The Hotline: An ALPS Ethics and Professionalism Program

Friday, March 22, 2019 | 9:00 a.m. – 12:15 p.m.
Dena'ina Civic and Convention Center
Anchorage, AK

CLE# 2019-311 3.0 Ethics CLE Credits

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Moderated by: Mark Bassingthwaighte, Esq., Risk Manager with ALPS
Panel Members: Nelson Page, Bar Counsel and Maria Bahr, State Ethics Attorney

Program Description:

"The Hotline" is an educational seminar designed to shed light on ethical issues that many attorneys face daily. Although the vignettes may be presented as taking place outside your jurisdiction, we will apply the Rules of Professional Conduct of your jurisdiction to the analysis of the issues presented.

This program is designed to be somewhat interactive. After viewing a series of video vignettes, a panel will discuss a series of questions that address the issues raised in each vignette. During the panel discussions, attendees will be encouraged to ask questions and share comments.

The intent is to emphasize that attorneys should take time to reflect upon ethical issues and what it means to be a professional on a more frequent basis. Ultimately, the desire is to have attendees leave the program with a greater sensitivity of the many ethical issues that can be in play any day of the week, be better prepared to view these issues as learning opportunities, and be more willing to take advantage of these opportunities in order to see that the issues are responsibly addressed and resolved.

Program Summary:

In Vignette One, we'll listen in to the first segment of a talk show called "The Hotline." Topics raised in this vignette include the duties that arise when a lawyer acts as an escrow agent, the duties that arise when a lawyer holds settlement funds, rogue clients, and the tension between a lawyer's duty to maintain client confidences and a court's need for sufficient information upon which to rule on a motion to withdraw.

In Vignette Two, we'll watch the second segment of "The Hotline" talk show. Topics presented in this vignette include the obligations that arise upon discovery that a firm attorney has been fraudulently billing clients, the circumstances RPC 1.6's phrase "to prevent reasonably certain death or substantial bodily harm" is intended to cover, the application of the RPCs to artificial intelligence, the use of text message advertising services, and using text messaging as a client communication tool.

Finally, in Vignette Three, we'll watch the final segment of "The Hotline." In this segment the topics raised include exploring the "generally known" exception set forth in RPC 1.9, conflict issues that arise in multiple client representation, responding to a malpractice claim, and ransomware prevention.

A Sampling of Attendee Takeaways:

- Ethical clarity on how to deal with clients who go rogue.
- Identification of proactive steps lawyers can take to prevent and/or recover from a ransomware attack.
- Identification of the pros and cons of using text messaging as a client communication tool.
- Guidance on handling settlement funds.

Biographies

Since 1998, **Mark Bassingthwaighte, Esq.** has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 450 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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Maria Bahr is Ethics Counsel for the office of the Alaska Attorney General. Prior to that, she was Bar Counsel for the Alaska Bar Association. Maria has an undergraduate degree from Harvard University and a JD from the University of California Los Angeles. She clerked for the Alaska Court of Appeals, and was admitted to practice in Alaska in 1991. Maria spent over 10 years with the Alaska Public Defender Agency representing clients in Anchorage, Sitka, Kodiak, and Palmer. Maria worked for the State Bar of Arizona as a staff attorney starting in 2003, and served as the Director of the Arizona Bar's Lawyer Assistance Programs for five years. Maria was an Adjunct Professor with the Arizona Summit Law School (formerly the Phoenix School of Law) teaching ethics and practice management skills. She served as Assistant Director of the General Practice Skills Program at the law school from 2009 to 2015. She was also a judge pro tem for the City of Mesa Municipal Court.

Nelson G. Page graduated from Georgetown University Law Center cum laude in 1978, where he was on the Board of Editors of the Georgetown Law Journal. He clerked for the honorable Warren W. Matthews, Associate Justice of the Alaska Supreme Court, and then joined the Anchorage law firm of Burr, Pease and Kurtz. His practice included regular representation of professionals in malpractice litigation. He was with the firm for 38 years and then became Bar Counsel for the Alaska State Bar in 2017. He served on the Board of Governors of the Alaska Bar from 2013-2016 and was president of the Board in 2015-16. He is a frequent speaker on ethics issues.

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Vignettes and Script by Mark Bassingthwaighte, Esq.
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Table of Contents

Selected Excerpts from
The Alaska Rules of Professional Conduct

Rule 1.1 Competence

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

(b) In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required or in which referral to or consultation or association with another lawyer would be impractical; provided, however, that the assistance shall be limited to that reasonably necessary in the circumstances and the client shall be advised of the lawyer's limited knowledge in the legal field in which the advice is sought.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

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

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation.

