 917 (1986). But beware, such a disclaimer may be void in some jurisdictions. See, e.g., In re Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009) (attorney's attempted representation limitation in bankruptcy case held invalid).

4. Advance Consent

There is some dispute as to how far a fee agreement may bind a client to future events. A general prospective release of malpractice liability is clearly unethical. ABA Rule 1.8 Comment 14 suggests that one can prospectively limit malpractice if the client is represented independently in making the agreement. No controlling authority is available for most of the following ideas, but some items that have been considered are:

a. Advance Consent to Simultaneous Adverse Representation on Other Matters. *See* Commentary ¶¶ 22 and 2 to ABA Rule 1.7.

See ABA Formal Opinion No. 93-372 (April 16, 1993); *Restatement of Law Governing Lawyers* - Tentative Draft No. 4 §202 Comment d; Note, "Prospective Waiver of the Right to Disqualify Counsel for Conflict of Interest," 79 Mich. L. Rev. 1074 (1981).

b. Binding Arbitration

May be enforceable if complies with law and client has independent counsel. ABA Rule 1.8 Comment 14; Cal. Formal Opinion 1989-116. Arbitration agreements may only be applicable to limited issues (i.e., not to statutory claims or those not covered by the contract). Coffman v. Provost Umphrey Law Firm, 161 F. Supp. 2d 720 (E.D. Tex. 2001), aff'd w/o opinion, 2002 WL 433003 (5th Cir. 2002). Remember one-sided arbitration agreements may be unconscionable.

c. Shifting of Sanctions

Probably not enforceable.

d. Indemnification Against Third Party Claims

May be enforceable if client has independent counsel; but what client would agree to it?

e. Prospective Waiver of Conflicts

Conflict waiver may be given in advance if it meets certain requirements. ABA Formal Opinion No. 93-372. A court may still order disqualification. Coaker v. Geon Co., 890 F. Supp. 693, 695 (N.D. Ohio 1995).

5. Non-Refundable Retainers

Are currently under attack in many states. McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., No. 07-CV-0314-CVE-PJC, 2008 WL 199895 (N.D. Okla. 2008) ("many jurisdictions have found that . . . non-refundable retainers are unenforceable"); Kershner v. State Bar of Texas, 879 S.W.2d 343 (Tex. App.—Houston [1st Dist.] 1994, no writ); but see Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-93-4; Texas State Bar Committee Opinion 431 (November 1986); see also In re Dixon, 143 B.R. 671 (Bankr. N.D. Tex. 1992) (refusing to uphold such a retainer paid pre-

petition).

C. Take Only Those Cases On Which You Can And Will Work

1. Disciplinary Complaints

Twenty-five (25) to thirty (30) percent of all disciplinary complaints involve neglect or inadequate representation. Neglect violates ABA Rule 1.1 and NH Rule 1.01. See also ABA and NH Rules 1.3, 1.4, 1.16 and 3.2. In an older study, the ABA estimates that on a national scale 15% of all disbarments and 15% of all suspensions were for neglect. ABA Journal, October 1, 1986, p. 65. Most of these problems seem to result from a situation where the lawyer takes on a case or a client he would rather not have. J. Chanen, "Just Say No to Problem Clients," ABA Journal, April 1996; R. O'Malley, "Client Screening," Lawyers Liability Review, March 1990.

a. Turn the Bad or Unwanted Case Down. A lawyer is not ethically required to represent all of those that seek his advice.

i) A lawyer cannot help prosecute a frivolous claim or one made for the purpose of harassment or embarrassment. ABA Rule 3.1; Texas Rule 3.01; Fed. R. Civ. P. 11; Bankruptcy Rule 9011.

ii) A lawyer cannot knowingly advance an unwarranted claim or defense. ABA and NH Rule 3.1; Fed. R. Civ. P. 11; Bankruptcy Rule 9011.

iii) Various laws now allow for costs to be assessed against the lawyer for filing frivolous lawsuits. See, e.g., 28 U.S.C § 1927; Fed. R. Civ. P. 11; Bankruptcy Rule 9011; see., e.g., In re Bagdade, 334 F.3d 568 (7th Cir. 2003) (costs assessed against attorney for prosecuting frivolous appeal).

b. Turn Down the Unwanted Client.

i) The client who cannot be satisfied.

ii) The client who does not understand the system.

iii) The client in a hurry.

iv) The client seeking reinforcement.

v) Client whose attitude is too positive.

vi) The strapped client.

vii) Client with a matter outside your expertise.

viii) Client with too large or too small a matter.

2. How To Turn A Case Down

a. Make it apparent that you are turning down the case.

b. Return all documents and have the potential client sign a receipt for same. ABA Rules require only that records of client property be maintained for five years. ABA Rule 1.15(a). NH

Rule 1.15(b) requires attorneys to keep "all funds and other property of the client" for six years. Keep a copy of the file to protect yourself. Tuite, "Cleaning House," ABA Journal, p. 98 (May 1991).

c. Offer someone else's name for a second opinion.

d. Be aware of any applicable notice provision or statute of limitation. In Villarreal v. Cooper, a lawyer who held a client's case for fifteen months was held subject to a malpractice action despite the fact that he returned the file and the client hired another attorney some 77 days before the statute ran. 673 S.W.2d 631 (Tex. App.—San Antonio 1984, no writ).

e. An attorney may be liable if he negligently fails to inform a person that he is not undertaking representation. See, e.g., Hinojosa v. Ashcraft Law Firm, No. 11-03-00145-CV, 2004 WL 1960217 (Tex. App.—Eastland Sept. 2, 2004, pet. denied); Collin Cnty. v. Johnson, No. 05-99-00034-CV, 1999 WL 994039 (Tex. App.—Dallas Nov. 3, 1999, no pet.).

D. Accepting the Case

1. Keep the client informed

ABA and NH Rules, like virtually all jurisdictions, require an attorney to keep the client reasonably informed. See, e.g., U.S. v. Oriakhi, 394 F. App'x 976 (4th Cir. 2010); Eureste v. Comm'n for Lawyer Discipline, 76 S.W. 3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

a. Provide the client with copies of all pertinent pleadings and documents.

b. Explain to him the time requirements, especially if the work involves a potential lawsuit.

c. Make it clear what you are representing the client for and what you are not doing. See Comments to ABA Rule 1.2.

d. NH Rules 1.2(c) and (f) provide specific instructions concerning limited representation. Rule 1.2(g) actually provides a form for this in a litigation context, but use it for all situations involving limited representation.

e. By accepting representation a lawyer impliedly warrants in most jurisdictions that:

(1) He possesses the requisite skill, learning and ability;

(2) He will exert his best judgment;

(3) He will exercise reasonable and ordinary care; and

(4) He will conduct the proceeding to the conclusion.

2. Great Expectations

a. Do not make any warranties, guarantees or representations

about the outcome or your ability. (These are not necessarily prohibited by ethical standards but are suggested as a safe means to practice).

b. Advertising - Advertising is controlled by ABA and NH Rules 7.1, 7.2 and 7.3. A total review of that subject is beyond the scope of this article. Suffice it to say that any advertisement must be done with an idea of how it would look as Exhibit 1 in a fraud or consumer protection lawsuit. Beck, "Advertising - Its Effect on Your Malpractice Exposure," 18 Forum 268 (1983). Further advertising that crosses state lines or is on the internet may expose one to some unexpected liability.

c. Be Wary of Claims of Expertise

(1) ABA and NH Rule 7.4 forbids claims of expertise unless one is a patent lawyer, an admiralty lawyer or is board certified by an organization accredited by the ABA.

(2) Someone who holds oneself out to be an expert can be held to a higher standard of care. See, e.g., Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000) (attorneys held to standard of tax specialists); Rhodes v. Batilla, 848 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (attorney held to standard of "tax expert"); Restatement (Second) of Torts, § 299A (1965).

(3) Arguably, one practicing in an area requiring special expertise can be held to the standard of expert and/or is required to refer such case to an expert. In re Yetman, 552 A.2d 121 (N.J. 1989); Russo v. Griffin, 510 A.2d 436 (Vt. 1986); Horne v. Peckham, 158 Cal. Rptr. 714 (Cal. Ct. App. 1979); Comment, "Specialization: The Resulting Standard of Care and Duty to Consult," 30 Baylor L. Rev. 729 (1978).

