George Mason American Inn of Court

Legal Ethics Update

October 15, 2025

I. 2025 Recent Developments in Legal Ethics

(Prepared by Emily Hedrick, VSB Ethics Counsel)

II. Developments on the "Hot Potato" Doctrine

a. ABA Formal Opinion 516
b. DC Bar Ethics Opinion 272

III. VSB Developments

a. Supreme Court approves changes to Rule 1.5 (Prohibiting non-refundable advance fees)
b. Proposed LEO 1901 (Reasonable Fees and the Use of Generative Artificial Intelligence)

2025 Recent Developments in Legal Ethics

Prepared by Emily Hedrick, VSB Ethics Counsel
(updated September 29, 2025)

2025 RECENT DEVELOPMENTS IN LEGAL ETHICS

Emily Hedrick, VSB Ethics Counsel

UNDERSTANDING BENEFITS AND RISKS OF GENERATIVE AI

- Importance of Technology Awareness for Lawyers
  - Lawyers must understand benefits and risks of relevant technology
  - Rule 1.1 emphasizes this responsibility
- Generative AI: Rapid Evolution
  - Technology and skills are rapidly developing
  - Benefits and risks are constantly evolving
- Unchanged Ethical Responsibilities
  - Basic ethical responsibilities remain the same
  - Issues with generative AI are similar to those with other technologies
- Guidance on Generative AI
  - Resources provide specific guidance on evaluating AI benefits and risks
  - Application of ethics rules to generative AI

CONFIDENTIALITY CONCERNS

Terms of Service	Lawyers must understand the terms of service of AI models
	Free models may instruct not to input confidential information
Risks of Public AI Models	Information input may be disclosed to other users
	Information may be used for model training
Legal-Specific or Internal Products	May offer protection for confidential information
	Must assess security and evaluate protection measures
Consulting Experts	Consult IT professionals before sharing confidential information
	Ensure generative AI products are secure

DISCLOSURE TO CLIENTS

- Disclosure Requirement
  - No general requirement to inform clients about generative AI usage
- Factors Influencing Disclosure
  - Existence of any agreement or instructions from the client
  - Potential disclosure of confidential information to generative AI
  - Risks to the client from using generative AI

COMPETENCE AND SUPERVISION

- Hallucinated Citations
  - At least 251 instances of hallucinated cases have been reported in the US
- Necessity of Verification
  - Lawyers must review and verify AI-generated citations
  - Legal-specific AI products may be more reliable
- Recent Incidents
  - Academic expert witness submitted fake AI-generated sources in court
  - Judges emphasize the need to verify AI-generated content
- Potential Bias and Inaccuracy
  - Generative AI might produce biased or inaccurate information
- Supervision and Policy

BILLING AND FEES

Reasonable and Explained Fees

Fees must be reasonable and adequately explained under Rule 1.5

Hourly fees cannot exceed actual time spent on the case

Billing for Generative AI

Cannot bill for time saved by using generative AI

Can bill for actual time spent using generative AI

Consider alternative fee arrangements for value generated by generative AI

Charging for Costs

Costs associated with generative AI must be permitted by fee agreement and Rule 1.5

Costs passed to the client must be actual costs, not marked up

Jurisdictional Variations

See pending LEO 1901

COURT DISCLOSURE REQUIREMENTS

- Varied Requirements Across Courts
  - Different courts have different requirements
  - Scope and content of requirements vary
- Certification of AI Usage
  - Lawyers must certify if generative AI was used
  - Applies to any document filed with the court
- Compliance with Rule 3.4(d)
  - Lawyers must determine applicable disclosure requirements
  - Must comply with relevant requirements
- Potential for New Requirements
  - New requirements may be added at any time

RELATIONSHIPS WITH NONLAWYERS

NORTH CAROLINA – KIOSK IN LAWYER'S OFFICE

- North Carolina 2023 Formal Ethics Opinion 3
  - Lawyer handling DUI defense renting space to a company for a self-service kiosk
  - Arrangement not permissible if company pays rent to the lawyer
  - Creates a financial interest in the kiosk and a personal conflict of interest
- Conditions for permissible arrangement
  - Company does not pay a rental fee
  - Recommendation must be in the client's best interest
  - Lawyer cannot receive a referral fee
- Virginia's stance on financial conflicts
  - Typically not found to be non-consentable
  - Require informed consent from the client
  - Reasonable belief that lawyer's judgment is not influenced

SOUTH CAROLINA – SOCIAL WORKER IN LAW FIRM

- Lawyer Hiring Social Worker
  - Social worker to assist with elder law practice
  - Role as elder care coordinator
  - Developing life care plans for clients
- Supervision and Professional Obligations
  - Lawyer must supervise nonlawyer employee
  - Research social worker's professional obligations
  - Check if social worker is a mandatory reporter of abuse
- Potential Conflicts with Confidentiality
  - Inform client of social worker's conflicting duties
  - Client must consent to social worker's assistance
  - Lawyer must prevent access to information triggering disclosure

AI CHATBOTS AND MARKETING CONTRACTORS

- Florida Opinion 24-1 on Generative AI in Legal Practice
  - Focuses on the use of generative AI chatbots to communicate with clients
  - Lawyers must inform clients they are communicating with an AI, not a human
  - Lawyers are responsible for any misleading information or coercive behavior from the chatbot
- Maryland State Bar Association Opinion 2024-01 on Independent Contractors for Advertising
  - Incentive agreements with independent contractors based on firm's financial performance are impermissible
  - Majority believes Rule 5.4 exception for profitsharing plans should be limited to employees
  - Profitsharing plans must be based on overall firm profitability, not specific cases or referrals

ABA FORMAL OPINION 506 – NONLAWYER INTAKE

- Nonlawyer Assistance in Client Intake
  - Nonlawyers can help with initial client intake tasks
  - Tasks include obtaining initial information, performing conflict checks, and assisting with fee agreements
  - Prospective clients must always have the opportunity to communicate with the lawyer
- Unauthorized Practice of Law
  - Lawyers must ensure nonlawyers do not engage in unauthorized practice of law
  - Nonlawyers cannot answer specific legal service questions, negotiate fees, or interpret engagement agreements
  - Lawyers must respond to ensure accurate information is provided
- Careful Management of Delegation
  - Delegation of client intake must be carefully managed
  - Simple questions may require the lawyer's personal knowledge and expertise

OHIO – BONUSES FOR POSITIVE REVIEWS OF NONLAWYER STAFF

- Ohio Op. 23-11 Overview
  - Addresses lawyer's ability to pay bonuses to nonlawyer staff
  - Focuses on bonuses tied to positive online reviews
- Opinion Conclusion
  - Bonuses based on positive reviews are not permissible
  - Violation of Rule 5.4: Ties bonus to a particular client or matter
  - Potential violation of Rule 7.3: Recommendation of professional employment
- Concerns Raised
  - Undue influence by nonlawyer staff
  - Intimidation or overreaching potential

ALLIED LEGAL PROFESSIONALS

- Licensing and Independent Practice by Paraprofessionals
  - Programs in at least seven states
  - Licensing regime similar to lawyers
- Community Justice Workers
  - Existing community helpers like social workers, librarians, school staff
  - Trained to assist with legal needs in association with legal aid or nonprofits
  - Supervised by legal aid lawyers
- Advantages of Justice Workers
  - Already in contact with and trusted by populations in need
  - No specific education required beyond targeted training
  - Reduced time and financial costs to entry

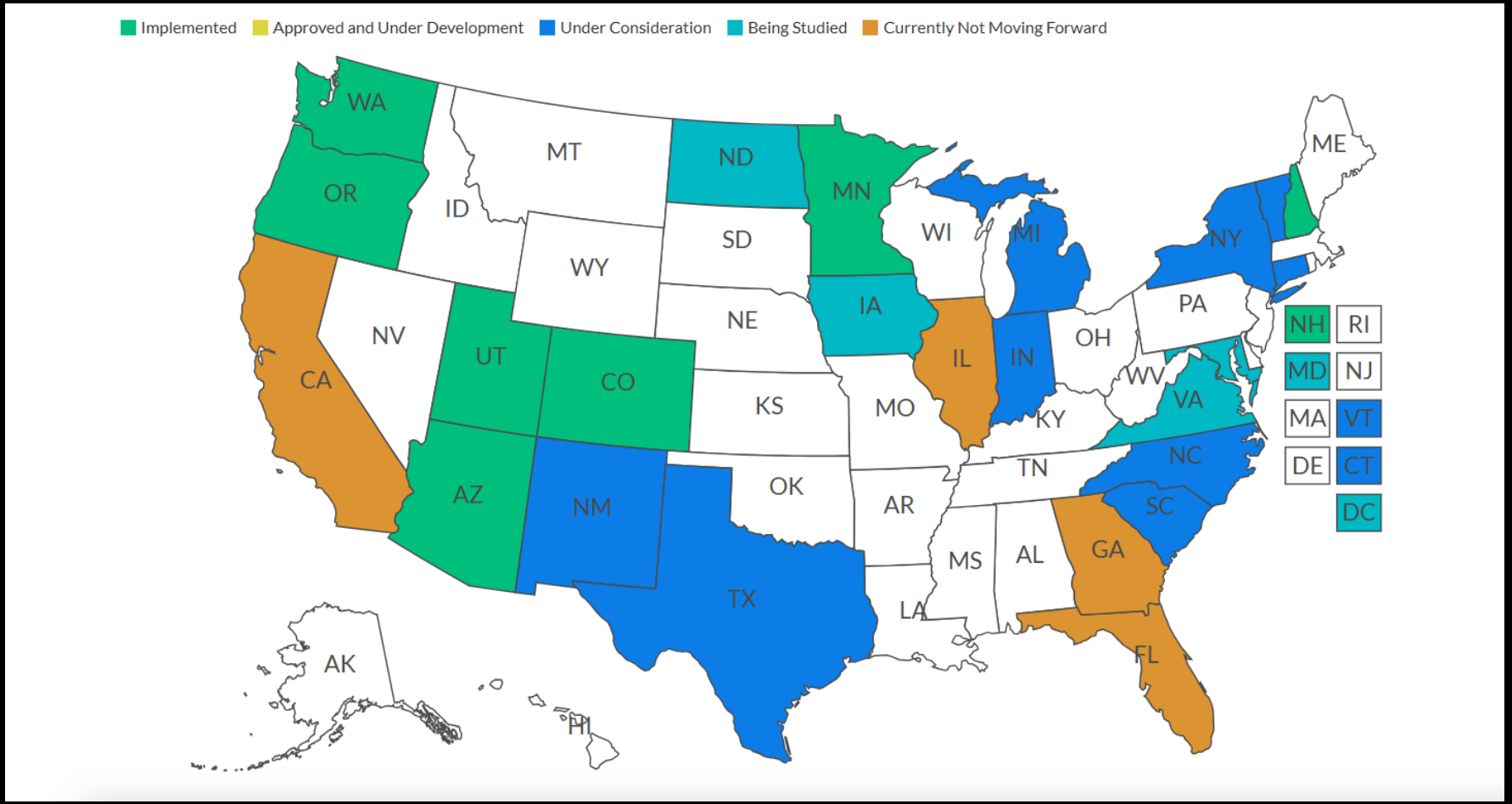
ALASKA'S JUSTICE WORKER MODEL

- Origin and Development
  - Pioneered in Alaska by Alaska Legal Services Corporation
  - Based on an existing network of community health services
- Training and Enrollment
  - Over 400 justice workers enrolled
  - Training includes food benefits, debt collection defense, Indian Child Welfare Act matters, wills, and unemployment compensation
- Authorization and Court Appearance
  - Justice workers can be authorized to appear in court
  - Requires training in substantive law, court procedures, and Rules of Professional Conduct