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Rule 1.3 Diligence

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

Rule 1.4 Communication: Case Status; Informed Consent; Malpractice Insurance Disclosure.

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(b) A lawyer shall promptly inform the client of any decision or circumstance that requires the client's informed consent, unless the client has already made an informed decision on the matter in previous discussions. Until the client has given the required informed consent, a lawyer shall refrain from taking binding action on the matter.

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation. This paragraph does not apply to lawyers employed by the government as salaried employees or to lawyers employed as in-house counsel.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer must act competently to safeguard a client's confidences and secrets against unauthorized access, or against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, by any other persons who are subject to the lawyer's supervision, or by others involved in transferring or storing client confidences and secrets. This duty includes guarding against unauthorized access to a client's confidences and secrets. See Rules 1.1, 5.1, and 5.3. A client may give informed consent to forgo security measures that would otherwise be required by this Rule. When transmitting or storing information that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule or Rules 1.8, 1.9, or 1.10, exists.

(d) For purposes of this rule, the term "client" does not include unidentified members of a class in a class action or identified members of a class when individual recovery is expected to be de minimis.

Rule 1.9 Conflict of Interest: Duties to Former Clients

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

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

(1) whose interests are materially adverse to that person; and

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

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

(1) use confidences and secrets to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal confidences and secrets except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 or 1.9(c) that is material to the matter, or the firm retains records containing such information.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in conduct or intends to engage in conduct (whether act or omission) related to the representation that violates a legal obligation to the organization, or that constitutes a violation of law that might reasonably be imputed to the organization, and that this conduct is likely to result in substantial injury to the organization, then the lawyer shall take the steps reasonably necessary to protect the best interest of the organization.

In determining how to proceed, the lawyer shall give due consideration to:

(1) the seriousness of the violation and its consequences,

(2) the scope and nature of the lawyer's representation,

(3) the person's responsibility within the organization and the person's apparent motivation,

(4) the policies of the organization concerning such matters, and

(5) any other relevant considerations.

Any measures taken by the lawyer shall be designed to minimize disruption of the organization and the risk of revealing client confidences and secrets to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

The lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law, unless the lawyer reasonably believes that this is not necessary or is not in the best interest of the organization.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to timely and appropriately rectify a threatened or ongoing action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal client confidences and secrets, whether or not Rule 1.6 would permit the disclosures, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) does not apply to client confidences and secrets relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the circumstances of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) "Constituents" denotes officers, directors, employees and shareholders of a corporate client, or positions equivalent to officers, directors, employees, and shareholders held by persons acting for an organizational client that is not a corporation.

Rule 1.14 Client with Impaired Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has impaired capacity, that the client is at risk of substantial physical, financial, or other harm unless action is taken, and that the client cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) The confidences and secrets of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or the third person. Other property shall be identified as the client's or the third person's and appropriately safeguarded. Complete records of these account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, and only in an amount necessary for that purpose.

(c) A lawyer shall deposit funds received for future fees and expenses into a client trust account, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third

person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the funds or property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim conflicting interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (g), a lawyer or law firm shall establish and maintain an interest bearing insured depository account into which must be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:

(1) No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.

(2) Only funds of clients which are nominal in amount or are expected to be held for a short period of time may be deposited in such account. Funds which reasonably may be expected to generate in excess of one hundred dollars interest may not be deposited in such account.

(3) The depository institution shall be directed by the lawyer or law firm establishing such account:

(A) To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and

(B) To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.

(4) The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.

(g) A lawyer shall indicate on the lawyer's annual bar dues notice whether the lawyer or the lawyer's law firm: 1) elects to maintain the account described in paragraph (f); 2) elects not to maintain the account described in paragraph (f); or 3) does not maintain a trust account. A lawyer or law firm who wishes to change a previous election may do so at any time by notifying the Alaska Bar Association in writing.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

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

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

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

(7) other good cause for withdrawal exists.

(c) A lawyer 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.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable and timely remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable and timely remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse to the lawyer's position.

Rule 3.4 Fairness to Opposing Party and Counsel

(a) A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, nor shall a lawyer counsel or assist another person to do any of these acts.

(b) A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) A lawyer shall not knowingly violate or disobey an order of a tribunal or an obligation under the rules of a tribunal, except for an open refusal based on an assertion that the order is invalid or that no valid obligation exists.

