ABA AND NHBA ETHICS OPINIONS AND NHBA PRACTICAL ETHICS ARTICLES

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 03-430 **July 9, 2003**

Propriety of Insurance Staff Counsel Representing the Insurance Company and Its Insureds; Permissible Names for an Association of Insurance Staff Counsel

This opinion addresses two ethical issues arising under the Model Rules of Professional Conduct.[1] First, may insurance staff counsel[2] represent both their employer and their employer's insureds in a civil lawsuit resulting from an event defined in the insurance policy? Second, under what name may an association of insurance staff counsel practice?

For the reasons set forth below, the Committee reaffirms its prior opinions and concludes that insurance staff counsel ethically may undertake such representations so long as the lawyers (1) inform all insureds whom they represent that the lawyers are employees of the insurance company, and (2) exercise independent professional judgment in advising or otherwise representing the insureds.

The Committee also concludes that insurance staff counsel may practice under a trade name or under the names of one or more of the practicing lawyers, provided the lawyers function as a law firm and disclose their affiliation with the insurance company to all insureds whom they represent.

Background

A liability insurance policy, subject to stated policy limits, promises to pay on behalf of the insured any amount for which the insured is liable on claims falling within the policy's coverage. In addition to this duty to indemnify, the insurance company assumes the duty to defend the insured against any such claims. The insured, in turn, by entering into a liability insurance contract

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

2. "Insurance staff counsel" are insurance company employees. Alternatively, they are called "house," "in-house," "salaried," or, less precisely, "captive" counsel.

with an insurance company, consents to give the company considerable control over the direction of the defense and any settlement of the matter.[3]

If the insured asks the insurance company to defend a lawsuit, and the suit falls within the insurance company's duty to defend, the insurance company is contractually bound to retain a lawyer to represent the insured. Absent a conflict, the lawyer commonly represents the insurance company as well.[4] The determination of when and to whom the client-lawyer relationship attaches is a matter of state law and not governed by the rules of professional responsibility. However, once the client-lawyer relationship attaches, the rules of professional responsibility, not the insurance contract or the lawyer's employer, govern the lawyer's ethical obligations to clients.[5] These obligations, the Committee's prior opinions have found, largely are unaffected by the determination of whether or not the insurance company is a co-client.[6] In any event, the insurance company provides direction to defense counsel in accordance with the terms of the insurance policy, and often as a co-client as well.

Historically, most insurance defense lawyers practiced in private law firms. Today, however, many are employees of insurance companies.[7] Whether insurance companies may use employee-lawyers to defend insureds, therefore, has been the subject of numerous opinions by courts and state bar association committees.[8] The focus of these opinions customarily has been twofold. First, as a matter of the state's substantive law, does an

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3. *See* JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4681 (1979).

4. Many jurisdictions have adopted this "dual client" rule. For a collection of cases and authorities, *see* ABA Comm. on Ethics and Professional Responsibility Formal Op. 01-421 (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) n. 6 (Feb. 16, 2001), and RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 29.3 at 213 (5th ed. 2000).

Other jurisdictions have adopted a "single client" rule, in which the lawyer's sole client is the insured. For a collection of cases and authorities, *see* ABA Formal Op. 01-421 n.7. The ABA Ethics Committee's analysis and conclusions in this opinion are equally applicable in both "dual client" and "single client" jurisdictions.

5. ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403 (Obligations of a Lawyer Representing an Insured Who Objects to a Proposed Settlement Within Policy Limits) (Aug. 2, 1996), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 405 (ABA 2000).

6. ABA Formal Ops. 01-421 and 96-403, *supra* notes 4 and 5.

7. Insurance companies reportedly have employed insurance staff counsel to defend insureds since the 1890's. It is estimated that there are several thousand insurance staff counsel presently representing hundreds of thousands of insureds. *See* Charles M. Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 237-40 (1997-98).

8. Many of these court decisions and bar association opinions are collected in Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 155 (Ind. 1999).

insurance company that employs insurance staff counsel to represent the company's insureds engage in the unauthorized practice of law? [9] And second, as an ethical consideration, does the defense of insureds by employee-lawyers of the insurance company create an inherent and impermissible conflict of interest for the lawyer?[10] Because issues of substantive state law are beyond the purview of this Committee, we do not address the issue of the unauthorized practice of law. Rather, we focus exclusively on the second question, namely, the ethical considerations associated with the use of insurance staff counsel.

Issue one: May insurance staff counsel represent both their employer and their employer's insureds in a lawsuit seeking damages resulting from an event for which the insurance policy imposes a duty to defend?

The Committee first considered the ethical implications of lawyers serving as insurance staff counsel in Formal Opinion 282 (1950).[11] Applying the provisions of the Canons of Professional Ethics, we stated that "[a] lawyer, employed and compensated by an ... insurance company, which holds a standard contract of insurance with an insured, may with propriety.... [d]efend the insured in an action brought by a third party...."[12] We noted that "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest."[13]

We revisited the question in Informal Opinion 1370,[14] concluding that the

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9. A substantial majority of jurisdictions that have addressed the issue have concluded the use of insurance staff counsel does not constitute the unauthorized practice of law. *See, e.g.*, Gafcon, Inc. v. Ponsor & Assoc., 98 Cal.App.4th 1388, 1396-97, 120 Cal.Rptr.2d 392, 397 (Cal. Ct. App. 2002). Illinois and Maryland have enacted statutes permitting insurance companies to employ staff counsel to defend insureds. 705 ILL. REV. STAT. ch. 220, para. 5 (2001); MD. CODE ANN. BUS. OCC. & PROF. § 10-206 (2001). Kentucky and North Carolina, however, have interpreted their unauthorized practice of law statutes to prohibit staff counsel operations. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996); Gardner v. N.C. State Bar, 341 S.E.2d 517, 521 (N.C. 1986).

10. *See* Robert J. Johnson, *Comment: In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility*, 57 OHIO ST. L.J. 945, 965 (1996).

11. ABA Comm. on Ethics and Professional Responsibility Formal Op. 282 (May 27, 1950), *in* OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 621 (ABA 1967).

12. *Id.*

13. *Id.* at 622.

14. ABA Comm. on Ethics and Professional Responsibility Informal Op. 1370 (Representation of Policy Holder by Insurance Company House Counsel) (July 16, 1976), *in* FORMAL AND INFORMAL ETHICS OPINIONS 252 (ABA 1985).

then-applicable Code of Professional Responsibility suggested "no different results."[15] A year later, in Informal Opinion 1402,[16] we reaffirmed an observation made in Formal Opinion 282 that "[t]he essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity...."[17]

We acknowledge that insurance staff counsel operations, perhaps due to their evolution and growth, continue to spawn ethical challenges.[18] Therefore, we revisit the issue in the context of today's Model Rules.

Insurance Staff Counsel and the Model Rules of Professional Conduct

The defense of an insured under an insurance contract gives rise to interrelated duties between the insurance company, the insured, and the lawyer retained by the insurance company. The Model Rules provide considerable guidance to insurance defense lawyers who must address the potentially divergent interests of insureds and their insurance companies on a daily basis. Fortunately, in the great majority of liability cases, the interests of insureds and their insurance companies do not collide.[19]

This is particularly true in the "full coverage case" in which the probable monetary exposure of the insured is within the limits of the insurance policy and there is no dispute regarding coverage for the incident. The interests of the company and the insured in these situations are financially aligned.[20]

We do not view the employment status of insurance staff counsel as itself creating a conflict between the insurance company and the insured when they are both represented by insurance staff counsel in a lawsuit.[21] In fact, the Model

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15. *Id.*

16. ABA Comm. on Ethics and Professional Responsibility Informal Op. 1402 (Insured's Contractual Obligation to Reimburse Liability Insurer for Legal Expenses up to Deductible Amount in Defending Claim When Insurer's House Counsel Acts in Behalf of Insured) (November 3, 1977), *in* FORMAL AND INFORMAL ETHICS OPINIONS 290 (ABA 1985).

17. *Id.* at 292.

18. *See* Silver, *supra* note 7 at 237-58.

19. *See* Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance*, 4 CONN. INS. L.J. 17, 22 (1997-98) ("Intractable conflicts between insured and company have rarely developed, even though the insurance company largely calls the shots in the defense of claims.").

20. *See* In re Allstate Ins. Co., 722 S.W.2d 947, 952 (Mo. 1987) ("When coverage is admitted and adequate the interests of the insurer and the insured are congruent. Both are interested in disposing of the case on the best possible terms. Only the insurer's money is involved. Even though the insured may be interested in minimizing liability and damages, perhaps because of apprehension about insurance coverage and rates, this concern introduces no conflict and there is no reason why the same lawyer may not represent both interests.").

21. *See* In re Youngblood, 895 S.W.2d 322, 330 (Tenn. 1995) (employment relationship does not, in and of itself, constitute a violation of the professional duties of lawyers).

Rules dealing with conflicts of interest between co-clients specifically contemplate lawyers representing multiple clients. Of course, if a conflict of interest between the insurance company and the insured does arise in the course of the representation, the lawyer immediately must resolve it by either obtaining the insured's informed consent or terminating his representation of the insured.[22]

Some courts and commentators have argued that, when the insurance company uses insurance staff counsel to defend its insureds, the opportunity for undue influence by the insurance company is too great.[23] However, even if it were assumed that the insurance company has more control over its employees than it does over retained lawyers in private practice, that circumstance is of no significance in the full coverage case "in which there is no temptation to favor the insurer's interests over that of the insured."[24]

We do note, however, that in defending insureds, insurance staff counsel must be vigilant of Rule 5.4(c),[25] which requires a lawyer to exercise independent professional judgment in advising or otherwise representing clients, regardless of who may be paying for the lawyer's services.[26] This rule underscores the importance of undivided fidelity to the insured-client.[27] Nothing in

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22. In re Allstate Ins. Co. 722 S.W.2d at 953; Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("if [a conflict] arises retention of new counsel to represent the policyholder may be either preferred or necessary").

23. *See, e.g.*, American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d at 571, as well as Michael D. Morrison and James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 401-02 (2001).

24. In re Allstate Ins. Co., 722 S.W.2d at 952. *See also* Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("the potential for conflict is inherent in the insurer-insured relationship regardless of whether the attorney is house counsel or outside counsel, and the employment relationship is not qualitatively different in this respect"). Some authorities even assert that there is less opportunity for undue influence in an insurance staff counsel office than in a private law firm. *See* MALLEN & SMITH, *supra*, note 4, § 29.10 at 272 ("[I]n a properly structured corporate environment, salaried counsel does not face many of the economic pressures that can tempt outside counsel to favor the insurance company. Employed counsel has no bills to send out, justify or collect. There is no concern about receiving future assignments, and there is no economic benefit in seeking to increase the volume of the business."). For a description of the pressures placed upon outside insurance defense lawyers, *see* Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J., 27, 46 (1997-98).

25. Rule 5.4(c) states "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

26. Although a lawyer has the duty to advise, the Model Rules leave to the client or the client's representative the decision whether to implement legal advice. As Rule 1.4(b) states, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

27. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 12.13, at 12-31-12 to 32 (3d ed. 2002).

the status of insurance staff counsel as employees diminishes their obligation or ability to comply with Rule 5.4[c] or any of the other Model Rules.[28]

Disclosure of Employment Status

In Formal Opinion 96-403,[29] we discussed certain disclosures that an insurance defense lawyer must make to the insured-client. We noted that the Model Rules require the lawyer "to communicate with the client, and convey information 'sufficient to permit the client to appreciate the significance of the matter in question.'"[30] We advised that a prudent lawyer would inform the client of "basic information concerning the nature of the representation and the insurer's right to control the defense and settlement under the insurance contract...."[31] We suggested that this information could be routinely included in the retainer letter, or otherwise provided near the outset of the representation.

Here we interpret Rule 1.8(f) to require insurance staff counsel to disclose their employment status and affiliation with the insurance company to all insureds-clients.[32] Such disclosure should occur at the earliest opportunity practicable, such as during the initial meeting with the client or through appropriate language in the initial letter to the client.[33]

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28. *See, e.g.,* California State Bar Standing Comm. on Professional Responsibility and Conduct Formal Op. 1987-91, 1987 WL 109707 * 3 (1987) ("the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment").

29. ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403, *supra* note 5.

30. *Id.* at 406.

31. *Id.*

32. Model Rule 1.8(f) provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6." It typically applies when the insurance company pays the fees of the defense lawyer to represent the policyholder, whether or not the insurance company also is a client. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16, cmt. e (2000). ("A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client.").

33. These are not the exclusive means of informing insureds-clients. The disclosure of employment status to clients can be accomplished in a variety of ways, including a personal meeting with the insured or clear language in the engagement letter. As one bar association ethics committee has stated: "In this situation lawyers should exercise their own sound judgment as to how best to inform insureds whom they are designated to represent that they are paid by the insurers, whether as employees or independent contractors...." Nassau County Bar Ass'n Comm. on Professional Ethics Op. 95-5 (1995).

In contrast, the Model Rules do not place a similar duty of affirmative disclosure on insurance staff counsel in respect to communications with the courts or persons other than insureds-clients. As an ethical consideration, whether a lawyer is a member of an outside law firm or an employee of an insurance company is rarely material to persons other than insureds-clients. Therefore, although local law or court rule may require affirmative disclosure to persons other than insureds-clients, the Model Rules do not.

Issue two: How may an association of insurance staff counsel identify itself?

We next turn to the matter of names by which an insurance staff counsel office may identify itself. This subject has been of some concern to courts and state bar associations.[34] As the New Jersey Supreme Court stated: "We recognize the genuine interest of the petitioners in being permitted to practice under a name that they believe reflects the nature of their association."[35]

The inquiry must begin, as the New Jersey Supreme Court correctly assessed, with a determination of the "nature of the association." Stated directly: does an association of insurance staff counsel constitute a "firm" or "law firm" within the meaning of the Model Rules?