TEXAS'S PROPOSED RULES

- Legal Paraprofessionals
  - Must meet educational criteria
  - Apply to be licensed in specific practice areas
  - Take exams covering substantive law and ethics
  - Can perform tasks directly for clients, including court appearances
  - Rules delayed based on public comments and legislative concerns
- Court-Access Assistants
  - Similar to Alaska's justice workers
  - Must be trained and sponsored by an approved legal assistance organization
  - Pass a criminal history background check
  - No specific educational or licensing requirements
  - Provide legal services in civil justice court suits without a supervising lawyer

WHERE THINGS STAND NOW



SCRUTINY OF FEE AGREEMENTS

- Bar Association of San Francisco Opinion 2023-1
  - Addresses problematic fee agreement provisions
  - Provisions include:
    - Giving lawyer authority to decide ultimate objectives
    - Requiring client's advanced consent to settlement
    - Conditioning settlement on lawyer's approval
    - Designating a fee as nonrefundable
    - Charging fees in excess of statutory limits
    - Permitting lawyer's unilateral withdrawal without compliance with ethics rules
  - Examples of improper settlement restrictions:
  - Example of improper authority to decide objectives:
  - Permissible to memorialize decisions already made, subject to client revocation

OHIO OPINIONS 23-12 AND 24-03

- Opinion 23-12
  - Lawyer cannot offer a contingent fee agreement with a charging lien on the highest settlement offer before termination
  - Issues include burden on client's right to settle or terminate lawyer's services
  - Client may feel compelled to accept an offer to avoid lawyer termination
  - Risk of unreasonable fee under Rule 1.5 if lien amount exceeds quantum meruit value
- Opinion 24-03
  - Lawyer cannot have a fee agreement with hourly rate until settlement/judgment and then choose between hourly or percentage fee
  - Interferes with client's right to settle and may lead to unreasonable fees
  - Agreement is improper as it allows lawyer to choose the larger fee without risk
  - Eliminates traditional risks of contingent fee agreements

NEW RULES

- Rule 1.5(g)
  - Adds prohibition on nonrefundable advanced fees
  - Incorporates LEO 1606 into Rule 1.5
  - Includes comments explaining the provision
  - Clarifies difference between advanced fee and retainer
- Rule 6.5
  - Limited scope representation for first appearance
- Part 6, Section IV, Paragraph 3
  - Changes to emeritus membership status

CHANGES TO EMERITUS MEMBERSHIP STATUS

- Broadened Eligibility for Emeritus Status
  - Reduced practice requirement from 20 years to 10 years
  - Removed requirement to have actively practiced law for five of the last seven years
- Expanded Scope of Pro Bono Service
  - Aligned with the definition in Rule 6.1
- Administrative Requirement for Annual Certification
  - Allows for monitoring and enforcement of certification requirements
- As of March 1, 2025, there were 35 emeritus lawyers; increased to 39 as of August after this rule change took effect

ABA OPINION 514 - LAWYER'S OBLIGATIONS TO ORGANIZATION'S CONSTITUENTS

- Lawyer's Advice to Organizations
  - Lawyers provide advice through constituents like employees and board members
  - Decisions may have legal implications for constituents
- Professional Conduct Rules
  - Competent representation under Rule 1.1
  - Necessary communication under Rule 1.4
  - Candid advice under Rule 2.1
- Legal Risks to Constituents
  - Lawyers must advise organizations about legal risks to constituents
  - Constituents may misperceive the lawyer's role
- Clarifying Lawyer's Role
  - Rules 4.1, 4.3, and 1.13(d) require avoiding misunderstandings

RULE 1.13

- Advising Constituents on Conflicts
  - Lawyer should inform constituents of conflicts or potential conflicts of interest
  - Constituents may need independent representation
- Understanding Adversity of Interest
  - Lawyer cannot represent constituents with adverse interests
  - Discussions may not be privileged
- Case-by-Case Basis
  - Warning necessity depends on case facts

ABA OPINION 510 - DUTIES TO PROSPECTIVE CLIENTS

- Exceptions to Disqualification
  - Informed consent from both affected and prospective clients
  - Reasonable measures to avoid exposure to disqualifying information
    - Timely screening of disqualified lawyer
    - Written notice to prospective client

ABA OPINION 510

- Focus of Opinion – Meaning of taking "reasonable measures" to avoid disqualifying information
- Information Reasonably Necessary to Assess Whether to Undertake Representation
  - Whether lawyer may undertake representation
  - Conflict of interest, competence, crime or fraud, nonfrivolous goal
  - Whether lawyer is willing to accept engagement
- Limiting Exposure to Disqualifying Information
  - Limit information requested from prospective client
  - Caution client not to volunteer unnecessary information

BONUS TOPIC: CONFIDENTIALITY WHEN WRITING LEGAL ARTICLES

- NYSBA Opinion 1268
  - Lawyer represents a client wary of publicity
  - Client believes publicity could harm reputation
  - Lawyer wants to write an article post-representation
- Application of Rules 1.1(c) and 1.8(b)
  - Rules apply to current clients, not former clients
  - Former clients governed by Rule 1.9(c)
- Conditions for Writing the Article
  - Discuss legal issues from an intellectual perspective
  - Avoid discussing non-generally known facts

QUESTIONS?

2025 Recent Developments in Legal Ethics – updated September 29, 2025
Emily Hedrick, VSB Ethics Counsel

1) Use of generative AI in legal practice

By now it's well known that lawyers must pay attention to "the benefits and risks associated with relevant technology." Comment [6] to Rule 1.1. In the case of generative AI, those benefits and risks seem to be evolving by the day as the technology, and our skills to use it, rapidly develop. Nonetheless, a lawyer's basic ethical responsibilities have not changed, and many ethics issues involving generative AI are fundamentally similar to issues lawyers face when working with other technology or other people (both lawyers and nonlawyers). These resources attempt to provide some specific guidance on how to evaluate the benefits and risks of particular uses of generative AI and how to apply ethics rules and standards to generative AI applications.

Confidentiality

A lawyer must be aware of the Terms of Service and any other information about the possible use of information input into an AI model. Many free, publicly available models specifically instruct users not to input any confidential or sensitive information and any information input into such a model might be disclosed to other users or used as part of the model's training. Legal-specific products or internally-developed products that are not used or accessed by anyone outside of the firm may provide protection for confidential information, but lawyers must make reasonable efforts to assess that security and evaluate whether and under what circumstances confidential information will be protected from disclosure to third parties. It may be appropriate to consult with IT professionals or other experts before sharing confidential information with any generative AI product.

Disclosure to clients

There is no per se requirement to inform a client about the use of generative AI in their matter. Whether disclosure is necessary will depend on a number of factors, including the existence of any agreement with or instructions from the client on this issue, whether confidential information will be disclosed to the generative AI, and any risks to the client from the use of generative AI.

Competence and supervision

Lawyers and other professionals continue to make the news for court filings containing hallucinated citations or other information. For one example, an academic expert witness submitted a declaration in Minnesota federal court containing fake, AI-generated sources – in litigation over a ban on the dissemination of election-related AI-generated content. The

court's order indicated that the judge is adding her voice "to a growing number of courts around the country declaring the same message: verify AI-generated content in legal submissions!" In yet another level of irony, the expert indicated that he would ordinarily validate citations with reference software when writing academic articles but did not for this court filing. As of September 23, a website aiming to provide a comprehensive list of all legal decisions involving hallucinated content listed a total of 384 examples, of which at least 251 occurred in the US.

Legal-specific generative AI research products generally are linked to a legal research database and therefore may be more reliable with case citations. As with any legal research or drafting done by software or by a nonlawyer assistant, no matter what the source, a lawyer has a duty to review the work done and verify that any citations are accurate (and real).

Beyond generating information that is simply false, generative AI might also produce information that is not completely accurate or is biased. These issues are thought to arise because of the information in the dataset used for training the models. For example, IBM reported that researchers found bias in Midjourney, a generative AI art generator. When Midjourney was asked to create images of people in certain professions, it showed a mix of ages, but the older people were always men.

Such issues are difficult to detect or address in advance because of the lack of information about how these systems work and what material they were trained on, so output must be carefully evaluated to ensure that it is accurate and that it is consistent with the interests of the lawyer's client. Work product generated by generative AI should always be critically reviewed by the lawyer exercising independent judgment about the contents.

The duty of supervision extends to generative AI use by others in a law firm, and partners and other supervisory lawyers should consider whether Rule 5.1 requires adopting a policy on the use of generative AI, including education and safeguards on when use of generative AI is appropriate. Firms should also consider systems for tracking use of generative AI within the firm – for example, when it is used, what specific prompts and other information are used, and what output is generated. One resource for considering such a policy is the Virginia Bar Association, which has released a model AI policy for law firms.

Billing and fees

In all instances, fees must be reasonable and adequately explained to the client under Rule 1.5. A lawyer may not charge an hourly fee in excess of the time actually spent on the case. The lawyer may bill for actual time spent using generative AI in a client's matter or may wish to consider alternative fee arrangements to account for the value generated by the use of

generative AI. The lawyer may only charge the client for costs associated with generative AI if permitted by the fee agreement and by Rule 1.5; any costs passed along to the client and described to the client as costs must be actual costs and cannot be marked up. See LEO 1850.

Note that some jurisdictions and opinions have taken a more prescriptive view of permissible fees in this context. For example, ABA Formal Opinion 512 says, "The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee. For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. 'A fee charged for which little or no work was performed is an unreasonable fee.'" [Citations omitted.] The VSB Council approved LEO 1901 in June (pending with the SCV), which disagrees with the ABA opinion on this point and discusses other factors in Rule 1.5(a) that support value-based billing on a non-hourly basis for work done efficiently with the use of generative AI. The opinion further explains some issues that may require additional explanation in order to comply with Rule 1.5(b)'s requirement to adequately explain the lawyer's fee, such as why the lawyer's experience or technical skills contribute to the value of the services even when the time spent providing the services is reduced by the effective use of generative AI.

The opinion also critiques ethics opinions from other jurisdictions, including the ABA, that indicate that it might be unreasonable for a lawyer to charge the same non-hourly fee for work done with the assistance of AI as for work done without the use of AI. The opinion concludes that value-based fees can reflect efficiency gains, the specialized skill of effectively incorporating technology, and the value of the lawyer's services and output, and remain reasonable under Rule 1.5(a).

Court disclosure requirements

Some courts throughout the country have imposed requirements to certify whether generative AI has been used in any document filed with the court. The content and scope of these requirements vary depending on the court, and new requirements may be added at any time. A lawyer must determine whether any disclosure requirement applies to a filing that the lawyer is making and must comply with that requirement pursuant to Rule 3.4(d).

2) Business and employment relationships with nonlawyers

   Other jurisdictions have recently addressed a wide range of relationships between lawyers and nonlawyers, which may indicate increased salience of those relationships and/or increased regulatory scrutiny of those relationships.

North Carolina 2023 Formal Ethics Opinion 3 addressed whether a lawyer who primarily handles DUI defense could rent space in the lawyer's office to a company that would install a self-service kiosk where clients could sign up for an ignition lock serviced by the business.

- The opinion concludes that the arrangement is not permissible if the company pays rent to the lawyer. In this instance, the rental fee to be paid to Lawyer creates a financial interest in the kiosk. Although Lawyer does not have a direct financial interest in Company's business, Lawyer has a financial interest in receiving additional rent from Company, which presumably will continue if Lawyer's clients sign up for Company's services through the kiosk in Lawyer's office (and which will presumably discontinue if clients do not sign up for Company's services, thus creating an incentive for Lawyer to refer clients to Company through the kiosk). As such, Lawyer has a personal conflict of interest in recommending Company to clients pursuant to Rule 1.7(a)(2).
    - If the company does not pay a rental fee, lawyer can have the kiosk in his office and recommend it to clients as long as the recommendation is in the client's best interest. However, under no circumstances may the lawyer receive a referral fee for clients signing up with the kiosk, since that financial arrangement again impairs the lawyer's professional judgment and creates a non-consentable conflict of interest.
    - Virginia typically has not found these kinds of financial conflicts to be non-consentable, although they do require informed consent from the client and a reasonable belief that the lawyer's independent judgment is not influenced by the referral fee or other financial interest.