(d) A lawyer shall not make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(e) A lawyer shall not in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. A lawyer shall not assert personal knowledge of facts in issue except when testifying as a witness, nor state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

(f) A lawyer shall not request that a person other than a client refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving the information.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

(a) With respect to a nonlawyer employed or retained by or associated with a lawyer:

(1) a partner in a law firm, and a lawyer who individually or together with other lawyers has comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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

(b) A lawyer shall advise a nonlawyer who ends an association with the lawyer not to disclose confidences and secrets protected by Rule 1.6 that were learned by the nonlawyer during the association.

(c) A lawyer who employs, retains, or forms an association with a nonlawyer shall advise the nonlawyer not to disclose confidences and secrets protected by Rule 1.6 learned by the nonlawyer during an association with another lawyer. If the nonlawyer participated in a matter that would create a conflict of interest for a lawyer under Rule 1.7 or Rule 1.9, the nonlawyer shall be screened from any participation in the matter.

(d) A lawyer who learns that any person employed by the lawyer has revealed a confidence or secret protected by these rules shall notify the person whose confidence or secret was revealed.

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services or any prospective client's need for legal services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create a reasonable but unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.3 Solicitation of Clients

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

(1) is a lawyer; or

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

(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

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

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

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

Rule 8.3 Reporting Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers' or judges' assistance program.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

(d) state or imply an ability either to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Question & Answer Set

Vignette One

Questions to Consider

A) Part 1 - What are the ethical duties that arise when a lawyer agrees to act as an escrow agent and to whom do they flow? If a lawyer limits her services solely to those of escrow agent, do the rules of professional conduct even apply? Remember that non-lawyers can provide the very same services.

Part 2 - Do the duties broaden or change if the lawyer/escrow agent also happens to represent one of the parties? If so, how so? When a lawyer decides to represent one of the parties while simultaneously acting as an escrow agent, how is the duty of confidentiality impacted, if at all? For example, what if the lawyer learns that her client no longer has the financial wherewithal to cover a check that's about to be written in order to close the deal. And finally, what options does a lawyer/escrow agent have in the event of a dispute over property held in escrow?

B) What are the ethical duties that arise for a lawyer who is holding settlement funds against which a third party has asserted a claim? For example, must a lawyer take steps to determine the validity of any asserted third-party claim? What if the client tells the lawyer to disregard any third-party claims? What should a lawyer do if a client and third party have a dispute over the amount owed to the third party? Kathy took it even further by asking if a lawyer has a duty to investigate potential liens. Do lawyers have such a duty? If so, under what circumstances? Can a lawyer simply ask the client and rely on whatever answer is given?

C) Let's start with the basics. Kathy felt that if a lawyer had actual knowledge that a client had gone rogue, the answer to what must a lawyer do was rather straightforward. Is she correct? What must a lawyer do in this situation? Ian initially asked about a lawyer's obligations if there was a fear a client would go rogue or a suspicion that a client already had. What sorts of client conduct should lawyers be concerned about? When faced with such conduct, should or must the lawyer "investigate" further? How would one go about "investigating further?" What other options does a lawyer have at this point? Here's a fun one. Do lawyers have a duty to assume that their clients are being honest? Of course, there's the flip side to this. Do lawyers ever have a duty to assume their clients are being dishonest? Now, to Ian's real question. Does a lawyer's willful ignorance of a client's suspicious actions ever constitute actual knowledge? Finally, how could you avoid having to deal with rogue clients or at least minimize the repercussions to you due to the fallout of a rogue client's actions?

D) Part 1 - Does a lawyer's duty of confidentiality truly prevent a lawyer from sharing any client confidences in a motion to withdraw or is Kathy correct when she states it's more

about sharing only what is absolutely necessary and then protecting the disclosure a much as possible? What are the parameters here?

Part 2 - This issue was raised in the context of a client's non-payment of fees, suppose the reason for wanting to withdraw is something else, perhaps due to some type of client misconduct. What then? Does it make any difference if we're talking about withdrawing from a criminal matter verses a civil matter? Is client consent ever necessary when it comes to what can be shared? If not, must the client at least be informed, and if so, informed of what? Is the non-payment of fees always good cause for withdrawal?

Rules to Consider

Rule 1.1 Competence
Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.3 Diligence
Rule 1.4 Communication: Case Status; Informed Consent; Malpractice Insurance Disclosure.
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: Current Clients
Rule 1.15 Safekeeping Property
Rule 1.16 Declining or Terminating Representation
Rule 4.1 Truthfulness in Statements to Others
Rule 8.4 Misconduct

Answers

A) Serving as an Escrow Agent - Part 1

Commentary to Rule 1.15, which reads in part "The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule" clarifies the situation. Lawyers who serve solely as escrow agents are not subject to Rule 1.15.