3. Insurance Disclosure

a. NH Rule 1.19 requires an attorney to inform the client at the time of engagement or at any time subsequent if the lawyer does not maintain professional liability insurance with limits of at least $100,000/$300,000.

b. This notice must be in writing and must be signed by the client and kept for at least five years after the termination of the agreement.

c. A form of such notice has been provided in the Rules.

E. Ethical Obligations When Accepting the Case

1. All Conflicts and Other Material Facts Must be Disclosed

a. ABA and NH Rules 1.7 and 1.8 require an attorney to disclose all possible conflicts prior to accepting employment and those that arise during the course of employment. While both the ABA and NH Rules permit, under certain circumstances, a lawyer to undertake representation in concurrent conflict situations, New Hampshire Comment to Rule 1.7 makes it clear that extreme caution must be used.

The American Bar Association has in the past stressed the connection between malpractice claims and conflicts of interest:

> Malpractice today arises out of situations where the error can be subtle, and no more apparent in retrospect than when the advice was given. Increasingly, lawyers are being sued almost as insurers of the financial success of their clients' business transactions, where the client--who has taken some business risk and lost--can demonstrate that the loss could have been avoided if the lawyer had provided different advice.
>
> A key component of those claims is an allegation that the lawyer had a conflict of interest that impaired his or her ability to render objective advice. If proved, that allegation at once supplies the trier of fact with an explanation and motive for the lawyer's failure to give legal advice that would have avoided the client's problem. It also satisfies the breach of duty element of the malpractice claim. The client's business loss then becomes the lawyer's responsibility.
>
> All too often, practitioners unwittingly invite these claims by failing to recognize the rules governing conflicts of interest. If not detected early and resolved properly, conflicts of interest can create liability where otherwise none would lie. Schneider, "An Invitation to Malpractice: Ignoring Conflict of Interest Rules Open Pandora's Box," 78 ABA Journal 104 (November 1992).

In fact, the single largest malpractice verdict ($120 million) stems from a jury finding that a lawyer had a conflict. Adco Oil Co. v. Rovell, No. 03-C-341, 2003 WL 21148445 (N.D. Ill. May 19, 2003).

b. This disclosure requirement includes all personal conflicts, conflicts with current clients and any conflict with a past client.

ABA and NH Rule 1.7 Comments (10–12). ABA and NH Rule 1.9 specifically concerns former clients.

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

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

i. Whose interests are materially adverse to that person; and

ii. About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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

i. Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

ii. Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The main battleground seems to be over what constitutes "substantially related." In most jurisdictions, this concept is defined by case law. See ABA Rule 1.9 Comment 3.

Disqualification applies to all partners and associates if one of them is barred.

See ABA and NH Rules 1.8(K) and 1.10; see also Kline, "Motions to Disqualify Based Upon Conflicts of Interest—Identifying the Rules of the Game," 25 St. Mary's L.J. 739 (1994).

c. Issue Conflicts - No definitive cases but the following are good rules to follow:

(1) A firm may not take opposite positions at the same time before the same court;

(2) If at different times and in front of different tribunals a firm may take contrary positions if it does not materially and adversely affect a client; and

(3) In most situations written consent from both clients would cure the problem. See ABA Formal Opinion 93-977; Pitulla, "Positional Conflicts: When Can A Lawyer Argue Both Sided of an Issue," 79 ABA Journal (February 1993).

(4) Some of the states have issued their own ethical opinions on issue conflicts. Vol. III, No. 1, ALAS Loss Prevention Journal 5 (1992). See, e.g., Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 87-15 (7/27/87); State Bar of California, Standing Comm. on Professional Responsibility and Conduct. Formal Op. 1989-108 (undated), 5 Law. Man. Prof. Conduct 424 (1990); State Bar of Michigan Comm. on Professional and Judicial Ethics, Op. CI-1194 (4/6/88); Association of the Bar of the City of New York, Comm. on Professional and Judicial Ethics, Formal Op. 1990-4 (5/22/90), 6 Law. Man. Prof. Conduct 225 (1990); Philadelphia Bar Association, Professional Guidance Comm. Op. 89-27 (1990); 6 Law. Man. Prof. Conduct 117 (1990); Advisory Opinion Comm. of the State Bar of New Mexico, Op. 1990-3 (5/23/90).

See Fed. Defenders Of San Diego v. U.S. Sentencing Comm'n, 680 F. Supp. 26 (D.D.C. 1988); Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987); Avacus Partners, L.P. v. Brian, Civ. A. No. 11001, 1990 WL 27538 (Del. Ch. March 9, 1990), rev'd sub nom In re Appeal of Infotechnology, Inc.; 582 A.2d 215 (Del. 1990); Dzienkowski, "Positional Conflicts of Interest," 71 Tex. L. Rev. 457 (1993); Model Rule 1.7

Comment 9; Texas Rule 1.06 and the comments thereto; *Restatement of the Law Governing Lawyers*, Tentative Draft #4, § 209, Comment f; Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Ruling of Professional Conduct*, § 1.7: 104-106 (2d ed. 1990, 1991 Supp.).

2. Attorney/Personnel Conflict

a. Attorney Mobility Creates An Entire New Source Of Conflict Problems – Two Texas cases exemplify two different versions of the same problem.

i. Joint Defense Agreement - National Medical v. Godbey is perhaps the seminal case in Texas. 924 S.W.2d 123 (Tex. 1996). The Court held that two irrebuttable presumptions applied to a firm which laterally hired an attorney who held confidences of a client which the firm was suing. It held that: 1) it was presumed that the attorney had access to the former client's confidences; and 2) that knowledge was imputed to the attorneys in his new firm. This case should be reviewed in detail due to the complicated fact situation created by a joint defense agreement. For further information on that aspect, see Sheehy and Sherwood, "The Joint Defense Privilege and Its Ethical Implications," Defense Counsel Journal, p. 366 (July 1999) and Higgason, "The Attorney-Client Privilege; Joint Defense and Common Interest Cases," The Houston Lawyer, p. 20 (July/August 1996). See also ABA Formal Opinion 95-395 (July 1995); State Bar Committee Opinion 527 (April 1999).

ii. Hiring a New Lawyer – Henderson v. Floyd provides the typical situation. 891 S.W.2d 252 (Tex. 1995). The court held that the trial court had abused its discretion for failing to disqualify law firm "B" who had hired a lawyer from law firm "A." B's client had a case against a client of law firm A. B had the lawyer avoid all contact with the case and had attempted to shield him from any contact with the case regardless of source. The Court utilized the Texas version of Rule 1.9(a) to disqualify B because the associate had, in fact, worked on the file while working for A. See also Pitulla, "Clearing Up

Before Moving On," ABA Journal, p. 91 (April 1996); Bresnahan, "Breaking Up is Hard to Do," ABA Journal, p. 94 (Nov. 1995).

b. Affiliated Law Firms - probably bound by the same rules. ABA Formal Opinion 94-388 (December 5, 1994); but see In re Am. Home Products, Inc., 985 S.W.2d 68 (Tex. 1998).

c. Contract Lawyers - are ethical, but are bound by the same rules. NH Ethics Opinion 2011–2015. See also Hill, "When Outsiders Fill In," Lawyers Professional Liability Review (ABA 1999).

d. Screening Procedures. "Chinese Walls" have not been recognized by all jurisdictions. See ABA Rule 1.12(c); Reich, "The Right Choice," ABA Journal, July, 1988 p. 98. See also Bateman, "Return to the Ethics Rules as a Standard for Attorney Disqualification by the Use of Chinese Walls," 33 Duq. L. Rev. 249 (1995).

Many courts have decided a number of cases involving situations in which a lawyer or support staff change firms and create possible conflicts and/or are engaged by new clients which create new problems. Many jurisdictions that do not permit "Chinese Walls" for lawyers do for support staff. The result of these cases lead to the following conclusions or guidelines:

(1) If a non-lawyer employee works on a matter and then is hired by the law firm on the other side of this matter, it is presumed that the person possesses confidences and secrets gained from the first employer. In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819 (Tex. 2010); In re Mitcham, 133 S.W.3d 274 (Tex. 2004).

(2) If a secretary or paralegal changes employers and creates a conflict by going from one side of a matter to another, the law firm hiring that person is not automatically disqualified if the law firm establishes it has screened the employee from the matter in question.

(3) Disqualification will be mandatory if: 1) the information has been actually disclosed; 2) screening would be ineffectual; or 3) no screening was put in effect. The label or title of non-attorney personnel does not control the test. In re Am. Home Products, 985 S.W.2d 68 (Tex. 1998).