Whether an association of lawyers constitutes a "law firm" turns upon (1) the manner in which the association functions, and (2) the association's compliance with the responsibilities of a law firm, including those imposed by the Model Rules.[36] We thus examine the structure and function of insurance staff counsel operations.

Although there is substantial variation in approaches taken by different insurance companies, insurance staff counsel operations are most commonly unincorporated divisions of the insurance company's corporate law department. Typically, the offices of insurance staff counsel are physically and organizationally separate from the insurance company's business operations. A senior lawyer, often called a managing or supervising lawyer, oversees business and professional responsibilities in the office.[37] The supervising lawyer must make

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34. *See* MALLEN & SMITH, *supra* note 4, § 29.10 at 261 (setting out the various jurisdictional approaches).

35. In re Weiss, Healy & Rea, 536 A.2d 266, 269-70 (N.J. 1988).

36. *See* Florida Bar Ass'n Report of the Special Comm'n on Ins. Practices II at 16 (Mar.1, 2002), *adopted by* Florida Bar Bd. of Governors (Mar. 15, 2002) ("It is recognized that what constitutes a law firm for purposes of the rules is to be determined by a functional analysis of particular relationships and the purposes of the relevant ethical strictures in protecting the public interest."). *See also* Amendment to Rules Regulating The Florida Bar Re: Rules of Professional Conduct, 838 So.2d 1140 (Fla. 2003) (court formally adopted amendments to rules of professional conduct recommended in Special Commission report).

37. Report and Recommendations of the House Counsel Task Force of the Ohio State Bar Ass'n 10 (2002) ("Staff counsel organizations should be designed as law firms that are controlled by senior attorneys.").

reasonable efforts to ensure the office's compliance with the ethical rules of the jurisdiction, including conflict of interest provisions. In this regard, the supervising lawyer functions much like a managing partner in a private firm.

The lawyers work collectively, usually in teams with other lawyers, paralegals, and support personnel. Those lawyers in a single location commonly share confidences and consult with each other on assignments and strategies.[38] In addition to functioning as a law firm, insurance staff counsel frequently are part of the insurance company's legal organizational structure, thereby falling within Model Rule 1.0's definition of "firm" or "law firm."[39]

Having shouldered the responsibilities associated with law firm status, are insurance staff counsel permitted to refer to themselves as a "firm," "law firm," or an "association" of lawyers? We conclude they may do so provided that the names satisfy Rule 7.5(a), which cautions that, "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." Rule 7.1, in turn, reads:

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

We believe the use of traditional law firm names, without more, might mislead insureds-clients who do not know the firm's affiliation with the insurance

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38. If lawyers residing in separate offices function as insurance staff counsel for the same insurance company, the lawyers may share the confidences of clients among the offices. However, if they do so, or otherwise hold themselves out as associated with lawyers in other offices, the lawyers in all locations will be subject to the imputation of conflicts of interest under Rule 1.10. Whether various offices of insurance staff counsel constitute one law firm or multiple law firms for purposes other than maintaining client confidences and conflict avoidance has received scant attention from courts or scholars. Furthermore, it would seem to have few, if any, practical implications. Ultimately, as Comment [1] to Rule 1.10 suggests, the determination of whether offices operate as separate law firms comes down to "specific facts."

For example, in ABA Comm. on Ethics and Professional Responsibility Informal Op. 1309 (Legal Services Offices Representing Opposing Sides) (January 13, 1975), *in* FORMAL AND INFORMAL ETHICS OPINIONS 181 (ABA 1985), the ABA Ethics Committee addressed whether lawyers of the Neighborhood Law Office ("N.L.O.") and those of the state bar association's Legal Services Project, could represent opposing sides. The N.L.O. was an unincorporated legal services project that received indirect funding through the Legal Services Project. The Committee reviewed how the N.L.O. and Legal Services Project functioned, and concluded the lawyers could represent opposing sides because the offices "operate[d] as separate law firms." *Id.* at 182.

39. Rule 1.0(c) defines "firm" or "law firm" to include "lawyers employed in a legal services organization or the legal department of a corporation or other organization." Comment [1] to Rule 1.10 states, "[f]or purposes of the Rules of Professional Conduct, the term 'firm' includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization."

company. Such potential for misleading, however, is eliminated when insurance staff counsel disclose their employment status to their insureds-clients in the manner described above.[40]

As it happens, insurance staff counsel commonly include explanatory language on their letterhead, business cards, office entry signs, and court pleadings. The language identifies the lawyers in the firm as employees of the insurance company, *e.g.*, "Employees of the Corporate Law Department of ABC Insurance Company." Although permissible, the Model Rules do not require such explanatory language, provided that all insureds-clients are informed of the employment status of the lawyer. [41]

So long as disclosure is made to all insureds-clients, an insurance staff counsel office may refer to itself as an association of lawyers practicing under the name of the supervising lawyer, *e.g.*, "John Smith and Associates," or "Law Offices of John Smith." In addition, it is permissible for the lawyers to practice under the names of a former member of the firm who is totally retired from the practice of law, so long as the retired lawyer is designated as "retired" on firm letterhead and other firm listings.[42]

Insurance staff counsel offices may also practice under the name of two or more of the lawyers in the office, *e.g.*, "Smith and Jones." Care must be taken in the latter approach, however, to comply with the dictate of Rule 7.5(d) that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact." Specific and prominent disclosure of the employee status of the lawyers may be used to dispel any potential implication that the firm is a partnership.[43]

Insurance staff counsel offices also may use a trade name, subject to the limitations of Rule 7.5(a). For example, insurance staff counsel may include the name of the insurance company in the law firm's name, *e.g.*, "Law Offices of ABC Insurance Company."[44] The Model Rules allow for the use of

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40. *See supra* note 33 and accompanying text.

41. We note that insurance staff counsel do not solicit clients. They obtain clients solely through their affiliation with their employer. Because the employment status of insurance staff counsel is seldom material to anyone other than insureds-clients, Rule 7.1's threshold of a "material misrepresentation" rarely will be met in this context.

42. *See* ABA Comm. on Ethics and Professional Responsibility Informal Op. 85-1511 (Use of Firm Name "The X Partnership" Where X is Retired) (March 26, 1995), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 547 (ABA 2000), finding it permissible for a firm to practice under the name of the "X Partnership" when founding partner X retired.

43. *Accord* New York State Bar Ass'n Comm. on Professional Ethics Op. 726, 2000 WL 567960 *3 (2000). Another means of preventing misunderstanding would be to incorporate the legend "an association of lawyers not in partnership" or similar language whenever the firm's name appears on letterhead, business cards, and signage.

44. *But see* Virginia Legal Ethics Op. 775 (1986) (impermissible to use on letterhead designation "Law Offices of the ABC Insurance Company," followed by names of staff counsel).

trade names (including the name of a deceased member of the firm) so long as the name is not misleading or deceptive.[45]

45. Comment [1] to Rule 7.5 provides an instructive example. "If a private firm uses a trade name that includes a geographic name such as 'Springfield Legal Clinic,' an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication."

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1993-94/22
Conflict of Interest: Multiple Representation in Personal Injury Cases
November 17, 1994

RULE REFERENCES:

*Rule 1.3
*Rule 1.4
*Rule 1.7
*Rule 1.14
*Rule 1.16

SUBJECTS:

*Adverse Representation
*Client Communications
*Consent
*Multiple Representation
*Termination/Withdrawal of Attorney/Client Relationship

ANNOTATION:

QUESTION:

Under what circumstances may an attorney represent multiple family members in personal injury litigation where one of the family members was the driver and one or more additional members of the family were passengers in the same motor vehicle?

FACTS:

The inquiring attorney has encountered several personal injury cases in which the negligence of the opposing driver is so apparent and the potential liability of the family-member driver is so remote that, for practical purposes, it is a straightforward liability action against the opposing driver and family members, including driver and passengers, wanted to bring a consolidated action against the opposing motor vehicle driver.

The family members were very clear in their intentions regarding their family driver--he or she was, in their view, not at fault for causing the accident; but, even if he or she could have been partly legally at fault, they had no desire to bring a law suit against their family- member by reason of their relationship to the driver.

The inquiring attorney has also encountered situations in which it was necessary to advise a motor vehicle passenger client to bring suit against his or her family-member driver, because the evidence of potential legal liability on the part of the family- member driver was significant enough to warrant such a suit. In such situations, notwithstanding the inquiring attorney's advice that the failure to bring such a claim against the family-member driver would be likely to result in a reduction in the amount of compensation they could ultimately receive because of the liability likely to be imputed to the family-member driver by a jury, the passenger client was strongly opposed to bringing suit against his or her family-member driver.

RESPONSE:

Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents, after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.4(b) provides that a lawyer shall explain the legal and practical aspects of the matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation. When representing minors, the lawyer should also be mindful of the requirements of Rule 1.14. Even if the client consents with the full understanding of the implications of the common representation, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. Boyle's Case, 136 NE 21 (1992). Under certain circumstances, a potential conflict may be so clearly fundamental to a disinterested lawyer that undertaking the joint representation would be per se unreasonable. Kelley's Case, 137 NH 314 (1993).

In the first factual situation, where the lawyer reasonably believes the representation will not be adversely affected because the possibility of liability on the part of the family- member driver is extremely remote, the lawyer must contemplate whether a disinterested lawyer would conclude that the client should agree to the representation. If the answer is in the affirmative, and the client consents after consultation and with knowledge of the consequences, including the implications of the common representation and the advantages and risks involved, then such representation is permissible.

In those situations in which the lawyer believes there to be significant evidence of liability on the part of the family-member driver, the lawyer should not undertake to represent both the family-member driver and the family passengers, regardless of consent by the parties. In such circumstances, the lawyer could not reasonably believe that the representation of the family member driver would not adversely affect the relationship with the family passenger. A disinterested lawyer would not conclude that either the driver or the passenger should agree to the representation if it was known that there was significant evidence of liability on the part of the family-member driver.

Rule 1.3(b)(2) requires a lawyer to provide representation with no avoidable harm to the client's interests nor to the lawyer/client relationship. Representation of a family driver believed to be significantly liable constitutes an avoidable harm to the passenger's interest. Similarly, representation of a family passenger constitutes an avoidable harm to a family driver believed to be significantly liable.

Under such circumstances, the lawyer must refuse to represent both the driver and passenger, as representation of both would result in violation of the Rules of Professional Conduct pursuant to Rule 1.16.

Although the New Hampshire Supreme Court has not addressed this issue, other Courts have. In re Thornton, 421 A.2d 1 (D.C. 1980) (lawyer improperly represented driver and passengers in suit against other driver involved in auto collision); In re Shaw, 88 N.J. 433, 443 A.2d 670 (1982) (where liability was in

dispute, improper for lawyer to represent driver and passengers in auto collision case); In re Morris, 72 N.J. 135, 367 A.2d 1172 (1977) (lawyer improperly represented both driver and widow of fatally injured passenger involved in automobile accident against owner and operator of other vehicle involved); Weinberg v. Underwood, N.J. Super. 448, 244 A.2d 538 (1968) (counterclaim for contribution by defendant against co-plaintiff-driver created impermissible conflict with coplaintiff-passenger, both represented by same lawyer, as passenger could benefit if liability against driver were established); Fuanitto v. Fugnitto, 113 Misc. 2d 666, 452 N.Y.S. 2d 976 (1982) ("We emphatically disapprove the representation by counsel of both driver and passenger in a vehicle."); North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986) (improper to undertake representation of two wrongful death claimants in obtaining settlement from limited fund; any apportionment would benefit one client to other's detriment); Jebwabny v. Philadelphia Trans. Co. 390 Pa. 231, 135 A.2d 252 (1957) (lawyer improperly represented driver and passengers of damaged automobile as plaintiffs against bus company charged with responsibility for collision; under Pennsylvania law, bus company could realign automobile driver as involuntary defendant), cert. denied, 355 U.S. 966 (1958).

However, if the lawyer has consulted with both the driver and passenger, the lawyer may not represent either. It is, therefore, advisable to meet with one or the other prior to accepting representation to determine the potential liability of the driver. Facts discovered in the future may require the lawyer to revisit the issue of liability and may require withdrawal from representation of both the driver and passenger.

As the question was raised in the consent form proposed by the inquiring attorney, it should go without saying (but apparently must not) that it would constitute a violation of Rule 1.7(a) to represent the passenger in an action against the driver or his insurance carrier, if the driver is also represented by the same lawyer. The exception to this rule would be a claim against the driver's uninsured motorist provision of his policy.

Although the third full paragraph of page two of your letter requires client's consent to foregoing bringing suit against the driver, your consent form does not so provide. The third paragraph of your consent form provides consent to your making a claim or filing suit against the driver or his insurance company to collect the extent of any insurance coverage which the driver may have available. Considering that the immediately previous sentence acknowledged the passenger's desire to forego asserting such a claim, this provision is misleading, inappropriate, and contrary to the conclusions above expressed. If your intent is to limit claims against the driver to uninsured motorist provision claims, the form should clearly and unequivocally so state. The proposed form falls far short of this goal.

The final paragraph of your form suffers from the same malady when it states, "...and I wish to make a claim against that person (other driver), her insurance company, or my drivers insurance company, or both to receive compensation for our injuries..."

In conclusion, although the form provides for acknowledgment of a desire to forego bringing an action against the driver, it also provides for consent to do the opposite. Such conflict and confusion can be remedied by a more concise statement that any claim against driver's insurance company will be limited to a claim under the uninsured motorist provision thereof.