Does this mean that when a lawyer agrees to serve solely as an escrow agent, the Rules of Professional Conduct don't apply at all? For the most part, yes it does, given the significant number of rules that are expressly predicated on the existence of an attorney-client relationship. That said, be aware that Rule 8.4 is not expressly predicated on such a relationship. For example, were a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation outside of an attorney-client relationship, that conduct could be still be subject to professional discipline.

A) Serving as an Escrow Agent - Part 2

As we have seen, a lawyer who is asked to serve as an escrow agent for persons or entities who are not his clients are, for the most part, not bound by the Rules of Professional Conduct. Of course, things change once a lawyer agrees to serve as an escrow agent while also representing one of the parties to an escrow agreement. For example, the risk of exposure to a successful ethical misconduct allegation is exponentially increased should a lawyer in this situation fail to analyze potential conflicts of interest while serving in this dual role.

In addition to the scenario described by Andrew Morgan in the vignette, consider this one, summarized as a disciplinary complaint and cited in an article reprinted in *Bench & Bar of Minnesota* (October 1981). [1]

> The attorney represented a home builder in the sale of a newly constructed home. The builder and buyer escrowed monies for the purpose of a contemplated street assessment. The builder's attorney served as the escrow agent. Subsequently the street was not built and the escrowed assessment was to be distributed. However, in the interim, a dispute had arisen between the builder and the buyer. Each claimed damages from the other. The builder, as the attorney's client, ordered the attorney not to release the escrowed monies. The buyer, as a party to the escrow agreement, demanded the return of the escrowed monies. When the attorney refused to release the escrowed monies, the buyer complained the attorney acted unethically in failing to perform his duties as an escrow agent.

Consider Rule 1.7(a)(2) as it applies to the situation described above.

> **RULE 1.7. Conflict of Interest: Current Clients.**
>
> *(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
>
> *(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.*

The lawyer for the builder, because he is the escrow agent for both his client and the buyer is now severely conflicted. Does he release the demanded funds to the buyer because

[1] Hoover, Mike, "Attorney as Escrow Agent," *Bench & Bar of Minnesota* (October 1981) http://lprb.mncourts.gov/articles/Articles/Attorney%20as%20Escrow%20Agent.pdf

the terms of the escrow agreement so dictate, and disregard the instructions of his client? As the builder's lawyer, may he countermand his client's instructions not to disburse funds to the buyer? Would the release of funds to the buyer violate his ethical duty not to intentionally prejudice the client? Ethically, the lawyer is in an untenable position if he acts upon the instruction of either party. He has duties to both as escrow agent, and to the builder as his lawyer.

The author of the journal article offers this advice:

> When an attorney is faced with this conflict of interest the attorney must disqualify himself from representing either party. ABA Informal Opinion 923 sets forth the conflict that may arise and the duties placed upon the attorney:
>
> "Where both parties agree for an attorney to represent them as escrow agent to merely carry out routine escrow instructions, it would not appear unethical or improper for an attorney to so act. However, if before undertaking to so act, it appears that a conflict of interest might arise, the attorney should not accept to serve. If it were agreed in advance and with the express consent of both parties that if a conflict should arise, the attorney would represent only the seller (his client) and disqualify as to the buyer, then he may not be required to so disqualify himself as to both parties….If not, he should disqualify himself from representing either party."

Among other scenarios wherein a palpable conflict of interest might arise involve the lawyer's respective duties to a client and a non-client respecting confidentiality and a duty to communicate. One of the questions posed regarding the vignette is, what is a lawyer to do if he learns that his client no longer has the financial wherewithal to cover a check that is about to be written in order to close a deal? What would the lawyer's duties be if he learned that his client falsely stated to the other party that funds needed to cover a check were in the client's bank account? Might it be a violation of Rule 4.1(b) if the lawyer were to fail to correct the deliberate misapprehension his client created? The rules states:

> **RULE 4.1. Truthfulness in Statements to Others.**
>
> *In the course of representing a client a lawyer shall not knowingly:*
>
> *(b) fail to disclose a materials fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*

And Rule 1.6 (b)(2) states:

> **RULE 1.6 Confidentiality of Information**

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

Given the language in Rule 4.1, it would appear the failure to disclose would be a violation of this rule.

This last scenario is even more complex than the one involving the builder and the buyer. In the first scenario the attorney's ethical dilemma does not pit his obligation to maintain confidences against his duty to communicate and remedy client fraud. No confidence of the builder need be breached in order to explain the nature of the conflict to the parties. These examples of conflicts of interest demonstrate that depending on the circumstances different Rules of Professional Conduct may be implicated.