South Carolina Ethics Advisory Opinion 23-05 addresses whether a lawyer can hire a social worker to assist with the lawyer's elder law practice; the social worker would serve as an elder care coordinator and assist with developing a life care plan for elder law clients.

- The opinion concludes that the lawyer may do so, subject to the regular requirements to supervise a nonlawyer employee. The opinion also indicates that the lawyer should research the social worker's professional obligations, including whether they are a mandatory reporter of abuse. If the social worker has duties that potentially conflict with the lawyer's duty of confidentiality, lawyer should, under Rule 1.8(b), inform the client of the social worker's potentially conflicting duties and allow the client to make an informed decision whether to consent to the social worker assisting with the client's case. However, if Lawyer knows or reasonably should know that there is information in the Lawyer's file that will trigger disclosure by the social worker, Lawyer cannot allow the social worker to have access to that information.

Florida Opinion 24-1 addresses the use of generative AI in legal practice across a number of different ethics rules. One specific area of focus in the opinion is the use of a generative AI chatbot to communicate with clients or prospective clients. The opinion indicates that to avoid confusion or deception, a lawyer who uses a GAI chatbot must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. The lawyer is ultimately responsible if a chatbot provides misleading information or is inappropriately intrusive or coercive.

Maryland State Bar Association Opinion 2024-01 addresses the use of independent contractors for advertising. The opinion concludes that an incentive agreement with an independent contractor based on the law firm's overall financial performance constitutes impermissible fee-splitting with a nonlawyer.

- The opinion indicates that "a majority" of the committee believes that the exception to Rule 5.4 allowing profitsharing plans for employees should be read narrowly and limited only to employees, not independent contractors; further, allowed profitsharing plans must be based only on overall firm profitability, not tied to a specific case, claim, file, or referral.

ABA Formal Opinion 506

- A lawyer may train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the prospective client always is offered an opportunity to communicate with the lawyer including to discuss the fee agreement and scope of representation.
- Because Model Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law, whether a nonlawyer may answer a prospective client's specific question depends on the question presented. If the prospective client asks about what legal services the client should obtain from the lawyer, wants to negotiate the fees or expenses, or asks for interpretation of the engagement agreement, the lawyer is required to respond to ensure that the non-lawyer does not engage in the unauthorized practice of law and that accurate information is provided to the prospective client so that the prospective client can make an informed decision about whether to enter into the representation.
    - "[D]elegation of prospective client intake must be carefully and astutely managed. What appears to be a simple question about how long the lawyer will spend on the matter, may actually be a question about the

representation itself and cannot be accurately answered without the lawyer's personal knowledge and expertise."

Ohio Op. 23-11 addresses whether a lawyer can pay a bonus to a nonlawyer staff member based on the staff member receiving a positive online review. The opinion concludes that this would not be permissible; it ties the bonus to a particular client or matter in violation of 5.4 and may violate the rule on recommendation of professional employment (Rule 7.3) by creating the potential for undue influence, intimidation, or overreaching by the nonlawyer.

3) Legal practice by nonlawyers

Programs involving the licensing of and/or independent practice by paralegals or other paraprofessionals exist in at least seven states. These programs typically involve a licensing regime similar to lawyers. An even newer model for allied professional practice is community justice workers. Community justice workers are existing community helpers – social workers, librarians, school staff – who do not work in the legal profession but who regularly encounter people with legal needs. Community justice worker programs train those helpers to work in association with legal aid or other legal nonprofits to assist clients with certain discrete legal needs without the need for direct involvement by a lawyer, although justice workers are generally supervised by legal aid lawyers.

As opposed to lawyers or even licensed paralegals, justice workers are already in contact with and trusted by the populations most in need of this type of legal assistance. They are also not required to have any particular type of education beyond training designed specifically to enable them to handle the types of matters they intend to handle, which reduces the time and financial costs to entry.

The current justice worker model was pioneered in Alaska, where Alaska Legal Services Corporation used an existing network of community health services as a model and basis for their community justice worker program. Over 400 justice workers have enrolled in training for matters including food benefits, debt collection defense, Indian Child Welfare Act matters, wills, and unemployment compensation. As of late 2023, justice workers can also be authorized to appear in court after training in the appropriate substantive area of law, court procedures, and the Rules of Professional Conduct.

Texas issued rules subject to public comment in fall 2024 that would authorize both legal paraprofessionals and court-access assistants to provide certain types of legal assistance. Legal paraprofessionals must meet certain educational criteria, apply to be licensed in a specific practice area (family law, estate planning and probate law, and consumer debt law are the available practice areas), and take exams covering substantive law and ethics. Once licensed, the paraprofessionals may perform a number of tasks directly for clients,

including appearing in court under certain circumstances. The rules, which were scheduled to take effect December 1, 2024, were delayed based on the public comments received and possibly based on pending legislation in the Texas General Assembly (which has since failed).

Texas's proposed court-access assistants are similar to Alaska's justice workers and must be trained and sponsored by an approved legal assistance organization and pass a criminal history background check. Beyond that, there are no specific educational or licensing requirements, although the sponsoring organization must explain the scope of the applicant's services, the processes for lawyer supervision, and any training provided as part of the application. Once licensed, a court-access assistant may provide legal services in civil justice court suits (justice courts are similar to district and small claims courts) without a requirement for a supervising lawyer to also appear.

Anecdotally, it appears that the justice worker model may be gaining traction, and several jurisdictions are currently considering justice workers in some way. This includes Virginia, where the Self Represented Litigants Committee of the Access to Justice Commission is actively studying allied legal professional program models and how they could be implemented in Virginia. Up to date information about allied legal professional programs nationwide is available from the Institute for the Advancement of the American Legal System.

The most recent update comes from Illinois, where the Supreme Court just approved the "vision" for a community justice worker program, with the committee directed to present a final recommendation of the regulatory and other details of the program by October 1, 2026.

4) Guidance on fee agreements that attempt to limit a client's right to settle a case or terminate representation

A handful of ethics opinions from other jurisdictions have recently addressed lawyers' creative arrangements to ensure they get paid, in some cases at the expense of the client's right to decide whether to settle a case or to terminate the lawyer's representation.

Bar Association of San Francisco Opinion 2023-1

- This opinion addresses several problematic fee agreement provisions: giving authority to the lawyer to decide the ultimate objectives; requiring the client's advanced consent to settlement, condition settlement on the lawyer's approval, or giving the lawyer unlimited authority to settle on the client's behalf; designating a fee as nonrefundable; charging fees in excess of statutory limits; permitting the lawyer's unilateral withdrawal without compliance with the ethics

rules; or allowing for unqualified destruction of the client's file or conditional return of the file.

- Examples of provisions improperly restricting the client's authority to settle include:
    - Client agrees that he will make no settlement except in the presence of lawyer and with his approval, and if violated, client agrees to pay the lawyer a specified sum
    - Client agrees that there shall be no settlement of the claim without mutual consent of client and lawyer
    - Client promises to take the case to trial or settlement to ensure lawyer is paid for his representation
- Example of a provision improperly giving the lawyer authority to decide the ultimate objectives:
    - Client gives law firm full discretion to dismiss claims or parties if, in law firm's professional judgment, it is in client's best interests
    - Opinion clarifies that it is permissible to memorialize decisions that have already been made in the fee agreement, although they may be subject to revocation by the client, but the client cannot delegate authority to make decisions on substantive matters in the future because it is not an informed decision

Ohio Opinions 23-12 and 24-03

- 23-12: Lawyer may not offer a contingent fee agreement that requires the client to give the lawyer a charging lien for a percentage of the highest settlement offer made before termination of representation. The opinion identifies a number of problems with this provision, including the burden on the client's right to decide whether to settle the matter or terminate the lawyer's services. The client might feel compelled to accept an offer out of fear that the lawyer will terminate the representation if the offer is not accepted. There is also the risk of an unreasonable fee under Rule 1.5, even if that risk might only materialize under rare circumstances when the lien amount based on the highest offer made prior to termination exceeds the quantum meruit value of the services rendered.
- 24-03: Lawyer may not have a fee agreement that requires payment of an hourly rate until settlement/judgment and then allows the lawyer to choose between the hourly fee or a percentage fee, whichever is larger. This arrangement interferes with the client's right to decide whether to settle and may increase the likelihood of charging an unreasonable fee. The agreement is also improper because it is largely illusory since the lawyer can elect to charge the larger of two fees without incurring any risk of no recovery. It is improper to try to

eliminate the traditional risks of a contingent fee agreement by allowing the lawyer to collect the highest value fee at the conclusion of the matter.

5) New Rules 1.5(g) and 6.5; Changes to emeritus membership status

Two amendments to the RPCs were approved this year: Rule 1.5(g) and Rule 6.5. Rule 1.5(g) adds the existing prohibition on nonrefundable advanced fees (LEO 1606) to the text of Rule 1.5, and adds two comments further explaining the provision and clarifying the difference between an advanced fee and a retainer.

The amendments to Rule 6.5 are based on the recommendations from the Joint Legislative Audit and Review Commission (JLARC) report on Indigent Criminal Defense and Commonwealth's Attorneys, issued in November 2023. The report recommended that the committee study limited representation at first appearances and same-day bail hearings and, if appropriate, refer a rule of professional conduct on limited representation in these settings for review and approval.
Based on its study of the issues raised by the JLARC report, the committee determined that extending Rule 6.5 to cover these limited scope representations would reduce administrative burdens while maintaining ethical safeguards. The rule provides that lawyers participating in limited scope programs covered by the rule must consider known conflicts at the time of representation but are not required to perform a broader conflict check unless the representation extends beyond the initial limited scope appointment.

The VSB has also made changes to the emeritus class of membership which would broaden eligibility for emeritus status by reducing the practice requirement from 20 years to 10 years and removing the requirement to have actively practiced law for five of the last seven years. The amendments also broaden the scope of pro bono service under the rule to match the definition in Rule 6.1 and create an administrative requirement to file an annual certification to allow for monitoring and enforcement of the rule's certification requirements. These changes almost immediately increased the emeritus population by 5 lawyers!

6) ABA Formal Opinion 514 on a lawyer's obligations when advising an organization about conduct that may create legal risks for the organization's constituents

When advising an organization, lawyers necessarily provide their legal advice through constituents such as employees, officers, or board members. At times, the organization's decisions may have legal implications for its constituents who will be acting on the

organization's behalf, including the constituents through whom the lawyer conveys advice. This situation implicates both the lawyer's duties to the organization client and the lawyer's professional obligations in interacting with the nonclient constituents of the organization.

The Rules of Professional Conduct set forth a general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under Rule 2.1. Where a lawyer—in-house or outside counsel—is giving advice to an organization client about future action of the organization, these provisions may require the lawyer to advise the organization when its actions pose a legal risk to the organization's constituents.

When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice. Rules 4.1, 4.3, and 1.13(d) [1.13(f) of the Model Rules) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role.

An organization's lawyer may want to instruct or remind an organization's constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyers' role. Educating an organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.