(4) The test for disqualification is not actual disclosure, but the threat of disclosure. In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819 (Tex. 2010), quoting Grant v. Thirteenth Ct. App., 888 S.W.2d 466 (Tex. 1994).

(5) The non-lawyer employee should:

(a) Be cautioned that he should not work on any matter involving a former employee.

(b) The employer should also take affirmative steps to insure that the employee is surrounded by a Chinese wall.

(c) Failure to take immediate steps will result in disqualification. See In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819 (Tex. 2010) (plaintiff's attorney disqualified after not taking reasonable steps to shield legal assistant from case).

e. Choice of Law Important – It is ironic that the same fact situation may mandate disqualification in one state, but not in another. See, e.g., Dworkin v. Gen. Motors Corp., 906 F. Supp. 273 (E.D. Pa. 1995) (attorney disqualified only if evidence showed client's interests were compromised); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995) (attorney presumptively disqualified, no required showing of actual injury to clients); see also "Ethics Switching Sides: New Jersey Law Does Not Permit Screening For Private Practitioners," IADC News, p. 9 (May 1997).

f. Subsequent Lawyers May Not Be Allowed Access to Disqualified Lawyer's File – a successor to a disqualified lawyer is not allowed to use a disqualified attorney's work product unless he can rebut the presumption that the work product contains confidential information. In re George, 28 S.W.3d 511 (Tex. 2000).

g. Firm Mergers – The current range of mega-firm mergers does not relieve all of the lawyers in the two firms from resolving all conflicts with all clients.

3. Suing a Former Client

Not necessarily prohibited, but NH Rule 1.9 is primarily for the protection of clients. In these cases, the courts held a former client can only disqualify an attorney if the matter involved in the instant case is substantially related to the matters in the former representation or if the former client's confidential information is implicated.

Prior to the adoption of the current version of Rule 1.9, the Supreme Court of New Hampshire decided Sullivan County Regional Refuse Disposal District v. Town of Acworth. 686 A.2d

755 (N.H. 1996). In that case, the Court reviewed the then applicable Rule 1.9 (which was based upon the 1983 ABA Model Rule). It reversed the trial court's decision that in essence held that the former client could only prove prejudice by showing that Gardner possessed specific confidential information that would adversely affect the fairness of the proceeding. The New Hampshire Supreme Court rejected this approach and wrote it would enforce the Rules of Professional Conduct even when a violation did not result in prejudice. It has held that a former client need never prove that its former attorney actually misused confidences. A court must irrebuttably presume that the attorney acquired the information through his prior representation. See also Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008) (reiterating that an attorney is presumed to have acquired confidential information in prior representation).

4. Federal Approach to Suing One's Current or Former Client

Perhaps the biggest hotbed in the last thirty (30) years of ethical activity in the federal courts concerns the ability of a law firm to sue a current or former client. See, e.g., Milbank, Tweed, Hadley & McCloy v. Chan, 13 F.3d 537 (2d Cir. 1994) (upholding two million dollar verdict). In two of the most publicized cases, the Fifth Circuit has twice granted writs of mandamus against two different Houston law firms to keep them from representing clients adverse to a current and a former client respectively. In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992); In re Am. Airlines, Inc., 972 F.2d 605 (5th Cir. 1992). In the former case, the Fifth Circuit held that not only did Texas ethical rules apply to a lawyer practicing in federal court but that "the ethical rules announced by the national profession in the light of the public interest and the litigant's rights" also applied. The Court concluded that filing suit against a current client (even if on a matter totally unrelated to the present representation) violated the ABA Model Rules, the old Texas Code of Professional Responsibility and the ALI's Restatement of the Law Governing Lawyers, and absent exceptional circumstances was prohibited conduct.

In the latter case not only did the court focus on the concept of national ethical standards, but also based its decision upon the duty of loyalty which a client expects from a lawyer. The court, in a lengthy analysis of the "substantial relationship" test, rejected the argument that a party seeking to disqualify counsel had to prove that the past and present matters had to be so closely related as to "taint" the trial. It refused to reduce the concerns [underlying the rule] solely to the argument that a client's confidences might be disclosed and instead rested much of its decision to disqualify the law firm on "the client's interest in the loyalty of his attorney."

Neither the Dresser nor the American Airlines decisions probably apply to a lawyer who did not work on the matter in question, had no knowledge or it and subsequently left to join another firm. Am. Sterilizer Co. v. Surgikos, Inc., No. 4-89-238K, 1990 WL 276223 (N.D. Tex. 1990). One cannot avoid the conflict by dropping the client who refuses to consent to the otherwise conflicting representation. See, e.g., Santacroce v. Neff, 134 F. Supp. 2d 366 (D.N.J. 2001); Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n, 909 F. Supp. 287 (E.D. Pa. 1995); In re Sandahl, 980 F.2d 1118 (7th Cir. 1992); SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992); see also Gallagher and Hanen, "Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation," 24 Tex. Tech L. Rev. 1039 (1993).

5. Suing or Defending A Former Partner or Associate

Some states forbid a lawyer from suing or defending a former partner or associate on behalf of a client (under some circumstances) because of the likelihood of a conflict and the possible erosion of public confidence. See, e.g., Texas

State Bar Committee Opinion 447 (January 1988) (concerning a case where a law firm wanted to defend multiple defendants of whom one was a current partner). For a discussion of a dispute between partners and of the duties owed by a law firm to one of its partners, see Bohatch v. Butler & Binion, L.L.P., 905 S.W.2d 597 (Tex. 1998); Dawson v. White & Case, 672 N.E.2d 589 (N.Y. 1996); Reuben, "Suing The Firm," ABA Journal p. 68 (December 1995).

6. Rules Protect Clients

The Rules are for the protection of the clients. Consequently, the direction offered by the old rules to the effect that a lawyer should resolve any doubt of a conflict against representation is still good advice. In most jurisdictions, more latitude is allowed in a non-litigation matters. See ABA Rule 1.7. Comments 26, 27 and 28.

7. Merger of Opposing Law Firms

Mergers require disclosure to the court as soon as discussions begin and, in all likelihood, withdrawal from representing either side. See In re E. Sugar Antitrust Litig., 697 F.2d 524 (3rd Cir. 1982) (partially ordering a return of court awarded attorney's fees); Penn Mut. Life Ins. Co. v. Cleveland Mall Assoc., 841 F. Supp. 815 (E.D. Tenn. 1993).

8. Advance Waiver of Adverse Representation

ABA Formal Opinion 93-372 states that an advance waiver is not inherently impermissible if:

a. The lawyer reasonably believes the existing attorney-client relationship will not be disrupted by the waiver or the future adverse representation;

b. The future representation must be such that the future conflict was reasonably contemplated and generally identifiable at the time of the waiver;

c. The waiver does not extend to adverse use of confidential material; and

d. The waiver is written.

9. Mediators

An attorney acting as a mediator (and thus having access to a person's confidential information) may face the same problems as if he represented that person. NH Rule 1.12; Reuben, "Model Ethics Rules Limit Mediation Role," ABA Journal, p. 25 (June 1996).

10. Frequent Situations In Which Attorneys Face Conflicts

a. Corporation and its officers - a firm can face disqualifications and possible sanctions for not disclosing possible conflicts between potential corporate interests and those of individual officers. ABA and NH Rule 1.13 specifically states that a lawyer employed or retained by an entity works for the entity. The lawyer must take remedial action whenever he learns or knows that:

(1) An officer or other person associated with the organization has committed or intends to commit an illegal act which might reasonably be imputed to the organization;

(2) The violation is likely to hurt the organization; and

(3) The violation is related to the lawyer's representation of the organization.