Ethics Committee Advisory Opinion # 2008-09/1
Drafting Lawyer Acting as Fiduciary for Client

By the NHBA Ethics Committee
May 13, 2009

RULE REFERENCES:

Rule 1.1(b)
Rule 1.4(a)(2)
Rule 1.4(b)
Rule 1.6
Rule 1.7
Rule 1.7(b)
Rule 1.7(b)(4)
Rule 1.8
Rule 1.8(a)
Rule 2.1

SUBJECTS:

Adverse Effect on Professional Judgment
Adverse Representation
Attorney-Client Relationship
Business Activities
Client Communications
Competence
Confidentiality
Conflict of Interests
Consultation
Estates
Harsh Reality Test
Independent Judgment
Fees
Probate
Wills

ANNOTATIONS:

When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b) and that the attorney may continue to exercise independent professional judgment in recommending to the client the best choices for fiduciaries under Rule 2.1. In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the "informed consent" of the client to the selection of the drafting attorney as the named fiduciary.

It is ethically impermissible for an attorney to name that attorney, by default, or require the client to appoint the attorney as a fiduciary, in a document drafted by that attorney.

In the event the drafting attorney actively advertises and solicits clients to consider using the attorney as a nominated fiduciary in documents drafted by the attorney, the relationship that results from such advertisement and solicitation may constitute a "business transaction with the client" and thereby requires compliance with the more stringent Rule 1.8(a).

I. QUESTIONS PRESENTED:

1. May a lawyer who is drafting a will or other estate planning documents, identify the lawyer as the named executor or other fiduciary in the documents, at the request of the client?

2. May a lawyer identify himself or herself, by default, as the executor or other fiduciary in a client's estate planning documents?

3. May a lawyer solicit and/or require clients to identify the lawyer as a fiduciary in estate planning documents being prepared by the lawyer?

II. Introduction. It has been common practice for estate planning attorneys in New Hampshire to act as executors, guardians, trustees, administrators and attorneys-in-fact for clients. This is not surprising when considering the role an attorney plays as a trusted advisor, and the complexity and volume of New Hampshire statutes and regulations that are applicable to fiduciaries, and the administration of estates and trusts. However, the selection of appropriate persons or entities to act as a fiduciary is one of the most important decisions a client makes during the estate planning process.

This Committee's Formal Opinion #1987-88/9 ("Prior Opinion") addressed the restrictions on an attorney's ability to act as both the attorney and a fiduciary for the client, and the fees that may be ethically charged by the attorney in both capacities. Subsequent to the Prior Opinion, New Hampshire's Supreme Court adopted a total revision of New Hampshire's *Rules of Professional Responsibility* (where applicable "Rules" or "Rule"); *see*, Order dated July 25, 2007. While the new Rules applicable to the questions posed above are very similar to those that were in effect when the Prior Opinion was adopted, there were significant changes pertaining to what is required for "informed consent" and the necessity that a client's informed consent be confirmed in writing with respect to potential Rule 1.7 conflicts. Accordingly, this Opinion will examine the questions raised above in the context of the new Rules. Unlike the Prior Opinion, however, this Opinion will **not** address the issue of what fees may be reasonably charged by the drafting attorney, when later acting as a fiduciary resulting from a designation in the document prepared by the attorney; while the Prior Opinion will still be useful, there have been significant changes that impact such fee issues.[1]

For the purposes of this Opinion, references to the "attorney" or "lawyer" shall be deemed to include all members of the attorney's law firm as well as the law firm. The term "fiduciary," includes the following roles typically involved in estate planning documents: (a) an executor, (b) a trustee, (c) an Agent named under either a financial durable power of attorney or health care power of attorney in an Advance Directive, (d) a guardian designated under a Nomination of Guardian pursuant to RSA 464-A:10,II, or (e) a designated agent under a Declaration of Final Arrangements pursuant to RSA 290:17, I. The same ethical analysis would apply regardless of whether the attorney is named as the primary acting fiduciary or as an alternate or successor fiduciary.

III. Attorney Becoming a Designated Fiduciary at the Client's Request.

When an attorney has a long-standing relationship with the client or the client's family, and is a trusted friend and professional, it is not uncommon for the client to request that the attorney serve in one or more fiduciary capacities in the client's estate planning documents. In fact, it is not unusual for clients to believe, incorrectly, that they **must** name an attorney as the executor or trustee. However, the designation of the attorney as a fiduciary raises potential conflicts of interest, along with certain other ethical questions. The ABA's Formal Opinion No. 02-426 ("ABA Opinion") provides a comprehensive analysis of this issue, under ABA's current Model Rules (upon which the New Hampshire Rules are based in large part).

A. *Requisite Competency*. No matter how a client may initiate the request, before the attorney can begin drafting a document that names the attorney as a fiduciary, the attorney must first have the requisite knowledge and experience to be able to satisfy the Competence requirements of Rule 1.1(b). Given the increasing complexity of the rules and procedures involved in estate and trust practice and administration, this initial ethical inquiry should not be taken lightly by the attorney.[2]

B. *Discussion of Options*. When a client asks an attorney to serve in the role of fiduciary, the attorney must comply with Rule 1.4(a)(2) and Rule 1.4(b).[3] The attorney must frankly discuss all available options pertaining to the selection of fiduciaries for the client's documents, and during this discussion may disclose to the client the attorney's availability to serve as the fiduciary, ABA Opinion, at pages 2-3. The attorney and client should discuss whether or not the client's goals will be better served with the attorney serving as a fiduciary rather than the client's family, friends or a professional fiduciary, and the relative skills and experience each may have to assist in the performance of the fiduciary's duties. The discussion should include a disclosure that the professional fiduciary is typically fully bonded, and whether or not an attorney who will act as a fiduciary will be covered by errors and omissions insurance. The attorney should specifically discuss the relative costs of having the attorney or others serve as a fiduciary, as well as how the attorney will charge for the fiduciary services, depending upon the expected complexity or simplicity of the plan and the client's family's dynamics. "When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved." ABA Opinion, page 4. Discussing the option of appointing the attorney as a co-trustee, along with a family member, to assist with the growing technical complexities of trust administration, may also be warranted. The discussion should also address the fact that appointed professional fiduciaries, family members, or friends, as well as the named attorney, may retain an attorney to advise and assist them, as needed, to properly perform their fiduciary duties.

C. *Independent Professional Judgment*. During the initial discussion with the client pertaining to the fiduciary selection process, the attorney must not "allow his potential self-interest [in serving as a fiduciary] to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries."*ABA Opinion*, at page 3. *See also* Rule 2.1.[4] The attorney's discussion must also address possible limitations that could result from the attorney serving as fiduciary. For example: if later faced with the client's potential incapacity and/or involuntary placement, the attorney will be unable to serve as the client's attorney and may become an adverse witness, potentially placing the attorney and client at odds

over the issue. Similarly, the attorney will probably also be unable to represent the proponent of the document in question in any proceeding adjudicating the capacity of the client. Clarifications or corrections of scrivener's errors in the relevant documents may also become problematic.

D. *Conflict of Interest.* After considering Rule 1.7, the drafting attorney must evaluate whether the attorney's appointment as a fiduciary in a document drafted by the attorney, at the voluntary choice of the client, presents "a significant risk that the representation of ^.[the client] will be materially limited ^ by a personal interest of the lawyer", and therefore triggers application of Rule 1.7.[5] The attorney who is named as a fiduciary in the document is clearly acquiring a possible and lucrative financial interest in that client's future estate or trust. This Committee, however, does not reach the conclusion that a "concurrent conflict of interest" under Rule 1.7(a)**always** exists in these situations that would trigger having to confirm the client's informed consent in writing, as provided in Rule 1.7(b). Instructive on this issue is the following excerpt under the header "Appointment of Scrivener as Fiduciary", ACTEC Commentaries on the Model Rules of Professional Conduct (4th Ed., 2006), at page 95:

> "As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and *the appointment is not the product of undue influence or improper solicitation by the lawyer.* [emphasis added]"

Similarly, the ABA Comment 8, to Rule 1.8. while implying that being named as a fiduciary does not constitute a "business transaction with the client" under Rule 1.8, nevertheless cautions that the situation may require a conflicts disclosure under Rule 1.7.[6] There is some confusion now caused by the Ethics Committee Comment to Rule 1.8, which states in part that "[i]n New Hampshire, Rule 1.8(a) applies to a lawyer's advice as to, or preparation of, an instrument designating or appointing a lawyer ... as executor, trustee or other fiduciary position The Committee notes that this statement is erroneous and may simply be the result of a scrivener's error (which should have read "Rule 1.8(a) *may* apply"). The Committee is in the process of revising this Comment in a manner consistent with this Opinion.

There may also be other circumstances that further complicate this ethical analysis. As an example, situations where the attorney represents other family members will add additional potential conflicts that must also be considered. This is accentuated in family situations where the client is seeking to intentionally disinherit another family member who is also a client of the drafting attorney; this may, in certain situations , well prevent the attorney from ethically accepting being named a fiduciary, especially if for confidentiality reasons the attorney is prohibited from obtaining required informed consent by multiple clients. For example, ABA Formal Opinion 05-434 discusses the implications of the attorney drafting a will for one client that disinherits a beneficiary whom the lawyer also represents on unrelated matters, concluding while generally there would be no prohibition, there may be other circumstances that could trigger a prohibited conflict of interest. Ethical dilemmas faced in the representation of multiple family members was also addressed in ABA Formal Opinion 02-428, discussing issues surrounding representation of a testator at the request of and paid for by an intended beneficiary who is a client of the attorney, that concludes that the Rules "do not prohibit multiple

representation of family legal interests as long as the lawyer's independent professional judgment is maintained, the lawyer complies with the rules on client confidences, and any conflicts of interest are resolved under the applicable rules." The drafting attorney, therefore, must be extremely vigilant and properly examine all potential other conflicts that may impact upon this fiduciary selection issue.

The attorney must be mindful that a Rule 1.7 analysis will typically only take place, in hindsight, after something has gone dreadfully wrong, and that the facts will be viewed objectively by other disinterested lawyers. Illustrative of such a possible retroactive review of the attorney's actions is New Hampshire's application of its "harsh reality test" *after* an attorney has determined that it is appropriate to request a client's consent to a conflict of interest under Rule 1.7(b).

> "[I]f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation ***or question whether there had been full disclosure to the client prior to obtaining the consent***. If this 'harsh reality test' may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation..." [emphasis supplied]. New Hampshire Comment to Rule 1.7

Written confirmation of the client's informed consent of a concurrent conflict of interest under Rule 1.7(b)(4) is not required under all circumstances when documents name the drafting attorney as a fiduciary. Clearly, however, the better practice would be for the drafting attorney to always provide such written confirmation of the client's decision. The written confirmation should document the disclosures and discussions mandated under Rule 1.4. and, if applicable, Rule 1.7, and the client's selection of the attorney to act as fiduciary. See Rule 1.0(c) for a definition of "informed consent".[7]

E. *Confidentiality*. The attorney must analyze and discuss with the client the effect that Rule 1.6. ("Confidentiality of Information") may have upon the attorney, when acting in the fiduciary capacity as appointed in the client's documents.[8] The client must understand that the attorney may intentionally or inadvertently use or rely upon intimate details relating to the creation of estate planning documents that would not be available to other fiduciaries during the estate or trust administration process. If there is a will contest or a question as to either the interpretation of the document drafted by the attorney/fiduciary or the intent of the client, the drafting attorney may be the primary witness, and may be precluded from handling any litigation involving the particular document or the estate. While having the intimate knowledge and confidential information of the client may aid considerably in the ultimate realization of client objectives, there may be situations where it could possibly complicate the fiduciary's role. Further complicating the issue is that the fiduciary has the authority to waive attorney-client privilege, thereby giving the attorney/fiduciary the power to waive the privilege with respect to the client's communications with the attorney.

IV. Drafting Documents Naming the Drafting Attorney as the "Default" Fiduciary. The second question presented involves the "default" designation of the attorney to serve as a fiduciary in the documents drafted by the attorney. This question presumes that this practice occurs **prior** to there being any discussion with the client concerning the designation of

appropriate fiduciaries, or should the attorney require the client to use the attorney as a fiduciary. Based upon the above discussions, this Committee concludes that such a "default" designation is ethically prohibited under the current Rules. The Committee also believes that this practice could not be properly "cured" by subsequent client discussions and disclosure.

V. Drafting Attorney Soliciting Use of Fiduciary Services. The third and final question presented, involves the active solicitation of the client to use the services of the attorney as a fiduciary in one or more of the client's estate planning documents. All of the ethical disclosure requirements previously reviewed apply. This question raises the additional question of whether or not the law firm's active solicitation of fiduciary services creates a "business interest" that would also trigger the application of a Rule 1.8 disclosure. The ABA Opinion specifically allows the lawyer "to disclose his own availability to serve as a fiduciary" when discussing fiduciary selection options (at page 3). This question, however, presumes a greater level of solicitation of services by the drafting attorney. Such a determination will depend upon the specific facts involved in any given situation. For example, if the lawyer (1) advertises fiduciary services, and (2) actively solicits its clients consider selecting the lawyer as the fiduciary in the documents drafted by the lawyer, it would be difficult to argue that such solicitation does not transform the fiduciary selection by the client into a "business transaction with a client." If such practice is determined to involve a "business transaction with a client", then compliance with Rule 1.8 (a) would be required. (fn9) The more stringent Rule 1.8(a) conflict compliance requires (1) informed consent in writing *that must be signed by the client*; and (2), that the client must be advised in writing by the attorney "of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction". The attorney is further cautioned that, in certain circumstances involving concurrent conflicts of interest, the attorney may need to comply simultaneously with **both** Rule 1.8(a) and Rule 1.7(b).