See also Comments [10] and [11] to Rule 1.13:

[10] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

7) Prospective client conflicts and ABA Formal Opinion 510

    1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

ABA Opinion 510

The opinion focuses on paragraphs (c) and (d)(2), and in particular what it means to take "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." First, information that relates to "whether to represent the prospective client" includes information relating to (1) whether the lawyer may undertake or conduct the representation (e.g., whether a conflict of interest exists, whether the lawyer can conduct the work

competently, whether the prospective client seeks assistance in a crime or fraud, and whether the client seeks to pursue a nonfrivolous goal), and (2) whether the engagement is one the lawyer is willing to accept. Second, to avoid imputation, even if information relates to "whether to represent the prospective client," the information sought must be "reasonably necessary" to make this determination. Third, to avoid exposure to disqualifying information that is not reasonably necessary to determine whether to undertake the representation, the lawyer must limit the information requested from the prospective client and should caution the prospective client at the outset of the initial consultation not to volunteer information pertaining to the matter beyond what the lawyer specifically requests.

8) Confidentiality when writing an article about a former client's legal matter

NYSBA Opinion 1268 arises from fairly specific circumstances – a lawyer represents a client, who is very wary of publicity and believes that publicity about this case could be harmful to his reputation, in a contentious business matter. After the representation and the legal matter are concluded, the lawyer would like to write an article on legal issues related to the case. The opinion discusses the application of Rules 1.1(c) (in Virginia, Rule 1.3(c)) and 1.8(b), concluding that by their own terms, they are only applicable to current clients and not former clients. When a client becomes a former client, the duty of loyalty is diminished and the lawyer's duties are established by Rule 1.9(c).

In this situation, the opinion concludes that if the proposed article discusses the legal issues from a strictly intellectual perspective and does not discuss particular facts of the matter that are not generally known, the disclosure would not violate Rule 1.9(c) (even if the former client would perhaps prefer the matter not be discussed at all). The opinion cites Comment [4a] to New York's Rule 1.6 explaining that the "accumulation of legal knowledge or legal research that the lawyer acquires through practice ordinarily is not client information protected by this Rule." Thus, the limitation is on revealing facts related to the client's matter, not the legal issues separate from any confidential information.

The opinion also discusses two other important aspects of Rule 1.9, neither of which prove decisive of the question in this opinion. First, the opinion analyzes the exception in Rule 1.6 (in Virginia, Rule 1.9(c)) for information that is "generally known," and reiterates the well-established conclusion that pleadings and other documents filed in a court case are not generally known for purposes of the rule. Facts that have been revealed in a pleading or other court filing remain confidential unless they are, in fact, generally known in the relevant community, trade, field, or profession.

Second, the opinion discusses Rule 1.9(a)'s prohibition on undermining or negating a lawyer's previous work on behalf of a client, concluding that a lawyer may not write an

article about a former client that attacks or undermines the legal work the lawyer did for the client in the same way that a lawyer could not seek to rescind a contract on behalf of one client that the lawyer drafted on behalf of a former client. Again, that limitation does not raise an issue here because there is no indication that the lawyer's article would undermine any legal positions or legal work done on behalf of the former client.

Developments on the “Hot Potato” Doctrine

- ABA Formal Opinion 516
- DC Bar Ethics Opinion 272

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 516 **April 2, 2025**

Terminating a Client Representation Under MRPC 1.16(b)(1): What "Material Adverse Effects" Prevent Permissive Withdrawal?

ABA Model Rule of Professional Conduct 1.16(b)(1) permits a lawyer to voluntarily end, or seek to end, an ongoing representation if "withdrawal can be accomplished without material adverse effect on the interests of the client." A lawyer's withdrawal would have a "material adverse effect on the interests of the client" if it would result in significant harm to the forward progress of the client's matter, significant increase in the cost of the matter, or significant harm to the client's ability to achieve the legal objectives that the lawyer previously agreed to pursue in the representation. A lawyer may be able to remediate these adverse effects and withdraw in a manner that avoids or mitigates the harm that the Rule seeks to prevent. The lawyer's motivation for withdrawal is not relevant under Model Rule 1.16(b)(1). Therefore, under the Model Rules, if the lawyer's withdrawal does not cause "material adverse effect" to the client's interests in the matter in which the lawyer represents the client, a lawyer may withdraw to be able to accept the representation of a different client, including to avoid the conflict of interest that might otherwise result.

Introduction

A lawyer may ordinarily decline to accept an engagement for almost any reason.[1] For instance, a lawyer may be concerned about the amount of work involved, the payment terms, the temperament and personality of the client, opposing parties or opposing counsel, a history with the judge, the merits of the litigation, the likelihood of success of the transaction, or whether the cause is one the lawyer wishes to champion. Perhaps the lawyer is trying to balance practicing law with matters that permit time flexibility or that are in a new area of law. Perhaps the lawyer just has a gut feeling that things will not work out. These are all valid factors to consider when a lawyer decides to decline an engagement. But once an engagement is accepted, could these concerns be sufficient reason for the lawyer to unilaterally terminate the representation?

While "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to payment for the lawyer's services,"[2] ABA Model Rule of Professional Conduct 1.16 limits the

[1] But a lawyer may not "seek to avoid appointment by a tribunal to represent a person except for good cause." MODEL RULES OF PROF'L CONDUCT R. 6.2. Under some jurisdictions' civil rights laws, lawyers may also be restricted from declining clients for impermissibly discriminatory reasons. *See* Nathanson v. Commonwealth, 16 MASS. L. REP. 761 (2003). However, Model Rule 8.4(g), which prohibits lawyers' discriminatory conduct based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."

[2] MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. [4].

circumstances under which a lawyer may or, in some situations, must end a representation.[3] Simply put, getting out of a matter can be a lot harder than getting in.

Rule 1.16(a) requires a lawyer to end, or seek the court's permission to end, the representation when:

> (1) the representation will result in violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud ….

By comparison, a lawyer may voluntarily end, or seek to end, an ongoing representation only if "withdrawal can be accomplished without material adverse effect on the interests of the client," Rule 1.16(b)(1), or if good cause to end the representation exists. Rule 1.16(b)(2)–(b)(6) enumerates circumstances constituting good cause and Rule 1.16(b)(7) explains that "other good cause" may exist.

This opinion offers guidance to lawyers seeking to unilaterally terminate a representation under Rule 1.16(b)(1) when withdrawal is not mandatory under Rule 1.16(a) and is not permitted under circumstances enumerated under subparagraphs (2)-(7) of Rule 1.16(b). The opinion addresses the meaning of the Rule's phrase "material adverse effect on the interests of the client" and provides a framework for analyzing when and whether such an effect prevents a lawyer from permissive unilateral withdrawal. The opinion concludes that a material adverse effect is one which, despite a lawyer's efforts to remediate negative consequences, will significantly impede the forward progress of the matter, significantly increase the cost of the matter and/or significantly jeopardize the client's ability to accomplish the objectives of the representation.[4] In other words, the material adverse effect must relate to the client's interests in the matter in which the lawyer represents the client.

The meaning of "material adverse effect"

Prior to the 1983 adoption of the ABA Model Rules of Professional Conduct, there was no equivalent to what is today Rule 1.16(b)(1). The ABA's Model Code of Professional Responsibility, which preceded the Model Rules, included a provision regarding a lawyer's termination of a client-lawyer relationship. But the provision, Disciplinary Rule 2-110, did not authorize a lawyer to withdraw from a representation without good cause or the client's consent. The addition of Rule 1.16(b)(1) reflected a judgment that if a lawyer would not significantly impair the client's interests in a matter by withdrawing from the representation, the Rules would not

[3] If the matter is in litigation, Rule 1.16(c) provides, "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

[4] In this opinion, the terms "representation" and "matter" are used interchangeably. This is consistent with their use in Model Rule 1.2(a).

compel the lawyer to see the matter through to completion simply because the lawyer had initially agreed to do so and the client might perceive it as disloyal for the lawyer to renege.[5]

Under Rule 1.16(b)(1), a lawyer's withdrawal would have a "material adverse effect on the interests of the client" if the lawyer's withdrawal would significantly harm the client's interests in the matter in which the lawyer represents the client—e.g., if the lawyer's withdrawal would result in significant harm to the forward progress of the client's matter, significant increase in the cost of the matter, or significant harm to the client's ability to achieve the legal objectives that the lawyer previously agreed to pursue in the representation. This conclusion is consistent with ethics opinions which have determined that a lawyer's withdrawal will not have a "material adverse effect" where all projects for that client were completed,[6] where no projects for the current client are imminently contemplated,[7] where the case is at "an early stage,"[8] where the client has retained successor counsel,[9] or where the lawyer has given the client "ample notice."[10] This interpretation of "material adverse effect" is consistent with this Committee's previous interpretation of the same phrase in Rule 1.9(a), which proscribes a representation "in which [a new client's] interests are materially adverse to the interests of the former client." *See* ABA Formal Op. 497 (2021).[11]

Circumstances where withdrawal will likely have a "material adverse effect"

A lawyer's withdrawal may significantly harm the representation in several ways.[12] In some transactional representations, for example, delay caused in the search for substitute counsel may

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[5] Rule 1.16(b)(1) drew from case law in which courts permitted lawyers to withdraw from a representation in litigation. The Reporter's Notes accompanying the proposed rule acknowledged the general principle that "[u]ndertaking representation implies an obligation to continue to completion the project for which the lawyer has been retained," but explained that what is today Rule 1.16(b)(1) "adopts the position of cases holding that a lawyer may withdraw without cause or client consent . . . if no material prejudice to the client will flow from the withdrawal." KUTAK COMMISSION, PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT 104 & 106 (May 30, 1981), *available at* https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts/. The Reporter's Notes further explained: "What amounts to specific performance by an attorney has been required, but such cases are extremely rare. They fall into two general classifications, that is, situations where the client's rights will be prejudiced by the delay consequent on replacing counsel and cases where the trial calendar of the Court will be dislocated, so as to impede the interests of justice . . .." *Id.* at 106, quoting Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694, 696 (S.D.N.Y. 1973).

[6] Conn. Bar Ass'n Informal Op. 95-4 (1995).

[7] D.C. Bar Ethics Op. 272 (1997); Phila. Bar Ass'n Prof'l Guidance Comm. Op. 98-5 (1998).

[8] State Bar of Mich. Op. JI-154 (2023).

[9] Phila. Bar Ass'n Prof'l Guidance Comm. Op. 2000-2 (2000).

[10] Mo. Informal Ops. 990177 (1999) & 20030049 (2003).

[11] Typically, the quoted language covers representations in which the new client is involved in litigation against the former client. However, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 497 (2021) notes that this language may also cover situations in which a new representation will cause "specific tangible direct harm" to the former client. The Committee notes that the "material adverse effect on the interests of the client" referred to in Rule 1.16(b)(1) is not identical to the "materially adverse" circumstance referred to in Rule 1.9(a), but that both phrases refer to a harm that is material – not negligible.

[12] "The client might have to expend time and expense searching for another lawyer. The successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter. . . . Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of

result in scuttling a deal or reducing its value. If no substitute lawyer is available, or if none is available who can complete the representation in the necessary timeframe, the client will suffer a material adverse effect.[13] Where the timing is objectively important to the client, significant delay can itself be a material adverse effect even if the representation can otherwise be completed successfully.

In some cases, having to retain a new lawyer may threaten the success of the representation because the original lawyer has unique abilities or unique knowledge that cannot be replicated in the allotted time or at all. Alternatively, the relevant adverse effect may consist of the client incurring significant additional expense because, to "get up to speed," successor counsel will charge fees to duplicate work previously performed.