Furthermore, a lawyer must explain the identity of his client (the organization) whenever he meets with its employees, officers, directors or other constituents when it is apparent that its interest may be adverse. This, in effect, is a civil version of a "Miranda Warning". See also U.S. v. Ruehle, 583 F.3d 600 (9th Cir. 2009) (attorneys warned company employees that confidentiality privilege rested only with company); ABA Rule 1.7; ABA Journal, p. 116-18 (Dec. 1987). There may be a "joint-client" exception. See Meyerland Cmty. Improvement Ass'n v. Temple, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); but see Hoggard v. Snodgrass, 770 S.W.2d 577 (Tex. App.—Dallas 1989, no writ). At least one case has allowed a law firm to sue the general counsel on behalf of the very corporation that the general counsel had hired the law firm to represent. Ferranti Int. PLC. v. Clark, 767 F. Supp. 670 (E.D. Penn. 1991).

b. Insurance Company and its insured - an attorney must disclose the possible conflict to both. See M. Kincaid and Z. Wolfe, "Insurance Issues for Trial Lawyers," The Advocate (Texas) (Winter 2006); Silver and Syverud, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995), also published in brief in Defense Counsel Journal, Vol. 62 pp. 503-508 (Oct. 1995); Wunnicke, "The Eternal Triangle Revisited: The Insurance Defense Lawyer and Conflicts of Interest," For the Defense, p. 20 (Nov. 1993); O'Malley, "Ethics Principles for the Insurer, Insured and Defense Counsel: The Eternal Triangle Reformed," 66 Tulane L. Rev. 509 (1991); Wunnicke, "The Eternal Triangle: Standards of Ethical Representation by the Insurance Defense Lawyer," For The Defense, p. 7 (Feb. 1989); see also "Malpractice Claims by Primary and Excess Insurers: Is the Honeymoon Over?" Defense Counsel Journal, Vol. 62, pp. 18-26 (January 1995). Providing detailed billing statements to third party auditors hired by the insurer is rarely allowable. NH Ethics Opinion 2001–01/05.

c. Attorneys are often asked to represent both sides of a divorce or a sale of residential real estate. Rule 1.7 prohibits this in a divorce situation. At least one state has held that a lawyer may not represent both sides of a real

estate transaction even with consent. Baldasarre v. Butler, 604 A.2d 112 (N.J. 1992). The portion of the case involving the lawyer was settled on appeal, but the Supreme Court of New Jersey in dicta wrote: "[W]e hold that an attorney may not represent the buyer and the seller in a complex commercial real estate transaction even if both give their informed consent." 625 A.2d 458, 467 (N.J. 1993) (emphasis added); see ABA Rule 1.7 Comments 26, 27 and 28.

d. Partners in Business Deal - does one represent one partner, all partners or the partnership and none of the partners? Generally, an attorney's representation of a partnership does not necessarily include partners. See Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994). Remember Rule 1.13 applies to organizations, not just corporations. There is a split of authority over the question of whether a lawyer who represents a general partner and does the legal work for a limited partnership also represents the limited partners. See Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994); Roberts v. Heim, 123 F.R.D. 614 (N.D. Cal. 1988); Quintel v. Citibank, 589 F. Supp. 1235 (S.D.N.Y. 1984). But see paragraph "j" below.

e. Representing Various Members of Same Family - See NH Ethics Opinion, April 2001. See also Lanier v. Sallas, 777 F.2d 321 (5th Cir. 1985); Brennan's Inc. v. Brennan's Restaurants, 590 F.2d 168 (5th Cir. 1979).

f. Multiple Victims in Same Accident - Many times multiple family members are injured in the same accident—sometimes one member even causes the accident. Aggregate Settlements are discussed in Rule 1.8(g) and in Comment 13 to Rule 1.8.

g. Abstinence Safest Policy - An ABA Journal article describes the best solution to multiple representation problems as consisting of: "abstinence."

"The common practice of attorneys representing both sides in a real estate transaction, even with an iron-clad waiver of conflicts, frequently leads to malpractice claims, especially when one of the parties comes to regard the completed transaction as unsatisfactory.

The best defensive lawyer strategy in this situation is simply not to get into it. If you do decide to represent both parties, you must make extensive disclosure and repeat it at the time of closing. The documentation in your file must be sufficient to stop the malpractice claim before you find yourself needing to answer a complaint. Once an attorney-defendant becomes an issue in a two representation case, the likelihood is either a verdict against the lawyer or settlement."

Grasso, "Defensive Lawyering - How to Keep Your Clients From Suing You," ABA Journal, p. 98, 102 (October 1989).

h. Corporate Family - Representing corporation while being adverse to an affiliated company (i.e., parent, subsidiary or sister company). Some courts have found a conflict exists. See Gen-Cor, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049 (S.D. Ind. 2000); Gould Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1991); Teradyne Inc. v. Hewlett-Packard Co., No. C-91-0344, 1991 WL 239940 (N.D. Cal. June 6, 1991). Other courts have decided that a conflict does not exist. Pennwalt v. Plough, 85 F.R.D. 264 (D. Del. 1980); Hartford Accident & Indemnity Co. v. RJR Nabisco, 721 F. Supp. 534 (S.D.N.Y. 1989). This is especially true if the law firm had the conflict "thrust" upon it. AmSouth Bank v. Drummond, 589 S.2d 715 (Ala. 1991).

In-house lawyers are similarly bound by the Rules and must obtain consent from the participants in certain joint venture situations. State Bar Committee Opinion 512 (December 1995).

i. Husband v. Wife - Despite the days of Spencer Tracy vs. Katherine Hepburn, most authorities find a conflict when spouses are on opposite sides of a case. Comment 11 to ABA Model Rule 1.7 states:

"Thus, a lawyer related to another lawyer, e.g. as parent, child, sibling or spouse ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent."

The comments make it clear that this bar is not imputed to other members of the firm.

j. Unincorporated Associations –

The sole NH Comment to Rule 1.13 points out that a lawyer who represents an unincorporated entity also represents each individual of that entity as to matters of association business. Franklin v. Collum, 804 A.2d 444 (N.H. 2002).

11. Factual Disclosures

One must disclose all material facts, such as possible liability in bringing a lawsuit. Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175 (1st Cir. 1997); see, e.g., In re Seare, 493 B.R. 158 (Bankr. D. Nev. 2013) (attorney should advise client of risks of proceeding pro se). This would conceivably apply to counterclaims under the applicable common law or statutes and for sanctions under various federal and state procedural provisions. NH Rules 1.4 and 2.01.

12. Lawyer As A Witness

ABA and NH Rule 3.7 prevents a lawyer from representing a client in a case where he knows or believes that he might be a witness, unless one of the following exceptions applies:

a. Uncontested matter. NH Rule 3.7(a)(1).

b. Testimony relates solely to the nature and value of legal services involved. NH Rule 3.7(a)(2).

Lankler Siffert & Wohl, LLP v. Rossi, 287 F. Supp. 2d 398 (S.D.N.Y. 2003); In re Sanders, 153 S.W.3d 54 (Tex. 2004).

c. A refusal to allow the representation would be a substantial hardship on a client. NH Rule 3.7(a)(3). See, e.g., Yanaki v. Daniel, No. 2:07-CV-648, 2009 WL 1325054 (D. Utah May 6, 2009).

d. Some states provide that a lawyer may testify if he is a party or is pro se. Ayers v. Canales, 790 S.W.2d 554 (Tex. 1990).

e. If one attorney is disqualified, the entire law firm is not disqualified unless precluded by Rule 1.7 or Rule 1.9 NH Rule 3.7(b). An exception to the entire firm being barred may exist if the client consents in writing in the manner set out in Rule 1.7.

f. The party attempting to disqualify an attorney on the grounds he is a potential witness must demonstrate actual harm to itself.

g. A lawyer who insists on representing a client when he or a member of his firm will testify takes a chance that he may cause his client to lose a substantial verdict. Koch Oil Co. v. Anderson Producing Inc., 883 S.W.2d 784, rev'd, 929 S.W.2d 416 (Tex. 1996); see also Schwartz v. Jefferson, 930 S.W.2d 957 (Tex. App.—Houston [14th Dist.] 1996, no writ).

h. The lawyer for a plaintiff may not provide the controverting affidavit to defeat a motion for summary judgment. Mendoza v. U.S., 481 F. Supp. 2d 650 (W.D. Tex. 2007).

i. A law firm's in-house expert is similarly disqualified from testifying.

F. Confidentiality

A lawyer shall not reveal the confidential information of a client or former client, except with the client's consent or those revelations which are implied by the task for which the lawyer was hired. ABA and NH Rule 1.6. Many states which use a dual approach to confidential information have a much more complicated analysis. In those states, one may make the following additions: (1) a lawyer shall not use confidential information to the disadvantage of a former client (unless the information has become generally known); and (2) a lawyer shall not use confidential information for his own advantage or that of a third person without the client's consent.

1. Under Rule 1.6, a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to:

   a. Prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

   b. Secure legal advice about the lawyer's compliance with these Rules;

   c. Establish a claim or defense on behalf of the lawyer in

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

d. Comply with other law or a court order.