It is beyond the scope of this Opinion as to whether or not, and/or how the law firm may ethically establish a fiduciary services law-related business separate and apart from its legal practice, in compliance with Rule 5.7, "Responsibilities Regarding Law-Related Services."

VI. Summary. When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b). In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the "informed consent" of the client to the selection of the drafting attorney as the named fiduciary.

It is ethically impermissible for an attorney to name that attorney, by default, or require the client to appoint the attorney as a fiduciary, in a document drafted by that attorney.

In the event the drafting attorney actively advertises and solicits clients to consider using the attorney as a nominated fiduciary in documents drafted by the attorney, the relationship that results from such advertisement and solicitation may constitute a "business transaction with the

client" and thereby requires compliance with the more stringent Rule 1.8(a).

Footnotes:

[1] With respect to the executor and administrator fiduciary role, subject to the jurisdiction of the Probate Court, there has been a significant change resulting from *In Re Estate of Rolfe*, 136 N.H. 294 (1992). Also, in the event the estate planning process involves flat fee charges, the drafting attorney need be mindful of the change in Rule 1.15(d) requiring that withdrawal of client funds may occur "only as fees are earned or expenses incurred"; see*New Hampshire Comment* for Rule 1.15.

[2] The minimum requirements for legal competence under Rule 1.1(b) include:

(1) specific knowledge about the field of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest."

[3] Rule 1.4. Client Communications provides as follows:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

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

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

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

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

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

[4] Rule 2.1., "Advisor" provides as follows:

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

[5] Rule 1.7., "Conflicts of Interest" provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

[6] Comment 8 of the ABA Model Rules, Rule 1.8, provides as follows:

> "[8] This Rule [Rule 1.8] does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position."

[7] "Informed Consent" as defined under Rule 1.0 (e) "denotes the agreement by a person to a proposed course of conduct [nominating the client's attorney to act as a fiduciary in the client's document] after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." If a

client's informed consent is confirmed in writing, it should include the substance of that discussion regarding fiduciary choices, and the ultimate selection by the client of the attorney, as is required under Rule 1.4, and discussed above.

[8] Rule 1.6., "Confidentiality of Information" provides as follows:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to 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 interests or property of another; or
> >
> > (2) to secure legal advice about the lawyer's compliance with these Rules; or
> >
> > (3) to 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
> >
> > (4) to comply with other law or a court order.

[9] Rule 1.8(a) provides as follows:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Ethics Committee Advisory Opinion #2011-12/7
Limitations on Client Gifts to a Lawyer

By the NHBA Ethics Committee
April 11, 2012

RULE REFERENCES:
Rule 1.8(c)
Rule 1.7
Rule 1.7(a)(2)
Rule 1.7((b)(4)
Rule 1.0(f)
Rule 1.0(b)
Rule 2.1

SUBJECTS:
Client Gifts to Lawyer
Conflict of Interest
Informed Consent
Confirmed in Writing

ISSUES PRESENTED:

What ethical guidelines or limitations apply when a lawyer is asked by a client to benefit either the lawyer or the lawyer's family by a present or testamentary gift?

Factual Background: Estate planning lawyers, especially in smaller New Hampshire communities, may be called upon by their clients when drafting client wills and trusts to include provisions that may benefit the drafting lawyer or that lawyer's family. In this situation, following a recent health scare, a long standing client is now focusing on estate planning matters. During discussions with the lawyer drafting a revocable trust for the client, the client desires to provide for certain distributions of money and items of tangible personal property from an estate valued at roughly 3 million dollars that possibly could benefit the lawyer or her family. Over the last twenty years, the lawyer has assisted the client with estate planning, business matters and a myriad of other assorted legal issues affecting the client and his family. In fact, the client's brother is married to the lawyer's daughter. The client is a long-standing board member for the local hospital, in which both client and the lawyer serve on the endowment committee to steer a major campaign (of which the lawyer is the chair). In this context, the client desires to make the following testamentary and lifetime gifts:
Scenario 1: Client desires to leave in his trust a recently purchased sports car to the lawyer's son-in-law (and the client's brother).

Scenario 2: Client desires to leave in his trust a valuable painting to the lawyer's daughter (and the client's sister-in-law).

Scenario 3: In appreciation for all the work provided over the years, client desires to give the

lawyer tickets to the Palace Theater and $200 for a nice dinner out for the lawyer and her husband.

Scenario 4: Client desires to leave in his trust $50,000 to the hospital's endowment fund for general use purposes.

ANALYSIS:

Guidance concerning gifts from a client is found in Professional Conduct Rule (hereafter "Rule") 1.8(c), that states as follows:
"(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship."

This prohibition is triggered either through a solicitation by the lawyer (not involved in this situation) or the lawyer's preparation of an instrument containing a substantial gift, which clearly includes the lawyer's drafting of client's revocable trust. Quite clearly Rule 1.8 (c) prohibits the lawyer from including any provision in the trust that would provide any substantial gift directly to the lawyer drafting the trust unless the lawyer is related to the client.[1]

Scenario 1: The intended future gift of the sports car to the lawyer's son-in-law certainly could be construed as a potentially prohibited transaction to a person related to the lawyer were it not for the fact that the son-in-law is also the client's brother. Rule 1.8(c) defines related persons to include persons who "maintain a close, familial relationship," as well as those related by blood to the lawyer or client. However, nothing in the Rule prohibits a lawyer from preparing a document that gives a client's assets to a person related to both the client and the lawyer. Thus, unless the client has an estranged relationship with his brother, he surely would be considered "a related person to the client" and therefore exempted from the application of this Rule.

Scenario 2: The intended future gift of the valuable painting to the lawyer's daughter is clearly prohibited since she is definitely a "person related to the lawyer." It is possible that the client's sister-in-law (married to client's brother) may enjoy the same status of a person "related to the client" as is intended under Rule 1.8(c). Such a finding, however, would require a factual analysis of the familial relationship between the client and his sister-in-law to determine whether the relationship is "close" and similar to other familial relationships listed in Rule 1.8(c), such as a spouse, child, grandchild, or grandparent; it should not be summarily assumed by the lawyer that a sister-in-law would enjoy that status.

Scenario 3 and Unsolicited Client Gifts: The unsolicited gift of the tickets and $200 for dinner is not controlled by a reading of Rule 1.8(c). Nevertheless, because a lawyer holds a position of trust and confidence when representing a client, the proposed transaction in Scenario 3 must be evaluated based upon applicable standards governing fiduciary relationships. ABA Comment [6] is instructive, stating in part:
"A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is

permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent..."

Substantial unsolicited gifts, however, will be closely scrutinized. *See, e.g., Restatement of The Law, The Law Governing Lawyers* (2000), §127 (2), which states:
"(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
(a) the lawyer is a relative or other natural object of the client's generosity;

(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or

(c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice."

The rationale for this, as stated in Comment b. to Section 127, is that any valuable gift to the lawyer "invites suspicion that the lawyer overreached or used undue influence." *See also* ABA Comment [6] to Rule 1.8 articulating the concerns of "overreaching and imposition on clients" which may accompany a lawyer's receipt of a substantial gift from a client. Comment f. to Section 127 also provides helpful guidance in determining what constitutes a "substantial" gift, which is evaluated based upon the relative wealth of the client. Thus, depending upon the facts, a $100 gift from a poor client may be considered substantial, whereas a $1,000 gift from a wealthy client may seem insubstantial. This Restatement section cites many cases in which unsolicited substantial gifts from a client to the lawyer were set aside as being unfair, or in which the lawyer was forced to disgorge any benefit received from such gift. See also, those cases and other authority cited in *The American College of Trust and Estate Counsel Federation (ACTEC), Commentaries on the Model Rules of Professional Conduct* (4th Ed. 2006), Annotations to Rule 1.8 ("Gifts to Lawyer"), pages 114-117. The ACTEC Commentary to Rule 1.8 (Ibid, at page 112) also aids in assessing the "substantially of a gift" by indicating it "is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client *including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts.*" [emphasis added]

In this particular scenario, however, since this is an unsolicited gift of one-time theatre tickets and a dinner by a fairly wealthy client to his long time lawyer and friend, it would seem the unsolicited gratuity would be considered an insubstantial gift, and therefore, not prohibited either by Rule 1.8(c) or other law pertaining to gifts to lawyers.

Should a lawyer receive any substantial unsolicited gift from a client, either during life or by testamentary transfer, the best practice would be for the lawyer either to obtain, if feasible, Court approval before accepting such gift or secure the consent of all other beneficiaries or devisees. In a probate proceeding, this could be obtained by the lawyer filing a motion to validate the gift as being fair under the circumstances and not the product of undue influence or fraud. In a trust context, this similarly could be handled by an appropriate Nonjudicial Settlement Agreement under RSA § 564-B:1-111, or by requesting a specific order from the Probate Court affirming the same points, *e.g.*, RSA §§ 564-B:2-201(c), -203(a).

Scenario 4: The intended gift to the hospital clearly is nothing that benefits the lawyer or her

family directly. Therefore, as long as the testamentary gift of $50,000 is not the product of solicitation or encouragement on the part of the lawyer, preparing a trust that includes the gift is not prohibited under Rule 1.8(c). Because of the lawyer's direct and close involvement with the hospital, however, this intended gift must be closely scrutinized under Rule 1.7. As chair of the endowment committee, the lawyer has fiduciary responsibilities to the hospital as well as a personal interest in furthering the endowment committee's success. These personal and fiduciary connections to the hospital, as the intended donee of the client's gift, certainly present "a personal interest of the lawyer" and "responsibilities to...a third party" that would constitute a concurrent conflict of interest under Rule 1.7(a)(2). In analyzing this issue the lawyer should further be mindful of the application of New Hampshire's "harsh reality" rule, as is discussed extensively under the Ethics Committee Comment to Rule 1.7.

This "harsh reality" test effectively establishes a two-step process in proceeding under a Rule 1.7 analysis. The first step is whether a disinterested, objective lawyer reasonably believes that an existing concurrent "conflict of interest" (in this situation the lawyer's own personal interest in furthering the objectives of the hospital's endowment committee) actually can be waived by the client in the first instance. Only after satisfying that first step may the lawyer then seek to accomplish the second step, which is to obtain the client's informed consent. It is important to keep in mind, however, that the first step of this analysis always is reviewed after the fact, when something has gone wrong, by a disinterested lawyer, and **not** through the subjective lens and belief of the lawyer actually making the initial decision to proceed with the representation. It should also be noted that in Maryland's Ethics Op. 2003-08 (2003), that Committee concluded that a lawyer on a church legacy committee may **not**prepare wills for church members who wish to bequeath property to the church. That Committee took the position that the drafting lawyer's membership on the church legacy committee impeded the lawyer's independent professional judgment and ability to render candid advice (under Rule 2.1), thus prohibiting the lawyer from forming a reasonable belief that representation of fellow church members would not be "adversely affected." This Committee, however, does not conclude that mere membership on an endowment committee of a hospital benefitting under a client's estate plan creates such a concurrent conflict of interest that would, in all situations, prohibit the lawyer from seeking client consent in compliance with Rule 1.7(b).

Accordingly, the lawyer could only proceed to draft the provision for the client's bequest to the hospital's endowment fund after fully discussing the potential conflict with the client and obtaining the client's informed consent as required under Rule 1.7(b)(4). So while the lawyer is not prohibited from this transaction, care must be taken that the lawyer has sufficiently disclosed all "material risks of and reasonably available alternatives to the proposed course of conduct" (*see*, definition of "informed consent" provided in Rule 1.0(e)). It is important to be mindful that Rule 1.7(b)(4) requires that such informed consent be "confirmed in writing" as is defined in Rule 1.0(b).

While Rule 1.7 does not require the client to sign and acknowledge the informed consent, certainly the best practice is to do so.

SUMMARY:

In conclusion, however innocuous a client's request may be to have the lawyer accept a gift or draft legal documents that could be construed to benefit the lawyer or the lawyer's family, each transaction must be carefully scrutinized under the above Rules of Professional Conduct and law pertaining to clients making gifts to lawyers.

ENDNOTES:

[1]"New Hampshire's Supreme Court addressed Rule 1.8(c) violations in two attorney disciplinary cases. The lawyer in *Kalled's Case*, 135 N.H. 557 (1992), pleading ignorance of Rule 1.8(c), and after undertaking several other egregious Rule violations in addition to preparing instruments awarding the lawyer substantial gifts, was disbarred. The Court in *Whelan's Case*, 136 N.H. 559 (1992), determined that the respondent/lawyer did not violate Rule 1.8(c), through imputation under Rule 1.10, since he had no participation in drafting the will that benefited another lawyer in his firm; this was decided prior to New Hampshire's adoption of Rule 1.8(k) (effective January 1, 2008).

Ethics Committee Advisory Opinion #2011-12/4
Foregoing Professional Conduct Complaints

By the NHBA Ethics Committee

RULE REFERENCES:
NHRPC 1.6
NHRPC 1.7(a)
NHRPC 1.8(h)
NHRPC 8.3(a)

SUBJECTS:
Confidentiality
Conflicts of Interest
Settling Malpractice Claims
Reporting Misconduct

ANNOTATIONS:

A lawyer may not condition a settlement of a dispute between the lawyer and the client upon an agreement that the client will not file a professional conduct complaint against the lawyer.

Permitting such settlements is prohibited because the ethics rules serve a purpose beyond rectifying a particular wrong to an individual client. The rules are designed to protect the bar and public generally.