A lawyer may be able to remediate these adverse effects and withdraw in a manner that avoids the harm that the Rule seeks to prevent. For example, the withdrawing lawyer may help the client find a new lawyer, collaborate with successor counsel to bring the new lawyer up to speed, and/or return or forego legal fees for work that will have to be duplicated.[14]

Circumstances where withdrawal is unlikely to have a "material adverse effect"

There are various circumstances where the withdrawing lawyer likely can avoid significantly harming the client's interest in the legal matter.[15] One such situation is where the representation has barely gotten off the ground. For example, a court found that "where defendant never deposited a retainer, where insubstantial services have been rendered and where the firm notified the court of its intention to withdraw early on in the litigation," withdrawal would "not significantly prejudice defendant."[16] One can envision circumstances such as these where, very soon after accepting a representation, the lawyer realizes that the legal work is not a good fit for the lawyer's skills, the work will take substantially more time than anticipated, it will be difficult to develop the client's trust, or there are other considerations that make the representation untenable.[17]

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confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §32 cmt. (h)(ii) (2000).

[13] *See*, *e.g.*, Rusinow v. Kamara, 920 F. Supp. 69, 71-72 (D.N.J. 1996).

[14] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §32 cmt. i (2000) (noting possible "material adverse effects" include the possibility that "[t]he client might have to expend time and expense searching for another lawyer" or "[t]he successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter," though "[a] lawyer wishing to withdraw can ameliorate those effects by assisting the client to obtain successor counsel and forgoing or refunding fees."). At least one opinion has suggested, "if the attorney refunded fees paid by the client to the extent services would be duplicated by new counsel, and addressed any other harm sustained by the client, then withdrawal [pursuant to 1.16(b)(1)] might be appropriate." Utah State Bar Advisory Op. 20-01 (2020).

[15] In all cases, Rule 1.16(d) requires a lawyer withdrawing from a representation to "take steps to the extent reasonably practicable to protect a client's interests." This Rule applies to mandatory termination under Rule 1.16(a) and withdrawal for cause as described in subsections (b)(2) through (7). However, the "reasonably practical" steps required by Rule 1.16(d) may not be sufficient to avoid the "material adverse effect" that would prevent withdrawal under Rule 1.16(b)(1).

[16] People v. Young, 38 Misc. 3d 381, 387 (NY City Ct. 2012).

[17] There may be cases where more than one section of Rule 1.16 applies. For instance, if the lawyer took on a matter that was beyond the lawyer's ability to complete competently, mandatory withdrawal might be necessary under Rule 1.16(a)(1) to avoid a violation of the duty of competency provided in Rule 1.1. While it may not be necessary under the Rule if another section of Rule 1.16 applies, it is always helpful to analyze whether Rule 1.16(b)(1) can be

Although it would have been preferable for the lawyer to decline the representation in the first place,[18] Rule 1.16(b)(1) generally permits the lawyer to withdraw early in the relationship.[19]

Another circumstance where withdrawing is unlikely to significantly harm the client's interests in the matter is where co-counsel can successfully complete the remaining work. For example, a court found that the withdrawal of one lawyer among many representing a party in the matter had no material adverse effect on the client's interests where the lawyer "completed all of the work he had been assigned" before withdrawing and the client "remained represented by dozens of other attorneys."[20] In other situations, the lawyer's withdrawal will not significantly harm the client's interests because the lawyer's work is substantially completed, and any remaining work does not require the lawyer's particular knowledge of the client and the matter. For example, after substantial completion of a transaction or litigation, there may remain ministerial tasks that would be easy for successor counsel to perform.

It follows that there will ordinarily be no material adverse effect on the client's interests in the matter at issue when there is no ongoing or imminent matter at the time the lawyer withdraws. For example, a lawyer and client may have an express or implied understanding that the lawyer will provide tax or estate planning advice when needed, or that the lawyer will represent the business client in collection matters as they arise. If the lawyer has completed all previously assigned matters, and there is no impending matter, having to secure a new lawyer for future matters is unlikely to have a material adverse effect on the client's interests.[21]

As these scenarios illustrate, Rule 1.16(b)(1) does not: protect a client's interest simply in maintaining an ongoing client-lawyer relationship, protect against the client's disappointment in losing the lawyer's services, or prohibit withdrawal based on the client's perception that the lawyer is acting disloyally by ending the representation.[22] Because it does not significantly harm the client's interests in the matter, the client's disappointment that this particular lawyer will not conduct or complete the representation is not a "material adverse effect" contemplated by the provision. If it were otherwise, the provision could never be used to permit a lawyer to unilaterally end the client-lawyer relationship.

While client consent is preferable, when a lawyer permissibly withdraws, or seeks to withdraw, under Rule 1.16, it is not required. In general, subject to confidentiality duties to others, the lawyer

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successfully invoked. In any context, the ability to demonstrate that withdrawal will not cause a "material adverse effect" will be helpful in establishing that the lawyer's withdrawal complied with Rule 1.16.

[18] The Committee acknowledges that it can be difficult to turn potential clients away. However, it is better to feel badly in the short run than to live with regrets in the long run.

[19] This will not invariably be true, however. For example, in fast moving litigation, a lawyer's withdrawal may have a material adverse effect even if it occurs early in the engagement.

[20] Cobell v. Jewell, 243 F. Supp. 3d 126, 165 (D.D.C. 2017).

[21] *See*, *e.g.*, R.I. Ethics Advisory Panel Op. 2023-6 (2023) (no material adverse effect on the client's interests where the lawyer has completed the services agreed to and no matter is pending or impending).

[22] In general, to the extent that the Model Rules proscribe disloyalty, they do so because of the expectation that a lawyer's disloyalty will adversely affect the quality of the lawyer's work. For example, a lawyer may not undertake another representation that is directly adverse to a current client without that client's informed consent because "the client is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [6].

owes the client a full explanation for withdrawing (*see* Rule 1.4), but not an explanation that necessarily satisfies the client or convinces the client that it is best to retain a different lawyer.

Invoking Rule 1.16(b)(1) when the lawyer's motivation is to represent an adverse party

When a lawyer withdraws under Rule 1.16(b)(1), the lawyer's motivation is irrelevant, unlike when a lawyer withdraws under one of the other provisions of Rule 1.16(b). Under the other provisions of paragraph (b), if a lawyer has an enumerated purpose for withdrawing, such as that the client has used or is seeking to use the lawyer's services to commit a crime or fraud, the lawyer may end an ongoing representation even if doing so has a material adverse effect on the client's interests. Rule 1.16(b)(1), however, permits withdrawal regardless of the lawyer's reason, so long as the lawyer's withdrawal would not have a material adverse effect on the client's interests. Therefore, a lawyer may withdraw for any reason, including for reasons relating to the lawyer's personal life or professional livelihood—e.g., to reduce the lawyer's workload—or for other reasons for which the client is entirely blameless.

For this reason, although Rule 1.16(b)(1) derives from judicial decisions, the provision parts company with the case law regarding whether a lawyer may withdraw from representing a client to avoid the conflict of interest that has resulted, or would result, from direct adversity to that client.[23]

In the context of litigation, some courts have held that without the client's consent, a lawyer may not withdraw from a representation to litigate against the now-former client.[24] Lawyers who end a representation for this reason have sometimes been disqualified from representing the new client. The so-called "hot potato" rule or doctrine comes from *Picker International, Inc. v. Varian Associates, Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir.1989), where the court concluded, "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." The implication of these decisions is that, even if the lawyer's withdrawal would otherwise be permissible, the lawyer may not withdraw to litigate against the client whose representation is terminated. But some courts recognize that the principle is not absolute and that it should not necessarily apply when the lawyer's withdrawal is not significantly prejudicial because, for example, "a lawyer's representation is sporadic, non-litigious and unrelated to the issues involved in the newer case."[25]

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[23] Directly adverse conflicts can arise in transactional matters as well as in advocacy. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. [6] & [7].

[24] *See*, *e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981); *In re* Gov't Investigation, 607 F. Supp. 3d 762 (S.D. Ohio 2022); Universal City Studios Inc. v. Reimerdes, 98 F. Supp. 2d 449 (S.D.N.Y. 2000); Int'l Longshoremen's Ass'n Local Union 1332 v. Int'l Longshoremen's Ass'n, 909 F. Supp. 287 (E.D. Pa. 1995); Penn Mutual Life Ins. Co. v. Cleveland Mall Associates, 841 F. Supp. 815 (E.D. Tenn. 1993); Harte Biltmore Ltd. v. First Pennsylvania Bank, 655 F. Supp. 419 (S.D. Fla. 1987); Truck Ins. Exch. v. Fireman's Fund Ins. Co., 8 Cal. Rptr.2d 228 (Cal. Ct. App. 1992); Phila. Bar Ass'n Prof'l Guidance Comm. Op. 2009-7 (2009); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §132 cmt. c (2000).

[25] Metro Life Ins. Co. v. Guardian Life Ins. Co. of Am., 2009 U.S. Dist. LEXIS 42475, at *13-14 (N.D. Ill. 2009). Another context where courts are unlikely to apply the principle is when a conflict of interest arises because through no "'fault' of the law firm, . . . two client companies or their affiliates merged or new parties joined a law suit." HAZARD, HODES, JARVIS & THOMPSON, THE LAW OF LAWYERING §21.15, n.3 (2024). *See also* John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 SAN DIEGO L. REV. 251, 283 (2011) ("courts frequently let

The "hot potato" principle is derived from neither Rule 1.16 nor any other professional conduct rule.[26] Rather, the principle is an extension of the common law duty of loyalty[27] and the need to preserve public confidence in the bar.[28] Even where a lawyer would otherwise be permitted to end a representation, such as where the lawyer is not currently engaged in a matter for the client or the client would not be significantly prejudiced if another lawyer completes the representation, courts might consider it disloyal for the lawyer to withdraw for the purpose of advocating against the now-former client even in an unrelated matter.

In general, although a lawyer may not advocate for a party that is directly adverse to another current client without both clients' informed consent, a lawyer may advocate against a former client if the matter is unrelated to the former representation and the lawyer does not use or reveal information relating to the representation to the disadvantage of the former client. *Compare* Rule 1.7(a)(1) (current client conflict rule) *with* Rule 1.9(a) (former client conflict rule).[29] Courts applying the "hot potato" doctrine treat the lawyer's withdrawal as if it did not occur and apply the principle of Rule 1.7(a)(1), which prohibits a representation that is directly adverse to another current client without consent from both clients.[30]

Disqualification decisions are informative, but they are not dispositive of the meaning and application of the Rules of Professional Conduct because courts do not necessarily rely exclusively on an application of the Rules to decide disqualification motions. Instead, many courts in the disqualification context have developed and come to rely on a judicial common law that is not necessarily tied directly to the jurisdiction's professional conduct rules. Courts often decline to disqualify lawyers even when the applicable conflict of interest rule appears to forbid the representation,[31] and less frequently, courts disqualify lawyers even when the applicable rule

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the doctrine remain unenforced by exercising their discretion to deny disqualification in light of many more or less relevant factors").

[26] Critics of the "hot potato" rule have noted that it originated in *Picker International, Inc.* under a set of professional conduct rules that did not include the current exception under Rule 1.16(b)(1). Further, the hot potato decisions are "facially inconsistent with the permissive withdrawal scheme of Model Rule 1.16(b)," and "[g]iven that permissive approach, it is hard to see why the more interesting or lucrative work could not entail suing a 'dropped' former client - assuming in addition, of course, that the matters are not substantially related." HAZARD, HODES, JARVIS & THOMPSON, *supra* note 24, §21.15, n.3.

[27] *See, e.g.*, Local 1332 v. Int'l Longshoremen's Ass'n, 909 F. Supp. 287, 293 (E.D. Pa. 1995).

[28] *See, e.g.*, Harte Biltmore Ltd. v. First Pa. Bank, 655 F. Supp. 419, 422 (S.D. Fla. 1987) ("Public confidence in lawyers and the legal system would necessarily be undermined when a lawyer suddenly abandons one client in favor of another").