2. This rule of confidentiality is much broader than the attorney-client privilege. This duty applies even when there is not yet an established attorney-client relationship, for instance, when a client comes in for an initial interview. Barton v. U.S. D. for the Cent. Dist. of Cal., 410 F.3d 104 (9th Cir. 2005); Kramer v. Am. Bank and Trust, 989 F. Supp. 2d 709 (N.D. Ill. 2013); Liu v. Real Estate Inv. Group, 771 F. Supp. 83 (S.D.N.Y. 1991); Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573 (Tex. App.—San Antonio 1998, pet. denied).

3. When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm the lawyer shall reveal it to the extent necessary. ABA Rule 1.6(b)(1).

4. New Hampshire rules are broader and include substantial injury to a financial interest or property of another. Comment to NH Rule 1.6.

5. The obligation of confidentiality extends after the termination of employment. ABA Rule 1.6 Comment 18.

6. Normally, there is no attorney-client privilege as to the identity of the client, conditions of employment or matters involving receipt of fees. See Chaundry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1995) (fees); In re Alexiou, 39 F.3d 973 (9th Cir. 1994) (identity); Stopka v. Am. Family Mut. Ins. Co., Inc., 816 F. Supp. 2d 516 (N.D. Ill. 2011) (conditions of employment).

7. A law firm can, under certain fact situations, have an attorney-client relationship with its own lawyers. United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996).

G. Interest in Litigation

One should not take an interest in the litigation other than a contingent fee or a lien to secure costs or expenses. ABA and NH Rule 1.8(i). Good faith and custom are not defenses if one is in violation of this rule. Texas State Bar Committee Opinion 449 (1988).

H. Financial Assistance to the Client

ABA and NH Rule 1.8(e) prohibit a lawyer from providing financial assistance to a client except for court costs and litigation expenses. But see Smith, "The New Code of Professional Responsibility for Lawyers," 34 Tex. Bar J. 749 (1971). However, NH Rule 1.8(e)(2) does state that a lawyer may provide court costs and expenses for an indigent client. One cannot accept as a fee literary or media rights prior to the conclusion of the representation. ABA and NH Rule 1.8.

I. Business Interests With Clients

One should not enter into a business transaction with a client unless after full disclosure and consent. ABA and NH Rule 1.8.

1. Do you want to owe the person on the other side of a business deal the burdens of a fiduciary relationship? Rule 1.8 states that the transaction and terms must

be fair and reasonable to the clients. Martin and Martin, "When Doing Deals Is Risky - Don't Get Involved In a Client's Business Unless You're Prepared to Cover Losses," ABA Journal, p. 80 (July 1996); ABA Rule 1.8(a).

2. A transaction in violation of this rule may be presumed to be fraudulent. Peters v. Thedford, 59 F.3d 1240 (5th Cir. 1995). It may be enough that the attorney got the better of the deal. King v. Fox, 418 F.3d 121 (2nd Cir. 2005) quoting Greene v. Greene, 436 N.E.2d 496 (Ct. App. N.Y. 1982). At least one court has gone further and stated it creates a rebuttable presumption of malpractice. Avianca v. Harrison, 70 F.3d 637 (D.C. Cir. 1995).

3. ABA and NH Rule 1.8 require that a client be given written advice and reasonable time to consult an independent lawyer and give his consent in writing. See Blumberg, "An Ounce of Prevention," California Lawyer, July 1985.

4. Malpractice Insurance - Probably does not apply to a business deal.

5. Excluded Activities Take Many Forms - Outside business problems that give rise to lawsuits appear in many forms. Some are truly malpractice actions; some involve ethical questions of conflict of interest and/or doing business with a client; and some are truly business-type lawsuits in which a lawyer is named solely because of his involvement with a particular business. The first two categories are more likely to be covered by malpractice insurance while the last is almost always excluded. For a laundry list of actual malpractice allegations, see Day v. Rosenthal, 217 Cal. Rptr. 89, (Cal. Ct. App. 1985).

6. Problem Areas:

   a. Attorney acting as officer or director of company;

   b. Attorney investing in client's securities;

   c. Attorney in business transaction with client;

   d. Attorney receiving stock in lieu of cash fee;

   e. Attorney receiving contingent fees in business deal;

   f. Attorney soliciting investments or giving investment advice;

   g. Law firms with consulting subsidiaries.

7. High Malpractice Risk - This is one of the most fertile fields for litigation over malpractice coverage. One insurance carrier has described the problem as follows:

   "It is not an overstatement to say that lawyers' increasing involvement in client related entrepreneurial and other extracurricular activities is threatening to become an unmanageable crisis within the legal profession." ALAS Loss Prevention Manual, Vol. II A p. 5 (1990).

   Furthermore the American Bar Association has been so concerned that it appointed a special commission to study the extracurricular activities of attorneys. That commission is called the Special Coordinating Committee on Professionalism. It was created as a result of the recommendations of ABA Commission on Professionalism which reported:

It seemed clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which the profession demands. 112 F.R.D. 243 at 280-81 (1986); see also Chavin, "A Conscientious Conclusion," 76 ABA J. 8 (March 1990).

The same conclusion was reached by the New Jersey Supreme Court over 55 years ago when it wrote:

"Perhaps society would be better served if practicing attorneys were to remain full-time lawyers rather than part-time businessmen." In re Carlsen, 111 A.2d 393, 397 (N.J. 1955).

Not only would society be better served but lawyers would also be better protected or at least better insured if they stuck to practicing law.

VI. ETHICAL CONSIDERATIONS DURING THE REPRESENTATION OF THE CLIENT

A. Representing the Client

1. Competent and Diligent Representation

ABA and NH Rule 1.1 require "competence." NH rule 1.1 expands the ABA rule significantly by defining the minimum standard of legal competence. ABA and NH Rule 1.3 require "diligence" and "promptness." ABA and NH Rule 3.2 require a lawyer to avoid delays and "expedite litigation."

a. A lawyer may not fail to (1) carry out his contract, or (2) carry out the lawful objectives of his client.

b. Nevertheless a lawyer may: (1) exercise his own professional judgment, and (2) may refuse to aid or participate in conduct he believes to be illegal. Rules 2.1 and 1.1. See Jones and Williams, "Defensive Representation: Inherent Conflict or Zealous Representation?" IADC News, vol. XVIII No. 2 (Fall 1992); see also Reinken, "Zealous Representation – No Win Benchmark For Lawyers," Tex. Bar J, p. 706 (Sept. 2002).

2. It is the Client's Case, Not Yours. ABA and NH Rule 1.2

a. The client must be fully informed of all important events, including all offers of settlement. ABA and NH Rule 1.4. This is true even if a settlement is accomplished (but not authorized). See Butto v. Collecto Inc., 290 F.R.D. 372 (E.D.N.Y. 2013); Carranza v. Fraas, 763 F. Supp. 2d 113 (D.D.C. 2011); Haas v. George, 71 S.W.3d 904 (Tex. App.—Texarkana 2002, no pet.)

b. NH Rule 1.2 specifically deleted several examples of when a client's decision controls that are delineated in ABA Rule 1.2 because of the concern that those examples would be interpreted as the only situations where a client has control.

c. The Comments to ABA Rule 1.2 direct the lawyer to assume the responsibility for the best means to achieve his client's objectives. The lawyer has broad discretion to determine tactics subject to the client's wishes. A lawyer has the

duty to inform the client of relevant considerations and explain their legal significance. The final analysis of whether to assert or forego legally available objectives is for the client to decide. ABA and NH Rule 1.2.

d. Many jurisdictions consider it unethical for an attorney in a personal injury case to obtain an unconditional power of attorney from the client.

3. Be Sure You Know Who Your Client Is

a. Some problem areas include partnerships, limited partnerships and joint ventures. See, e.g., Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994); ABA Formal Opinion 91-361; but see Griva & Davison, 637 A.2d 830 (D.C. App. 1994).

b. Do you represent the entity or the individual? If the client is an individual, which individual?