A question exists about whether a lawyer-mediator may be subject to discipline for failure to report a professional conduct violation by another lawyer if the violation rises to the thresholds set forth in NHRPC 8.3(a).

QUESTION PRESENTED:

In a settlement of a dispute between a lawyer and a client, may a lawyer condition the settlement upon an agreement that the client will not file a professional conduct complaint against the lawyer?

FACTS:

A lawyer-mediator is mediating a dispute between a lawyer and that lawyer's client involving the fees charged and the work performed by that lawyer in a matter. The lawyer and client have generally reached agreement on the resolution of all issues. However, the lawyer insists that as a condition of settlement, the client must agree not to file any professional conduct complaints against the lawyer.

ANALYSIS:

It may come as a surprise that there are no rules of professional conduct that deal directly with this issue. Perhaps the closest rule is NHRPC 1.8(h), which prohibits lawyers from *prospectively* limiting a lawyer's liability for malpractice unless the client is independently represented in making such an agreement. It also prohibits a lawyer from settling a claim or potential claim for malpractice liability with a former client or unrepresented client unless that person is advised in writing of the desirability of seeking the advice of independent counsel, and is given the opportunity to do so.

However, for those courts and ethics committees that have examined this issue, the consistent finding is that settlement of a fee or malpractice dispute can never be conditioned on the client's promise not to file a grievance against the lawyer or report the lawyer's misconduct to the appropriate disciplinary authority. *See* ABA/BNA Lawyers Manual on Professional Conduct, §51:114. *See People v. Moffitt*, 801 P.2d 1197 (Colo. 1990); *In re Freeman*, 835 N.E.2d 494 (Ind. 2005); *In re Wallace*, 518 A.2d 740 (N.J. 1986); *In re Goldberg*, 442 N.Y.S.2d 551 (N.Y. App. Div. 1981); *State ex rel. Oklahoma Bar Ass'n v. Colston*, 777 P.2d 920 (Okla. 1989). *See also* Arizona Ethics Op. 91-23 (1991); District of Columbia Ethics Op. 260 (1995); North Carolina Ethics Op. 84 (1988). This position holds true even if the lawyer believes the grievance to be unjustified. Connecticut Informal Ethics Op. 97-13 (1997).

The reasoning behind such rulings is that the ethics rules serve a purpose beyond rectifying a particular wrong to an individual client. The rules are also designed to regulate the bar and protect the public generally. *See* Michigan Informal Ethics Op. RI-257 (1996) (agreement may not provide that disputes over lawyer's professional conduct will be submitted to alternative dispute resolution). *See also In re Wallace, supra.* ("Public confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants.") At least one court has characterized such conduct as prejudicial to the administration of justice. *See In re Freeman*, 835 N.E.2d 494, *supra.* Thus, in resolving a dispute between a lawyer and a client, the lawyer should not propose a release of misconduct claims.

One other issue stemming from this inquiry is of note. If one of the issues in dispute involves conduct by the lawyer proposing a release of claims which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, a question arises as to whether the lawyer-mediator could be exposed to disciplinary action for failure to report that lawyer's misconduct. NHRPC 8.3(a) requires that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must report that lawyer to the Attorney Discipline Office. The failure to do so is a professional conduct violation itself. There are exceptions to this requirement if the information is otherwise protected by professional conduct rules pertaining to confidentiality (NHRPC 1.6), as well as for work by lawyers on the

New Hampshire Bar Association Ethics Committee and the New Hampshire Lawyers Assistance Committee. See NHRPC 8.3(c). However, none of those exceptions applies here. Likewise, there are court rules and generally accepted principles concerning mediation which require that mediators maintain the confidentiality of all information obtained in mediation unless otherwise required by law. *See e.g.* ABA Model Rules of Conduct for Mediators, Standard V, Confidentiality (adopted September 8, 2005) and Superior Court Rule 170(E)(1). As of the issuance of this opinion, there has been no determination by the New Hampshire Supreme Court or the Professional Conduct Committee analyzing the interplay of NHRPC 8.3(a) upon lawyer-mediators.

CONCLUSION:

A lawyer may not condition a settlement of a dispute between the lawyer and the client upon an agreement that the client will not file a professional conduct complaint against the lawyer.

Ethics Committee Advisory Opinion #2014-15/10
Joint Representation of Clients in Estate Planning

By the NHBA Ethics Committee

RULE REFERENCES:
Rule 1.0(e)
Rule 1.4
Rule 1.6
Rule 1.7
Rule 1.16

Issues Presented:
What ethical guidelines apply when an attorney is asked to represent two clients jointly in the preparation of estate planning documents? What type of informed consent, if any, must the lawyer obtain before proceeding?

Factual Background:
awyer is asked to meet with Mr. and Mrs. Smith, a married couple, to discuss preparing estate planning documents designed to manage the couple's healthcare and financial decisions. The couple has been married for thirty years and wants to create a joint revocable trust that benefits each other during life, followed by their mutual children after the second spouse's death. Mrs. Smith discloses during the initial meeting that, in addition to planning for shared marital assets, she wants to direct that a modest financial asset owned by her individually be made payable on her death to a charity. Nothing during the initial fact-gathering raises a concern for the lawyer that the interests of either spouse might limit the lawyer's ability to prepare a joint estate plan for the couple. At the end of the meeting, the couple wants to engage the lawyer to draft their documents.

Analysis:
One of the most challenging aspects of an estate planning practice involves the joint representation of clients. Before entering into joint representation, a lawyer must identify any potential conflicts of interest between the clients, and clearly communicate the nature of the client relationship and the lawyer's ethical obligations. Evaluating potential conflicts of interests requires the lawyer to assess the type of representation, the confidentiality protection afforded to information received by the lawyer, the duty of loyalty owed to each client, and either the existence or risk of adversity between the clients or a material limitation on the lawyer's ability to represent all clients involved. The lawyer must ensure the clients understand the confidentiality considerations and the fact that potential conflicts may arise which could change the lawyer-client relationship. Furthermore, the lawyer should obtain the clients' informed consent to share information at the outset of the representation.

Joint Representation Requires Informed Consent. The New Hampshire Rules of Professional Conduct (referred to collectively as the "Rules" and individually as a "Rule") are written as pertaining to a single client and the only discussion of "common representation" is contained in the ABA comments to Rule 1.7 [*see* comments 29 - 33]. Embarking on the joint representation of

two clients in connection with the same subject matter, especially in an estate planning context, requires a careful analysis of the lawyer's obligations to each client.

The majority of estate planning cases that involve document preparation for new clients with common objectives are free of conflicts of interest. In this factual scenario, there is nothing present that creates a direct adversity between the clients, nor any significant risk that the lawyer's representation of a client will be materially limited by the other client's objectives. Accordingly, at least at the outset, there is no Rule 1.7(a) concurrent conflict of interest of which the lawyer must be concerned, and no informed consent is required under Rule 1.7(b). However, informed consent should be obtained under Rule 1.6(a) before proceeding with the joint representation.

Preserving the confidentiality of client information is a cornerstone of the lawyer-client relationship. It is critical that clients involved in joint representation, such as spouses engaging one lawyer for estate planning, understand the lawyer's duties with respect to disclosure and non-disclosure of client-related information.

Since the lawyer must preserve the confidentiality of two clients involved in common representation, it is paramount that the lawyer's duties be communicated clearly to both clients. While neither the New Hampshire Supreme Court, nor this Committee, has opined on the issue of implied consent to share confidential information in a joint representation context, authority exists in other jurisdictions for the proposition that jointly represented clients do not impliedly relinquish the protections afforded under Rule 1.6 merely by agreeing to engage one lawyer to provide joint representation in the same matter. *See* Georgia Bar Assoc. Formal Advisory Op. 03-2 (Sept. 11, 2003); and Professional Ethics of the Florida Bar, Op. 95-4 (May 20, 1997). Accordingly, we conclude that until the New Hampshire Supreme Court opines on the issue, a lawyer should obtain the "informed consent" of both clients to allow all information protected under Rule 1.6(a) to be shared between the clients in order to continue with the joint representation of clients in estate planning matters.[1] While this Rule does not require the clients' informed consent to be "confirmed in writing," as does Rule 1.7(b), it certainly is recommended that written confirmation be obtained.

Given the importance of having all requisite information available to effectuate the clients' goals when preparing estate planning documents for a couple, a free flow of information among the lawyer and the clients is essential to ensure the clients' objectives are accomplished and the lawyer complies with the Rules throughout the course of the representation. The best practice for estate planning practitioners is to require clients to acknowledge, in writing, that information will be shared freely between the clients and lawyer during the joint representation. Such written acknowledgement establishes an unambiguous understanding, at the outset, as to whom disclosure of information is permitted and when.

Compliance with Rule 1.4. The lawyer must keep both clients reasonably informed about the representation under Rule 1.4(a)(3). A client's failure to authorize a free exchange of information with a joint client could place the lawyer in the difficult position of being in possession of information that cannot be used to further the other joint client's interests. In fact, the interplay

between the need to obtain informed consent under Rule 1.6(a) and compliance with Rule 1.4 is emphasized in the ABA Comment [31] to Rule 1.7:

> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

Rule 1.7 Concerns. It is not a *per se* conflict to represent two clients in connection with a joint estate plan. Concurrent representation of spouses in estate planning generally is non-adversarial and it often is more efficient and economical for spouses to engage one lawyer to assist with all aspects of a common plan. An alignment of interests may not always be the case. Sometimes joint clients involved in estate planning have common, but not identical goals, and it is important for the lawyer to determine at the outset of the representation whether (1) any such divergent goals exist and, if so (2) does the divergence rise to the level of a conflict of interest under Rule 1.7(a) that may or may not be waived through written informed consent under Rule 1.7(b).

A concurrent conflict of interest exists under Rule 1.7(a) if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." When evaluating at the outset whether joint representation of spouses in estate planning triggers a conflict under Rule 1.7(a), the lawyer must gauge the likelihood that the clients' interests currently differ or reasonably may diverge during the course of joint representation. If so, the lawyer must decide whether such difference or divergence materially would interfere with the lawyer's independent judgment and evaluation of estate planning alternatives that otherwise could be pursued for any one spouse. *See* Rule 1.7(a)(2) and ABA Model Rule Cmt. 8; *see also generally* N.H. Bar Assoc. Ethics Comm. Advisory Op. No. 1988-89/6 (Nov. 10, 1988) (advising a lawyer to weigh all factors carefully in order to determine whether a lawyer's independent professional judgment would be compromised by the dual representation of a husband and wife who plan to live separately but not divorce).

When assessing joint representation of clients, the lawyer should keep in mind that the failure to identify a concurrent conflict of interest under Rule 1.7, or obtaining informed consent to what later is determined to be a non-waivable conflict, is evaluated under New Hampshire's "harsh reality" test. The harsh reality test is based on an objective standard under which the lawyer should inquire "whether, if a disinterested lawyer were to look back at the inception of the representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent." *See generally* N.H. Bar Assoc. Ethics Comm. Formal Op. No. 1988-89/24 (Aug. 10, 1989).

Additionally, the existence of a conflict of interest must be evaluated throughout the entire course of any joint representation. For example, informed consent would be needed if (1) the interests of the clients diverge, and they now want to benefit different people with different plans, (2) each client disagrees as to the other's choices of people to act in various fiduciary capacities, (3) the clients no longer wish to use a joint revocable trust or (4) one party asks for information to be withheld from the other party. When new facts develop, the lawyer must assess whether a conflict exists under Rule 1.7(a), whether lawyer may continue to represent both and, if so, whether a consent is required and able to be provided under Rule 1.7(b). Under the facts described in this opinion, there are no conflict of interest concerns that would trigger the need for a detailed analysis under Rule 1.7. The fact that Mrs. Smith wishes to make a separate, modest charitable bequest, which was disclosed to the other spouse raises no adversity of interests and does not constitute a planning nuance that would materially limit the lawyer's ability to represent Mr. Smith.

Potential Withdrawal from Joint Representation. If the jointly represented clients later develop significantly divergent goals or become estranged during the joint representation, then the lawyer may need to terminate the representation of both clients if effective informed consent is not feasible under Rule 1.7(b). Notwithstanding the clients' clear agreement to share all client-related information at the outset of the representation, if one spouse communicates information to the lawyer that is relevant to the overall estate plan, but refuses to allow the lawyer to disclose the information to the co-client, withdrawal will be mandated if the inability to disclose information would impair the lawyer's duties under Rule 1.4(a)(3) to the co-client (See ABA Comment [31] to Rule 1.7). If withdrawal from joint representation is deemed necessary, the withdrawal must be accomplished in a manner that protects both clients' interests, and the lawyer must continue to protect client-related information even after termination of the representation. Rule 1.16. Additionally, if one joint client asks that material information be withheld from the other client, the lawyer who reached an agreement with the clients, and obtained informed consent in conformance with Rule 1.6(a) to share information, has a duty to disclose the information to the fellow client.

Alternatively, if a lawyer fails to obtain the requisite informed consent under Rule 1.6(a) at the outset of the joint representation, the lawyer is prohibited from sharing any information that a client has requested be kept secret. In this latter scenario, the lawyer should attempt to obtain permission from the disclosing client to share information and explain the ramification of any resulting denial, specifically that a withdrawal from representation of both clients would be necessary. If disclosure was not authorized at the outset of the joint representation, the lawyer also should consider whether a "noisy withdrawal" will be warranted, after evaluating the nature of the confidence and the harm that could result if the confidence is not disclosed.[2]

Best Practices for Obtaining Consent. It is essential that the lawyer develop procedures to ensure clear and unequivocal client expectations as to how the lawyer will handle joint representation of clients. Best practices dictate that, at minimum, several issues must be discussed at the initial meeting before the lawyer prepares documents for a joint estate plan, including the following: (1) there will be full disclosure of all client-related information between the lawyer and the joint clients; (2) no secrets shall be kept by the lawyer from either client; (3) throughout the course of the joint representation, both clients must concur with the overall planning goals, despite the fact

that each could, with consent of the other and consistent with the Rules, deviate from original objectives; (4) should differences arise between the clients' objectives that reasonably cannot be resolved, the lawyer may be forced to withdraw from representing both clients; and (5) each client has the right to request a copy of the client file following termination of the joint representation. Although not mandated by the Rules, from a risk management standpoint and to ensure client expectations are clear, the best practice is to obtain the clients' informed written consent to the disclosure of all information to both clients involved in the joint estate plan and what will be communicated by the lawyer between the joint clients.