[29] Even if withdrawal would not cause a material adverse effect on a client, a lawyer is not permitted, absent informed consent confirmed in writing, to be materially adverse to a now-former client in a matter that is substantially related to the former representation. For example, if a family law lawyer drafts a pre-nuptial agreement for a spouse and has completed all pending tasks, she would be permitted to withdraw as doing so would not cause a material adverse effect. But absent that spouse's consent, the lawyer would not be permitted to then represent the other spouse in seeking to interpret the pre-nuptial agreement because the matters are substantially related and the current spouse-client's interests would be materially adverse to the former spouse client's interests. *See* ABA Comm. on Ethics & Professional Responsibility, Formal Op. 497 (2021).

[30] *See, e.g.*, Markham Concepts, Inc. v. Hasbro, Inc., 196 F. Supp. 3d 345 (D.R.I. 2016).

[31] *See, e.g.*, Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) ("Although our decisions on disqualification motions often benefit from guidance offered by the American Bar Association (ABA) and state disciplinary rules, . . . such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification"). For example, some courts have held that a lawyer representing co-parties in litigation may withdraw from representing one co-client and continue to represent the other when the co-

would permit the representation.[32] Courts are well positioned to determine whether the harms against which the conflict of interest rules are meant to protect are likely to occur. Courts may also consider the harm to the party that could lose its chosen counsel and other relevant considerations such as whether the conflict appears to have been raised for tactical reasons or could have been addressed at an earlier juncture in the case. But because courts are not necessarily interpreting and applying the Rules of Professional Conduct in the disqualification setting, one cannot assume that approaches like the hot-potato rule developed by the judiciary and applied in many disqualification decisions are coterminous with the provisions of the Rules of Professional Conduct governing conflicts of interest.

Rule 1.16(b)(1) and other Rules of Professional Conduct do not incorporate the "hot potato" concept for the reason discussed above, namely, that a lawyer's motivation for invoking Rule 1.16(b)(1) is irrelevant. Even if the lawyer's reason for invoking Rule 1.16(b)(1) may be perceived as disloyal, the lawyer's motivation is not relevant. The salient question under Rule 1.16(b)(1) is whether, by withdrawing from a representation, the lawyer will materially adversely affect the client's interests in the matter in which the lawyer represented the client, not whether the lawyer will be adverse to the client in an unrelated matter after the representation is over.

Courts are, of course, free to exercise their supervisory authority over trial lawyers by disqualifying those who drop a client "like a hot potato" to advocate against that client in another case. Courts may elect to do so as a sanction or remedy for the lawyer's perceived disloyalty or to remove the incentive for lawyers to end representations for what courts regard as inappropriate reasons. But it does not necessarily follow that the lawyer's withdrawal, for a purpose of which courts may disapprove, constitutes a violation of the Rules of Professional Conduct for which a lawyer could be professionally sanctioned.

Conclusion

Rule 1.16(b)(1) permits a lawyer to voluntarily end, or seek to end, an ongoing representation if "withdrawal can be accomplished without material adverse effect on the interests of the client." A lawyer's withdrawal would have a "material adverse effect on the interests of the client" if it would result in significant harm to the forward progress of the client's matter, significant increase in the cost of the matter, or significant harm to the client's ability to achieve the legal objectives that the lawyer previously agreed to pursue in the representation.

A lawyer may be able to remediate these adverse effects and withdraw in a manner that avoids or mitigates the harm that the Rule seeks to prevent. For example, the withdrawing lawyer may help

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clients become adverse, at least when the now-former client was an "accommodation client." *See, e.g.*, Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977). Although Model Rule 1.9(a) might ordinarily forbid the lawyer from representing the remaining client in this situation without the former client's informed consent, a court might deny the former client's disqualification motion on the basis that the former client impliedly agreed in advance that the lawyer could continue to represent the principal client if a conflict of interest were to arise. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §132 cmt. i (2000).

[32] *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. [7] ("Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.").

the client find a new lawyer, collaborate with successor counsel to bring the new lawyer up to speed, and/or return or forego legal fees for work that will have to be duplicated.

Ideally, lawyers will exercise care and thoughtfulness in deciding whether to accept an engagement and will generally refrain from ending a relationship without good cause, whether out of a sense of obligation, loyalty to the client, or professional pride. But even careful lawyers may occasionally desire to end a representation for reasons other than those that constitute "good cause" under Rule 1.16. The lawyer's motivation is not relevant under Rule 1.16(b)(1). Therefore, under the Model Rules, if the lawyer's withdrawal does not cause "material adverse effect" to the client's interest, a lawyer may withdraw to be able to accept the representation of a different client, including to avoid the conflict of interest that might otherwise result.

DISSENT

Ethics opinions should, at their core, be helpful to lawyers seeking to navigate their ethical responsibilities. This opinion provides very helpful guidance to lawyers on many of the situations it addresses. However, the portion seeking to argue why the ethics rules do not prohibit a lawyer from firing one client in order to sue another client is something that we fear will prove more harmful than helpful to lawyers.

First, we are concerned that this opinion will only make it more difficult to convince lawyers to close files and transform current clients into former clients when they have completed their work on a matter. Practical guidance to help lawyers and firms understand the importance of actually terminating and closing files for dormant clients in order to limit ethical duties and conflict scenarios would be a much more helpful piece of guidance on this issue.

Second, the "hot potato" portion of the opinion is incomplete. The opinion fails to address the breadth of precedent on the "hot potato" doctrine, and we are concerned that by seeming to dismiss this judicial doctrine as involving a handful of outlier cases, the opinion may mislead lawyers about the law.[1] The opinion is incomplete, and thus also incorrect, because it does not directly answer whether terminating a client for the purpose of turning around and filing suit against it for another client could itself qualify as an act inflicting a material adverse effect on the interests of the client being dropped under Rule 1.16(b)(1).

Finally, we believe that there are several other reasons why the opinion is incomplete and thus not helpful guidance for lawyers. The opinion is incomplete because it avoids offering guidance on mandatory withdrawal under Rule 1.16(a).[2] While the adjudication of disqualification motions is always case and fact specific, any guidance on whether the ethics rules might conflict with the judicial "hot potato" doctrine should address the mandatory withdrawal scenario of Model Rule 1.16(a)(1). Realistically, when a lawyer or law firm comes to realize they have accepted a representation adverse to another client they must, at minimum, drop one representation to avoid running afoul of Rule 1.16(a)(1). This can happen for a variety of reasons, including through no fault of the lawyer. See the "thrust upon exception to the hot potato doctrine."[3]

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[1] *See* "HOT POTATO" DOCTRINE, https://www.freivogelonconflicts.com/hotpotato.html (last visited Feb. 17, 2025).
[2] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 515 (2025), at 2.
[3] *Supra* note 1, collection of precedent discussed after the heading "The 'Thrust-Upon Exception."

The opinion also fails to offer guidance for transactional lawyers. It only addresses "hot potato" situations in litigation as if they are deliberate decisions made before accepting a new representation. It does not meaningfully address common situations in transactional matters such as where a lawyer or firm terminates the representation of a business client in order to take on the representation of a different client in an adverse transaction or other non-litigation matter. Accordingly, we dissent, in part, from this opinion.

Brian Faughnan
Wendy Muchman

Ethics Opinion 272

Conflict of Interests: “Hot Potato”

A law firm may continue to represent a client, which it has long counseled on regulatory matters, in an adversary proceeding before the relevant administrative agency, even after a second client that it represents on unrelated matters hires separate counsel and unexpectedly initiates adversary litigation in that administrative agency against the first client and refuses to waive the conflict.

Where a lawyer-client relationship is on-going, conflict of interest issues involving that client are governed by Rule 1.7(b), not Rule 1.9, and thus the lawyer may not take a position adverse to that client on behalf of another. However, the lawyer may withdraw from the representation of the client if he may do so in accordance with the provisions of Rule 1.16, and after he has done so, the lawyer’s obligations to that client are governed by Rule 1.9.

Applicable Rules

- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.16 (Declining or Terminating Representation)

Inquiry

A law firm has requested our opinion concerning its ability to represent two clients of the firm who are adverse in an administrative proceeding. The firm has represented Client A for a considerable period of time with respect to matters that are regulated by that agency. The firm successfully represented Client A in a completed, non-adversarial matter before the agency and thereafter continued to provide advice regarding matters regulated by that agency. The firm also represents Client B in unrelated contract matters, but has not done any work for Client B in some months. Client B represented by separate counsel, has initiated an adversarial action against Client A before that administrative agency. Client B refuses to consent to the law firm’s representation of Client A in the administrative matter.

The question posed is whether and under what conditions the law firm, consistent with the D.C. Rules of Professional Conduct, may represent Client A in the administrative proceeding initiated by Client B. The Committee concludes that the law firm may represent Client A in that proceeding if the firm is ethically permitted to withdraw from the separate, unrelated representation of Client B. We find that in the circumstances presented by this inquiry withdrawal is permitted under Rule 1.16.

Discussion

The inquiry focuses on the conflict between the firm’s two clients, A and B, in the regulatory proceeding, a conflict that arose through no action of the law firm and that was not reasonably foreseeable at the outset of the firm’s representation of either of the two clients. Fundamental to the resolution of the questions presented is the difference in the standards applicable under the Rules where a lawyer wishes to oppose a present client and where he wishes to oppose a former client. The first issue to be addressed is whether the lawyer may consider his representation of Client B as

having ended for purposes of the conflict of interest rules. The second issue, assuming the answer to the first is in the negative, is whether the lawyer may withdraw as counsel to Client B in order to be free to litigate against that party under the less stringent rules governing conflicts of interest with former clients.

Governing Conflict of Interest Rules

Rule 1.7(b)(1) of the D.C. Rules of Professional Conduct provides that, without the fully informed consent of the affected clients, a lawyer may not represent a client in a matter if a position to be taken by that client in that matter is adverse to a position of another client in the same matter. This rule deals with a situation in which the lawyer is representing one client in a matter, such as a litigation or an administrative proceeding, in which another client, which the lawyer represents only in unrelated matters, takes a position adverse to the first client. Rule 1.7 is designed to ensure that an attorney will act with undivided loyalty to all existing clients. Undivided loyalty to a client is, of course, a fundamental tenet of the attorney-client relationship. *See* Wolfram, *Modern Legal Ethics* 146 (1986).

A lawyer's duty to a former client is somewhat different and is governed by Rule 1.9. Under this rule, a lawyer may sue or otherwise take positions antagonistic to a former client, without disclosure and without the former client's consent, if the new representation is not substantially related to the matter in which the lawyer had represented the former client. The purpose of this rule is to assure the preservation of attorney-client confidences gained in the prior representation and to preserve the reasonable expectations of the former client that the attorney will not seek to benefit from the prior representation at the expense of the former client.

If the fact situation presented by the inquiry were governed by Rule 1.7(b), it is clear that the law firm could not undertake the representation of Client A in the regulatory proceeding in which the firm's Client B was a party with separate representation, without the informed consent of both Clients A and B. On the other hand, if the firm's representation of Client B were at an end at the time Client A sought the firm's assistance against B, the situation would be governed by Rule 1.9 instead of Rule 1.7. In that situation, there would be no impediment to the firm's representing Client A against former Client B as long as the regulatory proceeding was unrelated to the firm's prior representation of former Client B.

Whether Client B Should Be Regarded as a Current Client

In light of the difference in the conflict of interest rules governing present and former clients, it is important to determine at the outset whether B should be regarded as a current or a former client. In many instances, such a question can be easily answered from objective facts. If the lawyer had previously withdrawn from the representation of Client B under Rule 1.16, the withdrawal would have terminated the relationship and converted the client into a former client. Or, if the firm had completed the single discrete task for which it had been retained, the client is a former one. Such is the situation envisioned in Comment [8] to Rule 1.3: "If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." That could be the situation presented to us in this inquiry, as the law firm completed all tasks for Client B and there has been no communication between them for some months.