B. Limitations of the Duties Imposed on an Attorney

1. The Frivolous Case

A lawyer has an obligation not to pursue a frivolous case or one filed for mere harassment or other malicious reasons. ABA and NH Rule 3.1; Fed. R. Civ. P. 11; Bankruptcy Rule 9011.

a. Prosecution of a frivolous case is prohibited by ABA and NH Rules 3.1-3.3.

b. An attorney is exposed to possible civil liability to the opposing party under theories of malicious prosecution, civil conspiracy and/or unconscionable conduct. Many states have traditionally made attorneys difficult targets for malicious prosecution suits. Annotation: Liability of Attorney Acting for Client for False Imprisonment and Malicious Prosecution, 27 A.L.R.3d 555 (1969); "Other Causes of Action", 50 Baylor L. Rev. 761 (1998). Nevertheless, attorneys have been found liable for unconscionable conduct. See Cuyler v. Minns, 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (client could maintain claim against attorney through DTPA for unconscionable conduct). Attorneys have also been found liable for wrongful attachment and/or fraudulent concealment. See, e.g., Lee v. State Farm Mut. Auto. Ins. Co., 249 F.R.D. 662 (D. Colo. 2008); Henningan v. Harris Co., 593 S.W.2d 380 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

c. For a more thorough discussion of potential duties owed to adverse or third parties, see Strickler, "Professional Responsibility In Appellate Advocacy," The Practical Litigator, p. 11 (March, 1991); Cann, "Frivolous Lawsuits - The Lawyer's Duty to Say 'No,'" 31 Defense L. J. 24 (1982); Probert and Hendricks, "Lawyer Malpractice: Duty Relationships Beyond Contract," 55 Notre Dame Lawyer 708 (1980); Comment, "Lawyers' Negligence Liability To Non-Clients: A Texas Viewpoint," 14 St. Mary's L.J. 405 (1983); Note,

"Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity," 21 Washburn L. J. 48 (1981).

d. An attorney may be liable to his client for indemnity when the client suffers damages for his involvement in pursuing a frivolous or malicious lawsuit.

e. Lawyers have an ethical duty to: 1) have a good faith belief in the claim; 2) use their independent analysis of the claim; and 3) investigate the facts and the law. An attorney does not have to believe he will win, only that the claim is tenable. See Fisher Tool Co., Inc. v. Gillet Outillage, 530 F.3d 1063 (9th Cir. 2008); Xcentric Ventures, L.L.C. v. Borodkin, 908 F. Supp. 2d 1040 (D. Ariz. 2012); Wise v. Cavalry Portfolio Serv., LLC, 279 F.R.D. 196 (D. Conn. 2012).

f. An attorney, while not a judge and jury, is not merely a "mouthpiece." There is no rule that requires an attorney to "stultify himself or debase his moral and intellectual integrity by presenting on behalf of his client . . . a trumped-up, purely visionary or fully rejected argument of law. . . ." Wilder v. State, 156 So.2d 395, 397 (Fla. App. 1963).

g. The duty to fully investigate prior to filing suit is not universally accepted. The court in Tool Research and Engineering Corp. v. Henigson opined that "an attorney has probable cause to represent a client in litigation, when after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable . . . ." 120 Cal. Rptr. 291, 297 (Cal. 1975); but see Spencer v. Burglass, 337 So.2d 596, 601 (La. App. 1976) (holding an initial filing of a lawsuit does not presuppose that lawyer should have known at that early stage of litigation that no convincing evidence could be discovered or developed).

h. Frivolous appeals are also a basis for sanctions. Macklin v. City of New Orleans, 300 F.3d 552 (5th Cir. 2002). A controversial and unsettled issue is not frivolous. NH Rule 3.1; Procter & Gamble v. Amway Corp., 280 F.3d 519 (5th Cir. 2002). A good faith argument for the extension, modification or reversal of existing law is permissible. Fed. R. Civ. P. 11.

2. Illegal Acts and Perjured Testimony

An attorney should not commit, participate in or advise another to commit an illegal act. ABA and NH Rules 1.2 and 8.4. Nor should an attorney offer false or perjured testimony. ABA and NH Rule 3.3; see also Kuhlman, "When Clients Lie," ABA Journal p. 88 (July 1990).

a. Attorney-client privilege does not extend to continuing or future crimes under traditional rules of evidence.

b. An attorney's rights and duties under the Model Rules are not nearly as clear-cut as under the old Rules.

c. ABA and NH Rule 1.6 require an attorney to maintain client confidences. This traditionally has been held to include past crimes and perjured testimony. ABA Committee on Professional Ethics, Informal Opinion No. 1318 (1975), No. 1416 (1978), and No. 1314 (1975).

d. An attorney may reveal the intention of his client to commit a criminal or fraudulent act that is likely to result in imminent death or substantial bodily harm to a person or substantial injury to property. ABA and NH Rule 1.6(b)(1). This may not extend to "financial crimes." See ABA Formal Opinion 92-366 (August 8, 1992); but see NH Rule 1.6(b)(1). ABA and NH Rule 1.2(d) state that a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on law to violate the law and avoid punishment. Rule 1.6 is more ambiguous, stating only that a lawyer may reveal a confidence to the extent he believes is necessary to prevent a criminal act likely to result in death or bodily injury. The comments under ABA and NH Rule 1.2 merely suggest withdrawal when an attorney discovers an ongoing wrongdoing. See also ABA and NH Rule 4.1 and Comments thereto.

e. ABA and NH Rule 3.3(a)(3) prohibit a lawyer from using perjured testimony, participating in the creation or preservation of false evidence and counseling or assisting his client in illegal or fraudulent conduct.

f. Once an attorney has information that clearly establishes a fraud on either a person or court, he must call upon the client to rectify the situation, and if the client refuses, the attorney shall reveal the fraud. ABA and NH Rules suggest an ex parte proceeding. ABA Rule 3.3(d); NH Rule 3.3(c).

g. ABA and NH Rule 3.3 Comments 10 and 11 suggest the following:

Remedial Measures – Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the

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

The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

See also U.S. v. Litchfield, 959 F.2d 1514 (10th Cir. 1992) (holding that it was not unethical for a lawyer to have an ex parte discussion with the trial judge expressing his concern that his client intended to commit perjury); ABA Opinion 87-353 (April 1987); Rotunda, "Client Fraud: Blowing the Whistle, Other Options," Trial, p. 92 (November 1988).

h. For a more thorough discussion of the dilemma facing the criminal defense attorney, see Ostergaard, "The Failure of Situation-Oriented Professional Rules To Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury," 55 Washington L. Rev. 211 (1979); Lefstein, "Client Perjury in Criminal Cases", Trial, Sept. 1988 pp. 30-40.

3. Ethics and Technology

a. ABA Rule 7.3 prohibits "in-person, live telephone or real-time electronic contact" to solicit professional employment when a significant motive is pecuniary gain. Though not affecting passive web sites or non-interactive blogs, this Rule does prohibit a lawyer's "chat room" communications that attempt to solicit prospective clients. Bennett, "Ethics of Lawyer Social Networking," 73 Alb. L. Rev. 113 (2009). Non-interactive internet content is still regulated, though, and solicitations on web sites, blogs and social media must be clearly marked as "Advertising Material" in accordance with Rule 7.3. Id.

b. Online communications amplify the risk of inadvertent attorney-client relationships. Attorneys

should be very cautious when providing online answers to legal inquiries: Responses that are general rather than fact-specific lessen the likelihood of creating an unintended attorney-client relationship. Thomas, "Online Legal Advice: Ethics in the Digital Age," 4 St. Mary's J. Legal Mal. & Ethics 440 (2014). Attorneys may also be well advised to include disclaimers in their online correspondence to inform recipients that no attorney-client relationship is created by the communication. Id.

c. Storing client information has changed dramatically in the 21st century as society increasingly utilizes online service providers—often called the "cloud"—to store data. Agreeing with the general consensus, the New Hampshire Ethics Committee stated that cloud computing is permissible "as long as the lawyer takes reasonable steps to ensure that sensitive client information remains confidential." Advisory Opinion #2012-13/4 (Feb. 2013). These 'reasonable steps' may include using password-protection schemes, utilizing in-house firewall protection, inspecting the provider's confidentiality and privacy practices or even seeking written assurances of security from the provider. Stephens, "Going Google: Your Practice, the Cloud, and the ABA Commission on Ethics 20/20," 2011 U. Ill. J.L. Tech. & Pol'y, 237 (Spring 2011).

d. Technological advancements have also changed the way attorneys conduct discovery. Modern storage devices and providers have revolutionized the amount of information that may be retained: Current clients are likely to "have five or ten times more . . . data today than they had five years ago." Finkelman, "Staying Up to Speed with Changes in E-Discovery," Aspatore (Aug. 2012). To effectively manage large amounts of data, attorneys should meet with their clients early on to discuss where case-related information is kept and how it is stored. Id. Attorneys should also be prepared to explain to a judge how their client's retention systems work or why a particular e-discovery process is overly burdensome or flawed. Id.

e. Social media is ubiquitous in current society, and the legal profession is no exception: In 2009, over 70% of attorneys reported belonging to a social media site. Lackey, Jr. & Minta, "Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging," 28 Touro L. Rev. 149 (2012). Although social media encourages the sharing of "every thought with little self-censorship and few repercussions," attorneys should use considerable discretion to ensure they protect client confidentiality. Id. Indiscriminate sharing can jeopardize an attorney's job: In

Illinois, a public defender blogged about her cases, including her client's names, crimes, drug usage and private conversations. Id. For these violations of confidentiality, the attorney was fired, charged with violating legal ethics and suspended from the practice of law for 60 days. Id.