ENDNOTES:

[1]To obtain "informed consent," the lawyer must share "adequate information and explanation" with both clients of the "material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0(e).

[2]For example, a "noisy withdrawal" might involve the attorney disclosing to the wife that information was disclosed by the husband with specific instructions not to share it with the wife, and the attorney is thereby forced to withdraw from representing either husband or wife. See for example *A v. B*, 726 A.2d 924, 158 N.J. 51 (1999).

Ethics Committee Advisory Opinion # 2004-05/1
Non-Recourse Lawsuit Financing

By the NHBA Ethics Committee
April 2005

RULE REFERENCES:	**SUBJECTS:**
NHRPC 1.6	Conflicts of Interest
NHRPC 1.7(b)	Harsh Reality Test
NHRPC 1.8(a)	Confidentiality
NHRPC 1.8(e)	Business Transactions

ANNOTATIONS:

Although participation by an attorney with the client in lawsuit financing programs is not unethical *per se*, attorneys are encouraged to exercise substantial caution in involving clients in such programs and participating with them to obtain such funding.

Before participating in any non-recourse lawsuit financing program, the lawyer must be absolutely convinced that it is in the client's best interests and that the client can clearly articulate how and why such interests are so well-served.

Lawyers must discuss all aspects of such financing with the client, including available alternatives, the costs and impacts of such financing, the ramifications on a potential recovery and other important considerations.

Information provided to the non-recourse lawsuit funding source or broker could be voluntarily or involuntarily disclosed to the disadvantage of the client. Likewise, there is a possible waiver of the attorney-client privilege through the disclosure of information about the case to the third party broker or financing source seeking to extend such financing.

If non-recourse lawsuit financing is used for the payment of a lawyer's fees and costs, it may well be cast as a business transaction between an attorney and client. NHRPC 1.8 (a) not only requires full disclosure and informed consent by the client and substantial certainty that participation in such financing is in the best interests of the client, but also requires counsel to afford the client a reasonable opportunity to seek review by independent counsel, a written consent and overall fairness – when viewed from the client's eyes at the time that such financing is sought.

QUESTION:

May an attorney participate in a program in which a third party provides financing to assist clients with legal fees and expenses, and living costs?

FACTS:

A number of companies have sprung up across the nation which provide non-recourse funding to clients - usually plaintiffs -- involved in lawsuits. That funding assists those plaintiffs in paying for legal fees and expenses, as well as living costs. Most of these programs seek to provide funding to clients involved in personal injury and medical malpractice cases, although it appears from advertising accompanying the programs that funding is available in a variety of different types of tort cases. Under the majority of programs, the client is usually alerted to such funding sources by his or her attorney. The companies generally prefer to fund cases that have been open for six months or longer - the logic being that some discovery has been developed to permit a sound evaluation of the case. The interested client then provides information to either a broker who works to link potential clients with a funding company source or the company itself. That information usually consists of a description of the incident giving rise to a claim and the client's injuries and damages. The client also asks his or her attorney to submit information that is more extensive - including medical records and expenses, treatment regimens and status, insurance limits, employer information, the fee structure between the attorney and the client, the prospects and timing of settlement, the existence of other liens against any potential recovery, the attorney's evaluation about the client and the case,[1] and the impediments to settlement. This often involves a detailed production of materials, pleadings, depositions, accident reconstruction records, medical records and specials, and other similar materials from the client's file.

If funding is approved, then funds are advanced against the client's potential recovery. If there is no recovery, then no repayment is sought. The programs state that the advance is not a "loan" and that any recovery is paid to the funding source *after* the payment of attorney's fees and litigation costs. Between the date of funding and the resolution of the case, the client can be charged a monthly fee based on the amount advanced. Alternatively, the client might agree to a higher percentage of the potential recovery or build the repayment of the monthly fee into the recovery. The cost to the client is usually dependent upon the risk that a recovery will ultimately result, with the cases in the highest risk category bearing the highest fees and costs. As one broker involved in such programs put it, "this is not cheap money, but it is usually the only way for the plaintiff to get cash to keep their case viable".[2]

Clients are not permitted to make any further assignments of the potential proceeds from their claim. They also grant a security interest to the funding source and represent that there are no prior assignments or commitments relating to such funding, except attorney's fees, costs and properly perfected liens which have already been disclosed. The client is also required to waive any defenses to payment. In one instance, the client agrees to an out-of-state venue in the event of enforcement proceedings, and to liquidated damages in the amount of two times the advance if there is a breach. The client is also required to issue an irrevocable letter to his/her attorney instructing that payment be released to the funding source after payment of legal fees, costs and expenses, and properly perfected prior liens. Finally, the client executes a release which permits the funding company to obtain records and other materials, reports and documents relevant to the case in the future, although the companies state that they exercise no control, input or influence over the conduct of the client's case.

RESPONSE:

At the outset, we offer two observations. First, it is not within this Committee's purview to

express opinions about the legality of a lawyer's conduct under state or federal laws, statutes, regulations and codes. Nonetheless, lawyers should be cautious about the legality of such programs under the state's banking and consumer protection laws, as well as common law notions of champerty and maintenance. Second, we note for guidance that a number of other states have examined such non-recourse lawsuit financing, and have cautiously determined that attorneys may participate in such programs.[3]

For our part, this ethics inquiry encompasses many familiar principles that this Committee visited in 1994 in an opinion dealing with LAWCARD. *See Confidentiality and Conflict of Interest: Use of LAWCARD to Finance Legal Fees*, #1993-94/18 (November 17, 1994) (hereinafter the "LAWCARD Opinion"). In that program, a national company known as LAWCARD invited New Hampshire lawyers to participate in a program that assisted clients in paying a lawyer's legal fees. If LAWCARD accepted the client, it would then pay the lawyer's legal fees and expenses upon receipt of an invoice, and in return, obtain an assignment of the lawyer's right to collect such fees and expenses. Interest on the outstanding balance was charged based on the risk of recovery. In the instance of LAWCARD, advances by the company were truly loans in the sense that amounts advanced had to be repaid by the client irrespective of recovery.[4]

In that opinion, the Committee evaluated the LAWCARD program against the professional conduct rules related to confidentiality and conflicts of interest. *See gen.* New Hampshire Rules of Professional Conduct (NHRPC) 1.6, 1.7 and 1.8(a). Although the Committee found that a portion of the program was unethical - dealing with information and opinions that the attorney had to provide regarding the collectability of the financing, it stated that while an attorney may not encourage a client/borrower to apply for a specific, identifiable credit program, an attorney may ethically participate with the client/borrower in seeking such financing. *Id.*

We reach a similar conclusion in non-recourse, lawsuit financing. That is, the Committee finds that although participation by an attorney with the client in such financing programs is not unethical *per se*, attorneys are encouraged to exercise substantial caution in involving clients in such programs and participating with them to obtain such funding. Attorneys should examine each case and client individually to determine whether, in each instance, participation and involvement is warranted, given the ethical considerations outlined below.

RULE 1.7

As recognized in the LAWCARD opinion, the first area of examination is the conflict of interest rule - NHRPC 1.7. This is because "(i)t seems beyond question that the (non-recourse lawsuit financing programs) present, at least, the question of a conflict between the client's and the lawyer's interests and, therefore, requires scrutiny under the rule". LAWCARD Opinion at p. 2.

Rule 1.7(b) provides:

> "b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation and with knowledge of the consequences ...."

NHRPC 1.7(b)

Thus, under a 1.7(b) analysis, a lawyer must first determine whether, in the context of the present inquiry, the decision to involve a client in a non-recourse lawsuit financing program might be adversely affected by the lawyer's responsibilities to a third party or to the lawyer's own interests. If and only if the lawyer satisfies this first inquiry can the lawyer then inquire of the client whether participation in such financing is warranted.

For years, this Committee has adopted a "harsh reality" test in measuring when it is appropriate to seek consent of a client to a possible conflict. This position has been reflected not only in a number of Committee opinions, but also in the way in which the New Hampshire Supreme Court has viewed conflicts analysis. *See* discussion of opinions and cases at LAWCARD Opinion, pp.3-4. Under this test, "a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would the lawyer seriously question the wisdom of this representation or question whether there had been full disclosure to the client prior to obtaining the consent". LAWCARD Opinion at p. 3; *see also* other opinions cited therein.

Utilizing this analysis, it is easy to conjure up instances where participation and involvement in non-recourse lawsuit financing would be unethical. For example, if the attorney sought to refer a client to a non-recourse lawsuit financing program to provide funding to assist that attorney's own personal cash flow demands or business needs, or to pay that attorney fees and costs which the attorney originally agreed to defer but now wants (or needs) to collect, then involvement and participation in the program would be impermissible. Likewise, if the irrevocable letter from the client instructing payment to be released to the funding source after legal fees, costs, expenses and other properly perfected prior liens is constructed to oblige counsel to pay irrespective of legitimate disputes between the client and the funding source, an irreconcilable conflict exists. At the other end of the spectrum, the analysis becomes more difficult if, for example, the client himself or herself discovered the program and asked the attorney for advice about applying for such financing. If, for example, the client fully understood the costs of the financing, the conditions under which such financing would be extended, the disclosure about the case which the attorney would be asked to undertake, and the real impacts on any potential recovery the client might achieve, it would be difficult to bar attorneys, based on professional conduct rules, from participating. This is true, even if the lawyer were to receive some benefit from the extension of such financing, such as a client's voluntary reimbursement of litigation expenses or the receipt of monies to pay attorney's fees in costly litigation in which the attorney and client agreed to an hourly fee. It would appear, however, that before participating in any non-recourse lawsuit financing program, the lawyer must be absolutely convinced that it is in the client's best interests and that the client can clearly articulate how and why such interests are so well-served.

If a client is "on the fence" about participating, an attorney should be mindful that under the New

Hampshire Rules of Professional Conduct, an attorney should only seek consent to a potential conflict once the client has "actual knowledge of the consequences that could occur as a result of the lawyer's divided loyalty". *See* New Hampshire Comments to NHRPC 1.7 discussing the "informed consent" standard of disclosure in NHRPC 1.7(b)(2). Thus, merely providing some form of explanation about the program is insufficient, if the client does not fully understand the consequences -- especially if the lawyer will receive some benefit from the extension of such financing. As paraphrased from the LAWCARD Opinion, this standard seems to present sound practical considerations to an attorney pondering involvement in such financing programs since the context in which such involvement might be contemplated is likely to occur in the charged atmosphere of a lawsuit that is several months old and in the throes of discovery and substantial investments of time. LAWCARD Opinion at p. 5.

Thus, lawyers need to be careful in discussing all aspects of such financing with the client, including available alternatives, the costs and impacts of such financing, the ramifications on a potential recovery and other important considerations. If a lawyer is unable or unprepared to undertake such careful discussion, or the client is not, for any reason, including economic duress, able to fully understand and appreciate the lawyer's advice, then participation in such non-recourse lawsuit financing is unethical.

RULE 1.6 AND ATTORNEY-CLIENT PRIVILEGE

It is also important to note that in the context of explaining to the client the consequences of participation in non-recourse lawsuit financing, the client should understand that by virtue of the questions asked of attorneys about the case, the client must release the attorney from his/her obligations to keep information learned about the client and the case confidential as it applies to the funding source and/or broker. See NHRPC 1.6. The client must also understand that there may be no remedy if the funding source or broker voluntarily or involuntarily discloses this information to the disadvantage of the client at some later date, in spite of contrary assurances in the program's advertising and contracts,. Likewise, the client should understand that there is a possible waiver of the attorney-client privilege through the disclosure of information about the case to the third party broker or financing source seeking to extend such financing. While discussions of privilege go beyond the rules of professional conduct, attorneys must be sure the client is at least aware of the possible waiver through disclosure, and the potentially harmful consequences.

RULE 1.8

Two final considerations are in order - both of which arise under NHRPC 1.8. First, to the extent that a lawyer knows or has reason to know he/she will obtain some form of benefit, such as payment of fees and costs, through the client's participation in non-recourse lawsuit financing, such an arrangement could well constitute a "business transaction" between the lawyer and client.[5] Rule 1.8(a) prohibits business transactions between a lawyer and client or a lawyer's acquisition of an "ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are (i) fair and reasonable to the client, and (ii) agreed to by the client after consultation;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing to the essential terms of the transaction."
NHRPC 1.8(a).

One can easily see that this is a more rigorous standard than the conflict of interest analysis under NHRPC 1.7(b). Much like NHRPC 1.7(b), it requires full disclosure and informed consent by the client and substantial certainty that participation in non-recourse lawsuit financing is truly in the best interests of the client. But it also requires counsel to afford the client a reasonable opportunity to seek review by independent counsel, a written consent and overall fairness - when viewed from the client's eyes at the time that such financing is sought. The element of fairness should be viewed critically in instances where the lawyer will benefit from participation in non-recourse lawsuit financing, given some of the fees charged in such programs.