On the other hand, certain facts are presented which suggest that the attorney/client relationship is continuing in this situation with respect to Client B. We are informed that the inquiring law firm is from time to time consulted by B on contract matters, which may indicate a continuing relationship punctuated by periods of inactivity. B appears to have a subjective belief that it continues to be a client of the firm. Since a reasonable subjective belief can be the basis for the formation of an

attorney/client relationship (*see Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)), it may also be the basis for the continuation of the relationship. The inquirer, moreover, refers to B as a client in its inquiry, and the inquirer sought B's consent to the representation of A in the administrative proceeding. With additional facts which may or may not be present here, another sentence of Comment [8] to Rule 1.3 could apply and lead to the conclusion that B remains a client:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be eliminated by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

While additional facts might affect our determination, we assume, on the facts presented and for purposes of this analysis, that B is a current client of the inquiring law firm.

Whether the Lawyer May Withdraw From Representing Client B

If B is a current client, the question then arises whether the lawyer may withdraw from representing Client B and invoke the more lenient conflict of interest provisions of Rule 1.9 to determine his obligations to his former client. Rule 1.16(b) provides, in relevant part, that a lawyer may withdraw from representing a client only if withdrawal can be accomplished without "material adverse effect" on the interests of the client.

Under the facts presented here, we conclude that the firm may withdraw under Rule 1.16(b) because it appears that withdrawal as counsel from Client B can be accomplished without "material adverse effect" on Client B. All projects for Client B have apparently been completed; no work had been done on the unrelated contract matters for several months; no outstanding projects appear to be contemplated imminently; and Client B was able to obtain different counsel, as reflected by the fact that B retained other counsel to represent it in connection with the administrative proceeding.

Relevance of Rule 1.7(d)

Our conclusion respecting the permissibility of the firm's representation of Client A against Client B is consistent with newly promulgated D.C. Rule 1.7(d). While this provision does not in terms apply in this situation, we believe it provides guidance and support for our resolution of this matter under Rule 1.16.

Rule 1.7(d) deals with the situation in which a law firm is representing two clients simultaneously in unrelated matters, and thereafter adversity between the clients' positions in a particular matter develops or for the first time becomes apparent.[1] Thus, under this Rule, if the law firm had been representing Client A in an ongoing administrative proceeding and Client B, represented by separate counsel, unexpectedly intervened in the administrative proceeding taking positions adverse to Client A, then the law firm would be able to continue both representations so long as it reasonably concluded that neither representation would interfere with the other.[2]

If the lawyer is currently representing both Client A and Client B, why then does Rule 1.7(d) not control in this situation, since one client has retained other counsel and preemptively sued the other? The answer is that when Rule 1.7(d) speaks in terms of a conflict not foreseeable "at the outset of a representation," we believe that this means representation in a particular discrete matter, as contemplated in Rule 1.7(b).

While it would not be unreasonable to interpret the phrase "outset of a representation" to mean the client's initial retention of the lawyer on any matter, it is clear from the context of Rule 1.7(d) that the drafters had in mind the outset of representation in the discrete matter in which the unforeseen conflict arises. The narrow exception to Rule 1.7(b) carved out by the new subsection (d) addresses the situation in which one client potentially has the power to disable the law firm from its ongoing representation of another client in a particular matter already in progress, simply by intervening in the proceeding with separate counsel, which would of course result in substantial prejudice to the client deprived in midstream of its lawyer.[3]

It would be a considerable step beyond this narrow class of "thrust upon" conflicts to extend Rule 1.7(d) to situations where, as here, there is a current general "representation" of a client but the matter in which adversity develops has not yet begun. Such an expansive reading of Rule 1.7(d) would, we believe, make a larger inroad into the protections of Rule 1.7(b) than the drafters of Rule 1.7(d) intended. Thus, we believe that Rule 1.7(d) does not apply where a law firm represents two clients on unrelated matters and thereafter one client decides to sue the second client in a new matter. In this situation, the law firm may represent one of the clients in the new matter only with the informed consent of both clients.

We believe the facts of the instant inquiry take it outside the terms of Rule 1.7(d), since there was no discrete matter in existence prior to the time that Client B initiated the proceeding against Client A. On the other hand, the concerns underlying the enactment of Rule 1.7(d) are clearly implicated here, since Client B's initiation of an action against Client A in a forum in which Client A would reasonably have expected to be able to avail itself of the services of its long-standing lawyers, would work precisely the same sort of "substantial prejudice" towards Client A about which the drafters of the "thrust upon" rule were concerned. We are thus reassured that our conclusion in this situation, that the firm should be able to represent Client A by withdrawing from its representation of Client B if allowed by Rule 1.16, is consistent with the overall policies of the rules.

In sum, we believe that the law firm should be able, under the circumstances presented, (i) to withdraw as counsel to Client B, rendering it a former client; and (ii) to continue thereafter, consistent with Rule 1.9, to represent A in the administrative proceeding, taking positions adverse to former Client B provided that the matter is not substantially related to the work that the law firm did for Client B.

Analysis of Precedents

In reaching our conclusion, we are mindful of a line of judicial authority and opinions of Bar committees in other jurisdictions that severely limit a lawyer's ability to terminate a client once a potential conflict arises in order to be able to take positions adverse to the erstwhile client. *See, e.g., Picker Intl., Inc. v. Varian Assoc., Inc.*, 869 F.2d 578 (Fed. Cir. 1989); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Penn Mutual Life Ins. Co. v. Cleveland Mall Associates*, 841 F. Supp. 815 (E.D. Tenn. 1993); *Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F. Supp. 419 (S.D. Fla. 1987). These cases have been cited for the broad proposition that "a law firm may not withdraw from a representation where the purpose is to undertake a new representation adverse to the first client, even in an unrelated matter, and apparently even if the withdrawal would not have an adverse impact on the client." Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, p. 480.1 (1996). As noted in the Hazard & Hodes handbook, this rule has come to be called the "hot potato" rule as a result of the colorful statement by District Court Judge Aldrich in *Picker Intl., Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989): "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."

We believe this line of authority does not govern the instant inquiry, for several reasons. In the first place, none of these cases was decided by a District of Columbia court; none was interpreting the D.C. Rules; and none of the cases arose in the District of Columbia. We are not aware of a District of Columbia court decision that addresses the issue. Second, and more important, we believe that the cases and bar opinions from the other jurisdictions are distinguishable on the facts presented by this inquiry, as well as by differences in the applicable rules.

We believe that the facts presented here make clear that the broadest statement of the so-called "hot potato rule" is too categorical to apply in all circumstances and is inconsistent with the optional withdrawal provisions of the D.C. Rules. As Professors Hazard and Hodes noted: "The ['hot potato'] rule will not wash if applied uncritically, *whenever* a lawyer drops a client for the purpose of suing that client on behalf of someone else." *Id.* at 480.2 (emphasis in original). These noted ethics professors further observe that the approach is "certainly inconsistent with the permissive withdrawal scheme of Rule 1.16(b)" and that a definition of loyalty broad enough to encompass the mere act of dropping a client "would convert the client-lawyer relationship into one of perpetual servitude." *Ibid.*

In each of the cited cases in which a lawyer was disqualified from continuing a representation of a client, the lawyer had affirmatively undertaken action — such as initiating a law firm merger — which created the potential conflict. In each of the cases, the representation of the client, whose termination was proposed, was active. Further, each jurisdiction involved had adopted Canon 9, of the former Code of Professional Responsibility, which provides that in all matters an attorney must avoid even the "appearance of impropriety." The D.C. Rules deliberately do not include any provision focusing on the appearance of impropriety. *See* Paragraph [32] Explanation of Committee and Board Revisions, Rule 1.7 of Proposed Rules of Professional Conduct submitted to the District of Columbia Court of Appeals, Nov. 19, 1986, by the Board of Governors of the District of Columbia Bar. Finally, none of the jurisdictions had a "thrust-upon" conflicts rule like D.C.'s Rule 1.7(d), which allows an attorney to remain in a matter after an unforeseeable conflict has arisen. In all of these respects, these cases from other jurisdictions are distinguishable.

It does not appear from the facts of this Inquiry that the law firm had any role in creating the conflict between the two clients, and indeed it had no reason to anticipate that such a conflict would develop when it undertook the representation of A in the administrative agency matters. Nor was the firm currently actively engaged in representing Client B in any particular matter, such that its withdrawal might work some prejudice to Client B.

We believe that the approach taken by the Alabama Supreme Court in *AmSouth Bank v. Drummond Company, Inc.*, 589 So. 2d 715 (Ala. 1991) is instructive. In that case, a firm represented Client A in a litigation and Client B, a bank, in unrelated securities matters. During the course of the litigation, Client B, in its fiduciary capacity as a trustee, retained separate counsel and joined the lawsuit against Client A. Client A agreed to waive the conflict, but Client B refused. The law firm promptly withdrew as counsel for Client B and continued to represent Client A in the lawsuit. Former Client B then moved to disqualify the law firm. The Alabama Supreme Court held that the law firm had acted properly in withdrawing as counsel to Client B in the suit because the litigation was not related to the matters on which the firm had represented Client B.

In considering the interplay among Rules 1.7, 1.9 and 1.16 of the Alabama Rules of Professional Conduct—which are similar, but not identical, to the provisions under which we operate in the District of Columbia—the *AmSouth* Court stated that the Rules of Professional Conduct are "rules of reason," and that it had always employed a "common sense" approach to questions concerning the professional conduct of lawyers. The Court emphasized four factors in reaching its conclusion that

the law firm acted properly in withdrawing as counsel to Client B and thereby treating Client B as a former client for purposes of the conflict rules:

1. The law firm did not by its actions create the conflict of interest; rather, Client B had taken the initiative;
2. Client A would be substantially prejudiced by the withdrawal of the law firm, which had already devoted hundreds of hours to the defense of A in the litigation;
3. The law firm, after failing to obtain consent, promptly withdrew from representing Client B; and
4. Client B would not be materially prejudiced by the withdrawal of the firm as its counsel on the unrelated matters which had consumed very few hours to that point.

While the fact patterns are diverse, a number of other courts have taken a common sense approach to conflict issues in analogous circumstances, permitting the matter to be resolved by withdrawal from representation of a client, where little or no prejudice will result to that client. *See, e.g., Monaghan v. S2S 33 Associates, L.P.*, 1994 WL 623185 (S.D.N.Y. Nov. 9, 1994); *In re Wingspread Corp.*, 152 B.R. 861 (Bankr. S.D.N.Y. 1993); *Pearson v. Singing River Medical Center Inc.*, 757 F. Supp. 768 (S.D. Miss. 1991); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990); *Hartford Accident & Indemnity Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534 (S.D.N.Y. 1989); *Penwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980).

In responding to the instant inquiry, we adopt the "common sense" approach of the Alabama Supreme Court in *AmSouth*, encouraged in this course by the recent adoption of D.C. Rule 1.7(d). We believe that the same four factors used by the *AmSouth* Court should be analyzed and balanced in cases when the conflict between two clients is unforeseen and does not arise during the course of a discrete ongoing matter.

On the other hand, we also strongly agree that the important values of client loyalty and confidence of the public in the bar preclude an interpretation of the rules that would enable a lawyer or a law firm to abandon a client during an active representation in anticipation of pursuing another, perhaps more lucrative, conflicting representation. If, for example, a lawyer were in the midst of representing a client when a prospective client came along seeking the lawyer's assistance in bringing a potentially rewarding lawsuit against the existing client in an unrelated matter, we believe that withdrawal from the existing representation under those circumstances would not be permissible under Rule 1.16. Our analysis of such a situation would be that virtually by definition the existing client would suffer material adverse harm by the withdrawal.