Releasing confidential information is not the only concern stemming from social media use: Attorneys should also be cautious when expressing opinions about those with whom they work. Id. Failing to heed this advice, an attorney in Florida was publicly reprimanded after calling a judge an "Evil, Unfair Witch" on a legal blog. Id. Similarly, attorneys should be cautious when sharing plans and photos: In Texas, an attorney asked a judge for a continuance because of the death of his father. Id. When the judge checked the attorney's Facebook, however, there were pictures of the attorney partying and drinking with friends. Id. Denying the continuance, the judge promptly disclosed the results of her search to the attorney's supervisor. Id.

Aside from information sharing, attorneys should also be mindful about whom they "friend" online. States currently disagree about whether a judge may be online "friends" with an attorney who appears before him. Id. The concern, however, is not that the online "friendship" represents an actual close relationship, but rather that it may convey the impression that the attorney can influence the judge. Id. Despite what state one is practicing in, though, the safest course of action is to avoid online "friendships" with judges before whom one may appear.

f. Social media is a valuable tool for attorneys seeking to learn more about potential jurors—jurors' social media profiles are often far more informative than answers given during voir dire. Mesenbourg, "Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updating to Remain Relevant in the Digital Age," 47 J. Marshall L. Rev. 459 (Fall 2013). Attorneys cannot, however, directly contact or communicate with prospective jurors online. Id. This prohibition likely includes gaining access to privatized information without a juror's full awareness, such as through the creation of a fake online profile to become "friends" with a potential juror. Id.

4. Other Problem Ethical Situations

a. *Ex parte* communications with a judge violate ABA and NH Rule 3.5. While some judges allow communications if in writing with a copy sent to opposing counsel, or if oral, after adequate notice has been given to opposing counsel, most judges find even these forms of communication to be *ex parte*.

b. One cannot contact or converse with a client represented by another counsel. ABA and NH Rule 4.2. This generally includes copying the opposing clients with correspondence. An exception usually exists for a second opinion which may be rendered without notifying or seeking consent from the original counsel. ABA and NH Rule 4.2 Comment 4. Counsel guilty of violating this rule are subject to disqualification, even if counsel did not initiate the contact. Papanicolaou v. Chase Manhattan Bank, 720 F. Supp. 1080 (S.D.N.Y. 1989); Shelton v. Hess, 599 F. Supp. 905 (S.D. Tex. 1984). At least one Texas State Bar Committee Opinion has suggested it may be unethical to encourage the clients to talk to each other. Watkins and Brown, "Professional Responsibility - Ethics Avoiding Traps That Can Catch Lawyers," Advanced Civil Trial Course (July 1988); Texas State Bar Committee Opinion 339 (March 1968); but see ABA Rule 4.2 Comment 4 (indicating clients can communicate with each other); Reich, "Ethics," ABA Journal p. 96 (January, 1989).

c. ABA Rule 4.2 Comment 7 suggests that communication with a represented organization is prohibited if the communication is with an individual who supervises, directs or regularly consults with the organization's lawyer concerning the matter at issue or with an individual whose conduct is involved in the matter at issue. The NH commentary takes pains to point out that the ABA test is known as the "managing-speaking" test. Other authorities recognize other tests such as the control group, alter ego or balancing test. While the NH Supreme Court has recognized the "control group" test for attorney-client privilege purposes, it has not adopted it in the *ex parte* contact context.

d. At least one court has held that the simultaneous negotiation of a settlement and attorney's fees may be a conflict of interest. In a suit on the merits, the attorney must prove the client was not harmed. Ramirez v. Sturdevant, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994).

e. In dealing with a person not represented by a lawyer, a lawyer shall not imply that he is disinterested and if the unrepresented person misunderstands his role, the lawyer must correct this misunderstanding. ABA and NH Rule 4.3.

f. Even in states that allow one party to surreptitiously record phone conversations, attorneys cannot without permission of the other person record phone conversations. ABA Formal Opinion 337. In some states, a lawyer can advise his client that it is legal for the client to tape phone calls (if true), but then he must advise his opponent of the possibility that his client may implement this electronic recording. Texas State Bar Committee Opinion 514 (Feb.

1996).

g. A lawyer cannot threaten criminal charges to obtain an advantage in a civil matter. See In re Evergreen Sec., Ltd., 363 B.R. 267 (Bankr. M.D. Fla. 2007); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). ABA and NH Rules do not contain this specific provision, however, such conduct might violate Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4 (b), and 8.4(e). Some states are more liberal than others in this regard. See Austern, "Ethics" Trial, pp. 13-14 (Jan. 1988). Nor can an attorney representing a plaintiff in a civil case help prosecute a related criminal matter.

h. Aggregate settlements pertaining to two or more clients require the clients to have knowledge of the total settlement figure, the existence of all claims and the participation of each person. ABA and NH Rule 1.8(g). While normally considered a plaintiff's problem, joint settlements can bite defense lawyers if there is not total agreement. See Scognamillo v. Olsen, 795 P.2d 1357 (Col. App. 1990).

i. ABA and NH Rule 4.2 are silent as to whether communication with opposing counsel's expert is prohibited, but many jurisdictions consider this contact inappropriate. In ABA Formal Opinion 93-378 (Dec. 9, 1993), the ABA held that its rules do not prohibit such conduct and that such conduct is controlled by local rules of court.

VII. TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

A. Relationship Does Not Continue Automatically

Generally once the purpose of employment is completed, the attorney-client relationship disappears.

1. Mutual Consent

Termination by mutual consent is always the best and most appropriate.

2. A Client Can Terminate

A client can always terminate the lawyer-client relationship. Garcia v. Teitler, 443 F.3d 202 (2nd Cir. 2006); Elliott Reihner Siedzikowski & Egan v. Pa. Emp. Benefit Trust Fund, 29 F. App'x 838 (3rd Cir. 2002); In re Users Sys. Serv., Inc., 22 S.W.3d 331 (Tex. 1999). This is true even if there is no cause for termination. ABA and NH Rule 1.16(a)(3) and Comment 4; Id. A lawyer fired without cause may still be entitled to a fee. See B.J. Hall v. White, Getgey, Meyer & Co., LPA, 347 F.3d 576 (5th Cir. 2003); Stair v. Calhound, 722 F. Supp. 2d 258 (E.D.N.Y. 2010); Walton v. Hoover, Bax & Slovacek, L.L.P., 149 S.W.3d 834 (Tex. App.—El Paso 2004), aff'd in part, rev'd in part, Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006).

3. A Lawyer Can Terminate

An attorney can terminate the relationship, but he is under a duty to minimize any adverse effects to his client. ABA and NH Rule 1.16(d). A lawyer may be entitled to a fee if he terminates an attorney-client relationship due to his client's misconduct. See Wythe II Corp. v. Stone, 342 S.W.3d 96 (Tex. App.—Beaumont 2011, pet. denied).

4. Mandatory Withdrawal

ABA and NH Rule 1.16(a) - An attorney must withdraw from employment when:

a. He knows the client's action is frivolous or for the purpose of harassment. ABA and NH Rule 3.1; see also Thode, "Groundless Case: Lawyer's Tort Duty to Client and to Adverse Party," 11 St. Mary's L. J. 59 (1979).

b. He knows continued employment would violate a law or rule of professional conduct. See Cargile v. Viacom Int'l, Inc., 282 F. Supp. 2d 1316 (N.D. Fla. 2003); Wood's case, 634 A.2d 1340 (N.H. 1994). ABA and NH Rule 1.16(a)(1).

c. The lawyer is physically or mentally incapable of carrying out the employment. See Green v. Forney Engineer Co., 589 F.2d 243 (5th Cir. 1979); Lawyer Disciplinary Bd. V. Dues, 624 S.E.2d 125 (W. Va. 2005); In re Morris, 541 S.E.2d 844 (S.C. 2001). ABA and NH Rule 1.16(a)(2).

d. He is discharged by his client. ABA Rule 1.16(a)(3).