Finally, one must also be aware of NHRPC 1.8(e), which comes into play to the extent that such financing is used to pay for or underwrite, in whole or in part, fees and costs incurred by an attorney. That provision requires that although a non-recourse lawsuit funding source may be providing some or all of the capital needed to fund a lawsuit, the lawyer's duty of loyalty runs to the client - in spite of pressures that may be placed by the funding source to undertake different directions in the case because the client's risk turned out to be less advantageous than that which the funding source originally perceived.

CONCLUSION

The Committee is unable to determine that participation in non-recourse lawsuit funding is *per se* unethical. However, an attorney contemplating involvement in such programs must be very cautious in advising his or her client to engage in such funding. Only through thoughtful and careful counseling and disclosure to the client can an attorney avoid the ethical pitfalls that exist.

The Committee strongly recommends that any lawyer considering the involvement of his or her client in such programs should carefully review not only this opinion, but also the LAWCARD Opinion. That opinion can be found at .

Footnotes:

[1] One of the forms asks attorneys "what are your thoughts and feelings about your client and the client's case". This question is posed although in advertising, the attorney is told that he/she is not required to make any representations about the merits of the case or the value of the claim.

[2] One of the programs charged ten percent (10%) per month on any advance.

[3] *See e.g.Florida Bar Association, Opinion 00-3* (March 15, 2002); *Virginia State Bar Ethics Opinion 1155*(12/15/88); *Maryland State Bar Ethics Opinion, 89-15* (10/25/88); *New York State Bar Association, Opinion 666 (73-93)* (June 3, 1994); *Philadelphia Bar Association, Opinion 91-9* (May 1991); *South Carolina Bar Ethics Advisory Opinion 94-04; State Bar of Nevada, Formal Opinion No. 29* (8/7/03); *North Carolina State Bar 2000 Formal Ethics Opinion 4* (January 18, 2001); *New Jersey Supreme Court Advisory Committee of Professional Ethics, Opinion 691* (January 15, 2001). *But see Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d. 121 (2003) (relying on principles of champerty and maintenance); *State Bar of Michigan Opinion RI-321* (June 29, 2000).

[4] In the LAWCARD program, attorneys were also asked to opine that the attorney had no knowledge of facts that may result in an uncollectible account or unenforceable loan. Attorneys were also required to cooperate with LAWCARD in the investigation of the claim should the client asset a right not to pay in full. The Ethics Committee found this aspect of the program violative of NHRPC 1.6.

[5] This would be especially true if participation in non-recourse lawsuit financing was a condition of and built into the lawyer's fee agreement as a means to pay for the litigation.

Ethics Committee Advisory Opinion #2009/10-6
Settlement Agreements and Restrictions on the Right to Practice

By the NHBA Ethics Committee

RULE REFERENCES:
Rule 1.2
Rule 1.6
Rule 1.7
Rule 1.9
Rule 5.6

SUBJECTS:
Allocation of Authority between Client and Lawyer
Confidentiality of Information
Conflicts of Interest
Duties to Former Clients
Restrictions on Right to Practice

ANNOTATION:

Settlement agreements afford individuals the opportunity to resolve disputes quickly and with finality in order to avoid the uncertainty and expense of litigation. Settlements typically are private arrangements among disputing parties and, consequently, specific terms often are not public to avoid disclosure of confidential information or facts that would negatively impact a party. During the course of representation and, in particular, during settlement negotiations, an attorney is obligated to abide by the client's objectives and decisions, subject at all times to the Rules of Professional Conduct. One such rule is Rule 5.6(b), which prohibits an attorney from "offering or making" a settlement agreement that restricts the attorney's "right to practice."

QUESTION:

Does Rule 5.6(b) prevent an attorney representing a defendant in a civil suit from insisting in the settlement of the suit that the attorney representing the plaintiff refrain from disclosing publicly available information about the case?

SHORT ANSWER:

It would violate New Hampshire Rules of Professional Conduct Rule 5.6(b) for defense counsel to request, as a term of a settlement agreement, that plaintiff's counsel refrain from disclosing information concerning the suit that is public, if doing so would have the effect of restricting the right of plaintiff's counsel to practice law or the public's right to identify and retain qualified legal counsel.

ANALYSIS:

The process of reaching a mutually agreeable settlement of an ongoing controversy often requires negotiations between opposing parties and their counsel. An attorney's duties to a client during the settlement process are no different than those generally imposed by the Rules of Professional Conduct throughout the attorney-client relationship. For example, an attorney may not counsel or assist a client to engage in conduct the attorney knows is criminal or fraudulent or otherwise violates a Rule of Professional Conduct. In addition, Rule 1.2 (Scope of Representation) requires an attorney to abide by a client's decisions concerning the objectives of representation. That obligation, however, does not permit the attorney to engage in conduct that would violate another Rule of Professional Conduct.

During the process of resolving a client controversy, an attorney's obligations to a client may raise for consideration Rule 5.6 (Restrictions on Right to Practice). Rule 5.6(b) states:

A lawyer shall not participate in offering or making:

> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

When interpreting the interplay between Rule 1.2 and Rule 5.6(b), the American Bar Association Standing Committee on Ethics and Responsibility ("ABA") concluded that Rule 1.2 must be read as "limited by the provisions of Rule 5.6(b)," within the context of settlement negotiations. See ABA Formal Op. 93-371 (1993). The ABA relied upon several policy considerations to support the position that defense counsel could not offer as a settlement condition, nor could plaintiffs counsel agree, to refrain from representing current and future clients against the same mass-tort defendant. Such a condition would impose an impermissible restriction on the right of plaintiffs counsel to practice under Rule 5.6(b). *See id.*

- **Policy Considerations Underlying Rule 5.6(b)**

Formal Opinion 93-371 articulates three policy considerations underlying the Rule 5.6(b) restriction on settlement agreements. First, allowing an attorney to enter into a settlement agreement that limits an attorney's right to practice restricts the public's access to counsel who, by virtue of specific knowledge and experience, may be the most qualified for such representation. Second, a restriction on the right to practice may be motivated by an intent to "buy off" counsel, rather than resolve the controversy. Third, a restriction on the right to practice may place an attorney in a conflict position, pitting the objectives of a present client against the interests of future clients. *See id.; see also accord* ABA Formal Op. 00-417; *see generally*, Colorado Bar Assoc. Ethics Comm. Op. 92 (1993) (a settlement agreement should not be "a facade for creating an actual or potential conflict of interest between the settling claimant's lawyer and his or her non-settling clients, present or future"); and Professional Ethics of the Florida Bar, Op. 04-2 (2005) (citing the policy considerations set forth in ABA Formal Op. 93-371 as part of its 5.6(b) analysis). These policies provide a framework for analyzing the propriety of settlement restrictions which are distinguishable from, but instructive to, the inquiry before this Committee.

- **Absolute Ban on Future Representation**

A settlement agreement that seeks to impose a ban on an attorney's ability to represent other clients against the same settling defendant violates Rule 5.6(b). *See generally* ABA Formal Op. 93371. The Vermont Bar Association followed ABA Formal Opinion 93-371 and similarly found that defense counsel could not propose a settlement term that would obligate plaintiff's counsel to decline to represent future clients against the same defendant. *See*Vermont Bar Assoc. Advisory Ethics Op. 95-11 (1995) (citing ABA Formal Op. 93-371). A New Mexico advisory opinion also concluded that it was impermissible for plaintiff's counsel to agree to a settlement condition in a prison riot case that would prevent plaintiff's counsel from representing other clients with claims arising out of the same incident. See New Mexico Advisory Op. 1985-5 (1985) (noting that close scrutiny should be given to the motivation for seeking a restrictive settlement).

By prohibiting attorneys from offering or accepting a restriction on the representation of other clients, Rule 5.6(b) protects the rights of as-yet unknown claimants by preventing defense counsel from buying off plaintiff's counsel, thus ensuring that settlement agreements do not reduce the pool of experienced attorneys available to the public.*See generally*, ABA Formal Opinion 93371.

- **Indirect Restrictions on Future Representation**

Settlement agreements that impose restrictions on an attorney's right to practice other than a ban on the representation of other current or future clients still may violate Rule 5.6(b). For instance, a settlement agreement that prohibits plaintiff's counsel from using any information learned during a current controversy, especially against the same defendant, may prevent the attorney from representing future claimants in similar controversies. The ABA has opined that a bar on the "use" of information gained during the course of a representation could materially limit an attorney's effective representation of future clients and, thus, impair the attorney's ability to provide competent and diligent representation. Consequently, a bar on the use of such information would violate Rule 5.6(b). See ABA Formal Op. 00-417 (noting a client cannot waive, under Rule 1.7(b), the obligation to provide competent and diligent representation).

In addition to violating Rule 5.6(b), restricting an attorney's right to use information gained during the representation of a client raises significant practical problems. It would be difficult, if not impossible, for an attorney to compartmentalize or disregard all that has been learned during such representation or recall with any precision when the information was obtained. As a result, a bar on the use of information gained during a representation would expose an attorney to potential violations of the settlement agreement in virtually every subsequent representation involving similar legal or factual issues.

Moreover, an attorney who agrees to refrain from using information gained during the representation may create a conflict of interest between the interests of the current client and those of future clients with similar claims. *See*ABA Formal Opinion 00-417. To avoid a conflict of interest as well as the risk of violating a ban on use, the safest approach might be for the attorney to refrain from representing future clients whose controversies involve similar issues. But adopting such an approach would be tantamount to agreeing to a ban on future representation, which, as discussed, impermissibly limits the public's access to attorneys who, by

virtue of knowledge and independent judgment, may be the most qualified choice. *Id; see also* ABA Formal Op. 93-371 (the protection against conflicts between the interests of current and future clients is a key policy consideration underlying Rule 5.6(b)).

Although not presented with a specific settlement provision to construe, the Colorado Bar Association articulated its own test for evaluating settlement clauses under Rule 5.6(b). The issue "is whether it [the agreement] would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation." *See* Colorado Bar Association Ethics Opinion 92 (alteration in original). Building on prior opinions concerning the impermissibility of settlement agreements that imposed direct restrictions on practice, the Colorado opinion states that settlement agreements that indirectly serve to limit an attorney's ability to diligently represent other clients also run the risk of violating Rule 5.6(b).

A New Mexico Advisory Opinions Committee concluded that a settlement agreement that required plaintiff's counsel to surrender her entire file, including all attorney work product, to defendant's counsel for retention under seal constituted an impermissible restriction on the right to practice and a violation of the New Mexico Code of Professional Responsibility. See New Mexico Advisory Op. 1985-5. The Advisory Committee opined that if an attorney's work product would reveal similar strategies and weaknesses in future client cases, or if counsel could not recreate and use certain work product, then requiring work product to be sealed in the hands of opposing counsel as a condition of settlement would result in an impermissible, indirect bar on the attorney's ability to represent future clients. *Id.*

This Committee concludes that Rule 5.6(b) is intended to prohibit both direct and indirect restrictions in settlement agreements on an attorney's right to practice because that interpretation of the Rule serves the important policy consideration of protecting the rights of non-settling clients to identify and hire qualified counsel whose judgment and expertise remains free from restrictive, private settlement arrangements. Furthermore, preserving the ability of attorneys to utilize the legal experience and substantive knowledge gained during their practice in a manner that does not risk materially limiting responsibilities to a client under Rule 1.7 (Conflicts of Interest), nor disadvantage a former client under Rule 1.9 (Duties to Former Clients), deserves as much protection under Rule 5.6(b) as does preserving the public's right to choose the most qualified legal counsel.

- **Restrictions on the Disclosure of Information**

The inquiry before this Committee concerns the propriety of a settlement agreement, sought by defense counsel, which restricts the right of plaintiffs counsel to disclose publicly available information concerning the case. Circumstances may arise under which maintaining the confidentiality of settlement terms or the mere existence of a settlement agreement is impossible, particularly if a settlement requires court approval or the facts involved have become public. Absent such circumstances, it is not uncommon for the parties to condition a settlement upon the mutual agreement of parties and their counsel to refrain from disclosing certain information in which the parties have a privacy interest.

- **Restrictions on Disclosure of Confidential Information Concerning a Settlement**

Rule 5.6(b) precludes an attorney from offering or agreeing to a settlement agreement that restricts an attorney's right to practice. The rule is silent, however, with respect to an agreement that prohibits the disclosure of information about specific settlement terms or facts about the case. Nevertheless, it is well recognized that a settlement agreement may require parties and their counsel to preserve some level of confidentiality relating to the settlement. The ABA has concluded that offering or agreeing to condition a settlement upon an attorney's non-disclosure of particular information, like "the facts of the particular matter or the terms of the settlement[,]" does not violate Rule 5.6(b). *See* ABA Formal Op. 00-417 (alteration in original) (citing Colorado Bar Ethics Comm. Op. No. 92). In fact, a settlement agreement barring an attorney from disclosing information relating to the representation of a client is consistent with the general duty of confidentiality imposed during the attorney-client relationship under Rule 1.6,[1] which duty survives termination of the attorney-client relationship and is separately reinforced under Rule 1.9(c)(2).[1] *See generally* North Carolina 2003 Formal Ethics Op. 9.