Thus we would view the situation quite differently if A were a prospective new client who had approached the law firm to seek the firm's services in a suit against B, an existing client of the firm. In that situation, there is the specter that the law firm was chosen precisely because it had represented the prospective defendant and thus the firm may presumptively be aware of certain facts or attitudes of the prospective defendant that could be useful to the potential new client. Second, in such a situation there is by definition no prior relationship between the prospective client and the law firm and thus there would be no apparent prejudice in requiring the prospective client to find other counsel. Third, the withdrawal of the firm from providing ongoing services for the existing client would almost certainly result in some prejudice, disruption or additional expense for the existing client. Each situation must be analyzed on its facts. In general, we suggest that the more the potential conflict was caused by the actions of the attorney for the benefit of the attorney and/or a prospective or other client, the less justifiable will be the firm's effort to withdraw and to treat the conflict under the principles applying to former clients. If, as a result, the firm is unable to withdraw, the conflict will have to be analyzed under Rule 1.7. Where, however, as here, A is an existing client with a legitimate and longstanding claim to his lawyer's loyalty and services; where the unrelated matters for Client B

had been completed, and the withdrawal can be made without material adverse effect on Client B; where the conflict was precipitated by Client B without any participation by the law firm; and where Client A would suffer material adverse effect by withdrawal, we believe a common sense reconciliation of the competing principles of professional responsibility permits the lawyer to terminate representation of Client B and to treat B as a former client under Rule 1.9. Of course, the withdrawal would have to be effected in a manner conforming to Rule 1.16, which includes a clear communication to the former client. It is also assumed that no confidential information obtained from Client B would be used in any way in the representation of Client A.

It is important to emphasize that in the question presented by the inquiry it is clear that the law firm was required to withdraw from at least one representation. The law firm either had to forego representing Client A in the administrative proceeding or cease representing Client B in the unrelated matters. Because the firm faced that choice and because at least one client was going to lose the firm's services for some purposes, it is pertinent to consider the competing equities, including the relative potential prejudice to each client from withdrawal of the representation of that client.

Practical Considerations

The inquiry highlights the importance of distinguishing between existing and former clients. We are aware that in many situations the relationship between an entity and a lawyer or law firm is ambiguous. For example, a corporation, not providing a retainer, may call upon a law firm from time to time for legal advice, paying on a per hour basis for services rendered. During the hiatus between the last call and before another possible request for advice, it may be unclear whether the corporation is an existing client or simply a former and prospective client. Absent an express termination, a court will likely examine the subjective expectations of both parties, as evidenced by their relevant conduct, to determine whether the attorney-client relationship continues. *See, e.g., Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D.N.J. 1989); *Derrickson v. Derrickson*, 541 A.2d 149 (D.C. App. 1988).

For a variety of reasons, including but not limited to the differing conflict rules applicable to existing and former clients, lawyers would be well advised to take steps to delineate the relationship clearly. This may be addressed in part by clearly defining in writing the project or services to be rendered at the outset of the retention. A termination clause may be included in the engagement letter, providing that upon completion of the described services and payment, the attorney-client relationship will be concluded. Alternatively, a law firm may deem it advisable to send close-out letters, politely concluding the relationship, when the assignment is completed. Similarly, it may be prudent for a law firm to comb its client list periodically and advise in writing entities or individuals for whom it has not performed legal work for a substantial period of time that the law firm deems the person or entity to be a former client. While such clarity, even if diplomatically communicated, may not always serve the best business interests of the law firm, an unambiguous statement of the relationship prior to the development of a potential conflict will serve both parties' interests better when a potential conflict is raised in the courts or before an ethics committee.

Conclusion

For the reasons discussed above, we believe that after Client B initiated an administrative proceeding with separate counsel against Client A, the law firm was entitled to withdraw from the unrelated representation of Client B, to treat Client B as a former client under the conflict rules and to continue to represent Client A, which it had long counseled in this area of the law, in the administrative proceeding.

Inquiry No. 96-5-14
Adopted: May 21, 1997

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1. Made effective by the D.C Court of Appeals as of November, 1996, Rule 1.7(d) provides:
If a conflict not reasonably foreseeable at the outset of a representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

2. Under new Rule 1.7(d) and its commentary, the law firm should promptly inform both clients of the situation and seek their informed consent. Comment [22] to the Rule states: "Where a conflict is not foreseeable at the outset of the representation and arises only under Rule 1.7(b)(1), a lawyer should seek consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw."
Accordingly, even if the client/opposing party does not consent, the law firm may continue both representations if it concludes that neither representation will be adversely affected by the simultaneous representation of the clients in the separate matters. Of course, either client is free to terminate the representation.

3. The prototypical situation covered by Rule 1.7(d) is where a lawyer represents a client in a litigation in which a second client, represented on unrelated matters, is at the outset neither a party nor a contemplated party. If, without any reasonable foreseeability, the second client takes an adverse position in that litigation, it would be quite unfair to disqualify the lawyer from representing the client that he had been representing in the ongoing litigation. Thus, under Rule 1.7(d), even if the second client refuses to consent, the lawyer may continue to represent the first client in the litigation.

VSB Developments

- Supreme Court approves changes to Rule 1.5 (Prohibiting non-refundable advance fees)
- Proposed LEO 1901 (Reasonable Fees and the Use of Generative Artificial Intelligence)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 16th day of May, 2025.

On March 6, 2025, came the Virginia State Bar, by Michael MacKager York, its President, and Cameron M. Rountree, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Rule 1.5, Part Six, Section II of the Rules of Court, be amended. The petition is approved and Rule 1.5 is amended to read as follows:

Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined,

including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) in a domestic relations matter, except in rare instances; or

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

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and consents to the participation of all the lawyers involved;

(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;

(3) the total fee is reasonable; and

(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

(g) Nonrefundable advanced legal fees are prohibited.

COMMENT

* * *

Nonrefundable Fee

[10] A nonrefundable advanced legal fee compromises the client's unqualified right to terminate the lawyer-client relationship because the right to terminate the representation would be negatively affected if the client would still risk paying for services not provided. Further, retaining a nonrefundable fee after being discharged by the client before the fee is earned violates the lawyer's responsibility to refund any unearned fee upon termination of the

representation. An unearned fee is per se unreasonable and therefore charging an unearned nonrefundable fee violates Rule 1.5(a). *See* LEO 1606.

[11] A retainer paid to ensure the lawyer's availability for future legal services and/or as consideration for the lawyer's unavailability to a potential adverse party is not an advanced legal fee and is earned when paid. The retainer must be charged solely for these purposes and not as prepayment for legal services to be rendered in the future.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective July 15, 2025.

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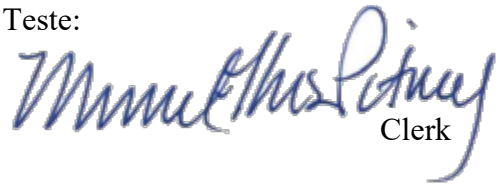

Clerk

LEGAL ETHICS OPINION 1901 Reasonable Fees and the Use of Generative Artificial Intelligence

Introduction

The rise of generative artificial intelligence – artificial intelligence that can generate text and other content – has led to renewed interest in whether and how lawyers can appropriately bill for work done with the assistance of generative AI. While it is clear that time-based billing, such as hourly fees, can only be based on the actual time spent on a task, lawyers increasingly seek guidance on the ethical parameters for non-hourly fee structures and how to assess reasonableness when using time-saving tools that rely on generative AI. This opinion discusses the ethical bounds and considerations when a lawyer is able to produce work dramatically more efficiently than in the past using generative AI. Though this opinion is specifically addressing productivity improvements generated through the use of generative AI, its principles may be equally applicable to a lawyer's use of other technological tools that result in comparable productivity improvements.

Applicable Rule of Professional Conduct

Rule 1.5 Fees

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

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

Analysis

Rule 1.5(a) – Reasonableness

Much of the discussion about value-based or other non-hourly billing schemes arises in the context of generative AI, but the application of Rule 1.5 is the same regardless of the reason for increased efficiency in legal work. When applying Rule 1.5's reasonableness factors to value-based billing, the tension lies between “the time and labor required” and “the skill requisite to perform the legal service properly,” both of which are components of 1.5(a)(1).

While generative AI can dramatically reduce the "time and labor required" for certain tasks, such as drafting routine documents, conducting preliminary research, or analyzing large volumes of data, it would not be reasonable to conclude that a lawyer is ethically required to reduce or limit the fee based solely on that factor. Rather, the "skill requisite to perform the legal service properly" might actually increase, as effective AI use could require specialized knowledge to prompt, verify, supplement, and integrate AI outputs into competent legal work product. The lawyer's judgment in determining when and how to deploy AI tools, and the expertise needed to critically evaluate AI-generated content, represent valuable services for which the lawyer reasonably can be compensated.

The factors concerning "the novelty and difficulty of the questions involved" (notably, this factor is included in the same sub-paragraph as the two factors discussed above) and "the experience, reputation, and ability of the lawyer" take on new dimensions in the AI context. The difficulty now includes properly configuring AI systems to address complex legal questions, understanding the limitations of current tools, and maintaining sufficient domain expertise to identify AI hallucinations or errors. A lawyer's unique value proposition might involve their ability to frame legal problems in ways technology can address while knowing when human judgment must predominate, which provides a sound basis for maintaining value-based fees even as raw production time decreases.

The factor addressing "the amount involved and the results obtained" supports value-based billing models that focus on outcomes rather than inputs. If AI assists a lawyer to achieve superior results more efficiently, the client benefits from both the improved outcome and potentially reduced total costs compared to a lawyer using traditional methods.

The committee notes that some other ethics opinions have reached a different conclusion. For example, ABA Formal Opinion 512 (2024) indicates, in the context of flat or contingent fees, that “if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it.” Likewise, in

2024 Formal Ethics Opinion 1, the North Carolina Bar cautioned that, "[i]f the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may not inaccurately bill a client based upon the 'time-value represented' by the end product should Lawyer have not used AI when providing legal services." The North Carolina opinion goes on to suggest that flat fees may be appropriate in this context, but it is unclear to what extent the flat fee must be adjusted for the use of AI.

The committee disagrees with the conclusions stated or implied by those opinions, concluding that it is not per se unreasonable for a lawyer to charge the same non-hourly fee for work done with the assistance of AI as work done without the use of AI. Any legal fee, regardless of the basis or type of fee, must be reasonable considering all the factors identified in Rule 1.5(a), but the time spent on a task or the use of certain research or drafting tools should not be read as the preeminent or determinative factor in that analysis. The opinions cited above fail to appreciate the value of advancing technology and the reaction of the legal markets to that technology; while over time, the market rate might drop based on dramatic improvements in efficiency, Rule 1.5 should not require the lawyer to surrender any benefit from the efficiency gains if clients continue to receive value from the lawyer's output.

Rule 1.5(b) – Adequate explanation

Separate from the reasonableness requirement in Rule 1.5(a), a lawyer's fee must also be adequately explained to the client under Rule 1.5(b). When a lawyer uses a fee arrangement that is primarily based on the lawyer's skills and the value of the anticipated final product, as opposed to time spent or reaching a fixed endpoint of a proceeding, the lawyer must ensure that the basis for that fee is adequately explained to the client. This could also be particularly important if the lawyer's time spent on the specific representation is substantially reduced due to the productivity-enhancing tool, such that the client may need additional explanation of why the lawyer's experience, technical skills, or other efficiencies contribute to the value of the services and determination of the fee.

Conclusion

When evaluating fee reasonableness for a lawyer who uses generative AI or other productivity-enhancing tools or experience, Rule 1.5 does not equate reduced time with proportionally reduced fees. Such an approach would fail to account for the investment lawyers make in developing AI expertise and the continuing value of their professional judgment. Instead, a proper analysis should recognize that reasonable non-hourly fees can reflect efficiency gains, the specialized skill of effectively incorporating technology, and the value of the relevant services and output.