5. Permissive Withdrawal

ABA and NH Rule 1.16(b) - An attorney may withdraw if:

a. Withdrawal can be accomplished without material adverse effect. NH Rule 1.16(1).

b. The client insists on a course of action that the lawyer believes may be criminal or fraudulent. ABA and NH Rule 1.16(b)(2).

c. The client seeks to use legal services to perpetrate a crime or fraud. ABA and NH Rule 1.16(b)(3).

d. The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement. ABA and NH Rule 1.16(4).

e. There is other good cause. ABA and NH Rule 1.16(b)(7).

f. The client deliberately disregards the fee arrangement. ABA and NH Rule 1.16(b)(5). The ABA and NH Rules require a warning that the lawyer will withdraw unless the fee is paid. ABA Rule 1.16(b)(4); ABA Informal Opinion 86 - 1520 (1986).

g. Continued employment would result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. ABA and NH Rule 1.16(b)(6).

h. The lawyer believes in good faith that a tribunal would find a good cause for withdrawal. The Rules require a lawyer to continue when ordered to by a court even when good cause exists. ABA and NH Rule 1.16(c).

6. Duties of a Discharged Lawyer

A lawyer must return any unearned portion of his fee, and all other pertinent papers and property. ABA and NH Rule 1.16(d); see In re Moore, 684 S.E.2d 71 (Ga. 2009); The Fla. Bar v. Kelly, 813 So.2d 85 (Fla. 2002); In re Edwards, 990 A.2d 501

(D.C. 2010).

B. Potential Liability When Withdrawing

1. Sufficient Time Needed

An attorney must allow the client time to retain other counsel prior to withdrawing. ABA and NH Rule 1.16(d); see Wood's Case, 634 A.2d 1340 (N.H. 1994); Moss v. Malone, 880 S.W.2d 45 (Tex. App.—Tyler 1994, writ denied) quoting Villegas v. Carter, 711 S.W.2d 624 (Tex. 1986); see also Annotation, "Legal Malpractice in Connection with Attorney's Withdrawal of Counsel," 6 A.L.R. 4th 342 (1981).

2. Prior Length of Representation Important

An attorney has been held liable for mental anguish when, after 15 years of representation, he withdrew two months prior to trial. Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839 (1982).

C. Termination Due to Other Considerations

1. Death of Attorney

Death of the attorney terminates relationship. Partners of the deceased attorney cannot continue without permission of the client.

2. Death of Client

Death of a client terminates the relationship unless the attorney secures the consent of the estate. See Pressman v. Estate of Steinvorth, 860 F. Supp. 171 (S.D.N.Y. 1994) (personal representative did not consent to representation); In re Estate of Gutchess, 498 N.Y.S.2d 297 (N.Y. App. Div. 1986) (personal representative consented).

3. Exceptions to Death of Client Rule

It has been held that an attorney can complete certain tasks under an express contract that do not require the client's "personal cooperation." See In re Estate of Lanza, 40 Cal. Rptr. 528 (Cal. Dist. Ct. App. 1964). An attorney may also continue with the representation if the power of attorney is coupled with an interest or employment which by its terms extends beyond the client's death. See Brantley v. Fallston Gen. Hosp. Inc., 636 A.2d 444 (Md. 1994).

D. Practical Considerations When Withdrawing

1. Keep a copy of the File

If you have any hint of a problem be sure and keep a complete copy of the file.

2. What Is the File and To Whom Does It Belong

ABA and NH Rule 1.16(d) require that a lawyer surrender to the client any papers to which a client may be entitled. (Most attorneys assume that this means the file.) It then continues to state that a lawyer may keep papers relating to the client to the extent permitted by law and to the extent it does not prejudice the client.

a. Most States' Rules Do Not Address Ownership or Extent of Client Files

As stated above, the Rules indicate that upon termination of representation, a lawyer shall "take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ." The lawyer may retain papers relating to the client to the extent permitted by law. However, this rule does not address exactly what

"papers and property" belong to the client.

b. "End Product" Rule

Several courts addressing the issue of ownership of client files have adopted the "end product" rule: The client owns the end product of the attorney's work, but the attorney retains ownership of materials such as notes and purely internal memoranda. See Fed. Land Bank v. Fed. Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss. 1989), aff'd in part and rev'd on other grounds, 128 F.R.D. 182 (S.D. Miss); Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 689 N.E.2d 879 (N.Y. 1997); Womack Newspapers, Inc. v. The Town of Kitty Hawk, 639 S.E.2d 96 (N.C. Ct. App. 2007). In addition, while the ABA has indicated that, although the question of what papers belong to the client is a question of law, the "end product" rule should apply to determine the attorney's ethical obligations. See ABA Comment on Ethics and Professional Responsibility, Informal Opinion 1376 (1977).

c. "Entire File" Rule

Other courts have emphasized the fiduciary duty created by the attorney-client relationship and have held that the entire contents of a client file belong to the client not the lawyer. See Resolution Trust Corp. v. H----, P.C., 128 F.R.D. 647 (N.D. Tex. 1989); (noting that "so long as the files were created in the course of the representation of the client, they belong to the client"); see also Sec. and Exch. Comm'n v. McNaul II, 271 F.R.D. 661 (D. Kan. 2010); U.S. v. Vinton, No. CR03-0062, 2007 WL 2363354 (N.D. Iowa Aug. 16, 2007); In re Kaleidoscope, 15 B.R. 232 (Bank. N.D. Ga. 1981). However, this position has been severely criticized. See Note, "Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File," 76 Minn. L. Rev. 148 (1992).

d. New Hampshire Rule

The Supreme Court of New Hampshire has held that the file belongs to the client and upon request the attorney must provide the client with the file. Averill v. Cox, 761 A.2d 1083 (N.H. 2000). This includes copies of all electronic communications and documents. New Hampshire Ethic Committee Advisory Opinion No. 2005–06/3.

e. File Retention

i) Attorneys may wish to obtain consent from the client to the destruction of client files pursuant to a record retention policy. This can be done in the fee agreement, in the disengagement letter or by later correspondence.

As an alternative, the attorney can offer to return the documents to the client.

ii) Attorneys may wish to adopt a policy whereby all important materials, as well as all original documents, are delivered to the client at the end of the transaction. It is a good practice to document this transfer in writing.

iii) Many attorneys routinely organize a client file at the end of a case or transaction. In the process, they may wish to determine whether inconsequential papers, such as interim drafts of documents and attorney notes, can be destroyed. In addition, this is a good time to note whether the client has consented to the destruction of the file or if there is a need to postpone destruction of the file due to unique limitations periods, the presence of court orders, etc.

iv) At the time a client file is slated for destruction or return to a client, attorneys may wish to review the file to ensure that no papers subject to court orders are inadvertently destroyed or delivered to a client in violation of an applicable court order.

v) Similarly, destruction of a client file should be suspended if the file is subject to a subpoena or document request served on the firm or the client.

3. Refusal to Give a Client a File

ABA and NH Rule 1.16 Comment "g" suggest that a lawyer may retain papers as a security for a fee, but this will guarantee you a lawsuit. Remember in most jurisdictions an action for malpractice is a compulsory counterclaim in a lawsuit for unpaid fees. In re Iannochino, 242 F.3d 36 (1st Cir. 2001); Goggin v. Grimes, 969 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1998, no pet.). The ABA has estimated that up to at least 20% of all malpractice claims result from an action for fees. Fraim, "The Hazard: Suing to Recover Fees," ABA Lawyer Professional Liability Review, No. 4 (1999).

4. Document the Dissolution of the Attorney-Client Relationship

Regardless of the reason. When appropriate stress in writing the need for new counsel.

VIII. **IMPORTANT WEBSITES**

United States Courts:	www.uscourts.gov
United States Supreme Court:	http://supremecourts.gov
First Circuit Court of Appeals:	http://www.ca1.uscourts.gov
New Hampshire District Court:	http://www.nhd.uscourts.gov
New Hampshire Bar Association Ethics Committee	ratwood@nhbar.org
Federal Law Clerk Information System:	https://lawclerks.ao.uscourts.gov
CourtWeb:	http://courtweb.pamd.uscourts.gov/courtweb
FindLaw: Ethics and Professional Responsibility Listing:	www.findlaw.com
ABA Formal Ethics Opinions	http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html
Model Rules of Professional Conduct	http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html