Several states concur with the ABA's position that a settlement agreement may be conditioned upon the non-disclosure of certain information relating to the settlement. For instance, a settlement agreement restricting an attorney's ability to disclose information regarding the settlement itself and the terms of a release in a securities case, to all but specific individuals and government agencies, was found to be permissible under Florida's version of Rule 5.6(b). *See* Florida Ethics Op. 02-2 (2005). The Florida Ethics Committee commented on the limited nature of the confidentiality clause being upheld, noting that it "makes only the terms of the settlement and release itself confidential [and] [s]uch confidentiality clauses have typically been determined not to violate ethics rules." *Id.* (alteration in original) (citing New Mexico Op. 1985-5 and Colorado Op. 92); *accord* Los Angeles County Bar Assoc. Formal Op. 512 (2004) (taking guidance from ABA Formal Op. 00-417 to find that a settlement agreement prohibiting the disclosure of the fact or amount of settlement did not restrict an attorney's right to practice); *see also generally* N.Y. St. Bar Assoc. Comm. on Professional Ethics Op. 730 (2000) (acknowledging that, subject to limited exceptions, confidentiality provisions that restrict parties and counsel from disclosing terms of a settlement are "common" and generally permissible). The North Carolina State Bar similarly upheld a narrowly crafted confidentiality clause that restricted an attorney's disclosure of the terms of a settlement agreement without restricting the use of information gained during the representation. See North Carolina 2003 Formal Ethics Op. 9 (citing ABA Opinion 00-417).[3]

Taking guidance from the ABA and state ethics opinions, this Committee concurs that provisions in a settlement agreement that require an attorney to refrain from disclosing specific settlement terms, such as the amount and existence of a settlement, are sufficiently narrow in scope and arguably serve to protect otherwise private information from public disclosure. In most cases, a narrowly drawn settlement agreement that limits the disclosure of specific information in which the parties or a party has a privacy interest will not be an impermissible restriction on the right to practice under Rule 5.6(b).

- **Restrictions on the Disclosure of Public Information**

The question presented to this Committee, however, is whether defense counsel may seek to condition a settlement upon opposing counsel's agreement to forego disclosure of publicly available information about the case. Such a settlement agreement is more expansive than the narrower restrictions that traditionally have been permissible under Rule 5.6(b). Unlike a more narrowly drawn settlement agreement that precludes an attorney from disclosing confidential information to avoid potential adverse effects resulting from disclosure, a provision that restricts an attorney's right to disclose public information concerning a case might well violate Rule 5.6(b).

As discussed, Rule 5.6(b) protects against overly restrictive settlement agreements that are motivated by a desire to restrict or restrain opposing counsel's ability to represent other clients. A settlement agreement sought by defense counsel that requires plaintiffs counsel to refrain from disclosing public information might well result in limiting an attorney's ability to disclose his or her expertise, thus limiting the public's ability to identify and obtain the most qualified counsel. Conversely, some non-disclosure agreements concerning public information likely would not result in an impermissible restriction on an attorney's right to practice due to the nature of the information to be protected. One example would be a settlement agreement that bars plaintiff's counsel from disclosing that a company has been sued "x" times, which information is part of public court filings. This restriction does not violate Rule 5.6(b) because the restricted information - the number of times the company has been sued - does not impair the attorney's ability to effectively represent future clients or the ability of potential clients to identify experienced counsel.

On the other hand, an agreement that precludes plaintiff's counsel from disclosing, for example, a published epidemiological study that resulted in a defendant drug company changing its published warnings concerning a drug, would violate Rule 5.6(b) because it prohibits plaintiff's counsel from discussing the study during the representation of future clients with claims against the same drug company. Similarly, an agreement that restricts an attorney's ability to disclose the fact that the attorney had previously sued the drug company also would violate the Rule because it would impermissibly limit the public's ability to identify the most experienced counsel for representation.

Accordingly, in the absence of countervailing considerations such as those described above, this Committee finds that if a settlement agreement that precludes plaintiff's counsel from disclosing publicly available information about a case would have the effect of restricting an attorney's right to practice or of limiting the public's ability to identify qualified legal counsel, then the settlement agreement would be a violation of Rule 5.6(b).

Footnotes:

[1] "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." N.H. Rules of Professional Conduct, Rule 1.6(a).

[2] "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: ... (2) reveal information relating to the representation except as the Rules would permit or require with respect to a client." N.H. Rules of Professional Conduct, Rule 1.9(c)(2).

[3] The committee went on to note that the provision at issue, e.g., requiring confidentiality of the essence of a settlement agreement and its underlying terms, is consistent with a lawyer's duties not to reveal confidential information under Rule 1.6 and 1.9(c).

Practical Ethics Article:
Conflict Of Interest In Family Law Matters

By the NHBA Ethics Committee - April 2001
Presented to the Board of Governors July 26, 2001

The Rule 1.9 restriction on a lawyer who has represented a client from representing another with adverse interests in a substantially related matter has special relevance in family law, where questions arise about situations such as:

- drafting wills for a couple and later, one of them seeking representation in a divorce

- representing John (unmarried person) in a paternity case brought by Mary, and later, his wife Joan seeks representation in their divorce.

Before considering these and other similar scenarios, a review of the standards that apply to all practice areas is in order. Absent full disclosure to and consent by the former client, Rule 1.9 prohibits an attorney who has represented a client in a matter from representing another person "in the same or a substantially related matter" where the clients' interests in the matter are "materially adverse," unless the former client consents "with knowledge of the consequences." The subject matter is "substantially related" if the factual and legal matters are so similar that there is a genuine threat that confidential information revealed in the previous case could be used against the former client in the present case. *Annotated Model Rules of Professional Conduct (4th ed.)*.

Factors in making such a determination include the duration and intimacy of the lawyer-client relationship, the lapse of time between causes, the likelihood of an actual conflict, and likely prejudice to the client if conflict does arise. *State ex rel, Wal-Mart Stores, Inc. v. Kortum*, 559 N.W. 2 496, 501 (Neb. 1997). A lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose re-zoning of the property, but would not be precluded, on the grounds of substantial relationship, from defending tenant of the completed shopping center in resisting eviction for nonpayment of rent.

This rule applies if the attorney' s former firm represented the former client whose interests are "materially adverse" and the attorney has acquired material confidential information, unless the former client consents. The rule also prohibits the attorney from using any information gained in a former representation against the former client, unless the information has become "generally known," and from revealing confidential information. Rule1.9, N.H. Rules of Professional Conduct, as amended effective June 1, 1999. Also see Practical Ethics column (*NH Bar News*, September 1, 1999).

The New Hampshire Supreme Court has found that a Rule 1.9 (a) violation is established by

proof of four elements:

1. The existence of a valid attorney-client relationship between the attorney and the former client.

2. The interests of the current and former client must be materially adverse.

3. The current and former matter are the same or substantially related.

4. The former client has not given an informed consent to the new representation.

Sullivan County Regional Refuse Disposal District v. Town of Acworth, 141 N.H. 479, 481-482 (1996). Upon a finding that all of these elements have been satisfied, "a court must irrebuttably presume that the attorney acquired confidential information in the former representation" and disqualification becomes mandatory. *Id. at 483; cf. Wood's Case*, 137 N.H. 698 (1993).

It is useful to analyze each of these elements, considering the application to family law.

Former Client

Being a family's "family lawyer" can mean that under Rule 1.9, one may not represent either spouse in a divorce. The "former client" may be the other spouse, or the prior representation may have been of the parties jointly. In addition, having represented the grandparents, or one of the children, or having served as GAL, could be a conflict.

The definition of "former client" is broad and includes persons who had only a one-time consultation. A lawyer-client relationship is created when:

- A person seeks advice or assistance from a lawyer,

- The advice or assistance sought pertains to matters within the lawyer's professional competence; and

- The lawyer expressly or impliedly agrees to give or actually gives the desired advice or assistance.

State v. Gordon, 141 N.H. 703, 705 (1997).

Rule 1.9 has three subsections. Subsection (a) allows representation if the former client consents; subsection (b) deals with former clients of a firm the attorney is no longer associated with; and subsection (c) prohibits use of information relating to the former representation against that client, unless it has become generally known. Even if the prior representation was joint representation of the parties, for example, preparing "husband and wife" wills, each client has a

right of confidentiality under Rule 1.6. Representation is presumed to involve receipt of confidential information under Rule 1.9. . In *Sullivan County*, supra, the Court noted that a former client "need never prove that the attorney actually misused ...confidences." 141 N.H. at 483.

It is essential to have a good conflicts-checking system to keep track of "former clients," including those that consisted only of consultations. Before taking on a new representation, run a conflicts check. Better still, check*before* you have any substantial discussion. This will prevent your consulting with wife, and six months later consulting with husband, resulting in being able to represent neither of them.

B. Material Adversity of Interests

The New Hampshire Supreme Court has not established any well-defined standard by which the interests of a present and former client are deemed to be materially adverse. However, in a divorce, the interests of the spouses are inherently adverse. This is why a lawyer may not represent both husband and wife in their divorce even if it is no-fault and uncontested. N.H. Ethics Opinion 78-5/2. Serving as a guardian *ad litem* for a child prohibits simultaneously representing the child's parent, even in an unrelated matter. *Boyle's Case* 136 N.H. 21 (1992).

C. Substantial Relationship Test

The New Hampshire Ethics Committee has said, "This test provides that the former client need only show that matters embraced in the pending suit in which his former attorney is representing his adversary are substantially related to the previous cause of action. The Court will then assume that confidences pertaining to the matter were revealed during the course of the former representation without inquiring into the nature and extent of such revelations." Advisory Opinion #1990-91/1.

The subject matter is substantially related if the lawyer could have obtained confidential information in the first representation that would be relevant in the second. *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1st Cir.1984). For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. The N.H. Ethics Committee has noted that the purpose of the substantial relationship test is to protect the former client's confidential information. Formal Opinion #1992-93/13.

The rules are broad enough to protect the voluntary disclosure of both privileged and unprivileged communications gained during the course of representation. Thus, every piece of information which the inquiring attorney hopes to use in his representation of the new client must be evaluated to determine whether he learned of it in the course of his previous employment. Formal Opinion #1996-97/3.

What does "same or similar matter" mean in the context of a divorce? In considering this issue, the North Dakota Bar Association's Ethics Committee noted:

> In divorce matters, virtually all aspects of a person's life are relevant to one or more issues. In dividing property, allocating debt, and awarding spousal support, the court considers the ages of the parties; the parties' earning abilities; the conduct of the parties during the marriage; the parties' station in life; the parties' health and physical condition; the necessities of the parties and their circumstances, financial and otherwise; the efforts and attitudes of the parties towards accumulation of property; and such other matters as the Court may determine are material. [Cite omitted.]
>
> In matters of child custody and visitation, the Court considers the disposition of a parent to provide love and guidance; the disposition of a parent to provide for the material needs of a child; the moral fitness of the parents; the mental and physical health of the parents; a parent's relationships with third parties; whether a parent has been abusive; and any other factors that the court deems relevant. In summary, there is very little that goes on in one's life that could not become relevant in a divorce proceeding. [Cite omitted.]

North Dakota Ethics Opinion 00-01 (January 26, 2000).

Communications between a lawyer and client in domestic matters are frequently wide-ranging and address sensitive matters. Even if the prior representation involved a different adversary such as a former spouse, it is likely that confidential communications occurred between attorney and client that could be relevant in the divorce case.

A conclusion about the possession of such information may be based on the general nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services. For example, is it reasonable to believe that information disclosed by a client in a protection order, child support, or custody proceeding would have relevance in the client's subsequent divorce case. Every divorce deals with all assets of both spouses, so that any prior representation concerning assets could bring up Rule 1.9. Such prior representation could include estate planning or bankruptcy. If there are minor children, both income and parenting are issues.

D. Informed Consent or Waiver

The language of Rule 1.9 requiring consent of the former client "after consultation and with knowledge of the consequences" is the same as that contained in Rule 1.7 for concurrent clients. (Note: Rule 1.7 requires the consent of both clients; while under Rule 1.9, only the former client need consent.) Under Rule 1.7, what is required for consultation or disclosure turns on the sophistication of the client, the client's familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues and the ability of the lawyer to anticipate what will happen if the conflict is waived. *IBM v. Levin*, 579 F.2d 271 (3rd Cir. 1978).

Consultation or disclosure requires the affirmative revelation by the lawyer of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation. *Financial General Bankshares v. Metzger*, 523 F.Supp. 744, 771 (D.D.C. 1981).

> The lawyer must take into account the ... former client's individual circumstances in deciding whether his/her disclosure and explanation of consequences is adequate under

> the Rules. For example, more care needs to be taken with the unsophisticated than with the more sophisticated and knowledgeable client. [Cites omitted.]

N.H. Op. 1990-91/1. The emotion-charged atmosphere that is typical of divorce, custody, and other disputes between family members is a "circumstance" that must be considered.

The ABA Ethics 2000 Report recommends that the phrase "consents after consultation" be replaced by "gives informed consent, confirmed in writing."

Practical Considerations

Even though consent is permissible and the prior client may be willing, a prudent family law lawyer would hesitate to ask. Many people seeking such representation would be unable to appreciate the significance of waiving the conflict.

There may also be a problem in even requesting the consent. For example, husband consults a lawyer in year 1 concerning marital problems, but takes no legal action. In year 3, wife seeks an appointment with the lawyer about a divorce. Asking husband to consent would require telling him that wife is seeking legal services, thus revealing confidential information.

A prudent lawyer would also consider the fact that family law is the practice area with the largest number of complaints docketed with the Professional Conduct Committee (27% of total in 1999). It would be better to err on the side of caution, rather than to parse Rule 1.9 looking for grounds to accept the new representation.

Conclusion

Rule 1.9 prohibits representing one spouse in a divorce if the lawyer had previously represented the other spouse or the parties jointly in a "substantially-related matter," absent consent. Careful scrutiny is needed if the prior representation involved a family law matter, whether or not it involved the current spouse. It is likely that the potential to utilize information obtained during the prior matter will arise and place the lawyer in a position in which his or her obligation to protect a former client's confidences conflicts with the obligation to represent the current client. In family law matters, the option of obtaining consent from the prior client raises both ethical and practical questions.