In the vignette, Ian Parker reflexively answered the question of whether an attorney should serve as an escrow agent for a client in a transaction by stating "Just say no!". This advice is the easiest for an ethics adviser to give and for a lawyer to take. A lawyer can avoid all ethical risks inherent in being both a client's lawyer and his escrow agent by simply declining to serve in that capacity.

With that said, however, and as Ian Parker and the other lawyers in the vignette eventually agree, there is a need to be "practical." There will be times when convenience, efficiency, and keeping escrow fees to a minimum militate in favor of having an attorney for one party to an escrow agreement also serve as the escrow agent for the client and all other parties. It is not *per se* unethical for a lawyer to serve in that dual capacity when some risk of potential conflict is present, but the decision to do so must follow the lawyer's gauging the level of risk. If there is only a small probability that the potential for a conflict will eventuate into a palpable, actual conflict of interest, then the lawyer may have little ethical risk in agreeing to the dual role, but he should nonetheless seek curative consents under Rule 1.7(b).

RULE 1.7. Conflict of Interest: Current Clients.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent, confirmed in writing.

A lawyer who has assessed the risk of serving as an escrow agent for his client and a third party non-client, and who has concluded that he can, despite a potential conflict of interest, provide competent and diligent representation to the client and also comply with his fiduciary duties to the non-client, should obtain the consents mentioned above. A consent from both the client and the non-client, treating each as an "affected client" under Rule 1.7(b), would be a prudent step to take.

Whether the curative consents to a potential conflict are in the escrow agreement itself, or in the form of a separate writing, they should contain an identification of the circumstances under which withdrawal would be mandatory. It should also, at a minimum, stipulate whether the lawyer would continue as an attorney for the client only or would withdraw from all representation and should address the disposition of the escrowed funds pending the resolution of a dispute between the parties, *i.e.* via an interpleader or placement with an unconflicted successor escrow agent. Of course, the non-client should have the opportunity to consult with independent counsel and should not be advised by the proposed attorney/escrow agent regarding the escrow agreement and/or the curative consent to a potential conflict.

B) Handling Third Party Liens and Claims

The answers to many of the questions raised in this question set are set forth in Legal Ethics Opinion 92-3 where the ethics committee stated:

> It is the opinion of the Committee that: (1) In order to trigger an obligation on the part of the attorney to pay a creditor's claim, in contravention of a client's instructions, the creditor's claim must be a valid assignment on its face or statutory lien which has been brought to the attorney's attention.[2] (2) If a client instructs an attorney to ignore or disregard a valid assignment or statutory lien, the attorney should advise the client that absent an explanation (e.g., a written release, or some other form of written waiver by the lienor or assignee) the attorney will withhold the disputed funds, and, absent some amicable resolution, the funds will be deposited into court where the dispute can be decided by the judge.
>
> A. WHAT THIRD PARTY CLAIMS MUST BE HONORED?

[2] However, practitioners should be aware that under some tax lien statutes, the statutory filing requirements provide the element of notice. See 26 U.S.C. § 6321.

This is another way of asking the question when is the attorney obligated to deliver to the client funds "which the client is entitled to receive." See DR9102(b)(4) (emphasis added). The Committee believes that when a client executes a valid assignment from settlement proceeds, or there exists a perfected statutory lien against settlement proceeds, it creates a presumption that the client is not "entitled" to those funds. Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Id. App. 1983); Herzog v. Riace, 594 A.2d 1106 (Me. 1991).

There may be other claims unrelated to the subject matter of the representation; for instance, child support, alimony, restitution for criminal conduct and so on. "However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party." See Comment to Model Rule 1.15. A client is capable of and responsible for payment of his or her own obligations. Unless the claim in question has been reduced to a valid assignment or perfected lien, a creditor has no more special "entitlement" to those funds than does the client. The creditor in that situation has other remedies, such as prejudgment attachment. See Alaska R. Civ. P. 89. However, where a settlement includes or references specific allocation for a lien claimed by a third party, the amount designated for satisfaction of the lien must be utilized for that purpose. In re Burns, 679 P.2d 510 (Az. 1984).

B. WHEN DOES A DISPUTE ARISE OVER THE CLIENT'S ENTITLEMENT TO HIS OR HER FUNDS, AND HOW SHOULD THOSE DISPUTES BE RESOLVED?

In the view of the Committee, if a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly inform the client that the attorney is obligated to withhold and segregate those funds in question. Unless the client and the creditor are able to amicably resolve their differences, or unless the client provides the attorney with some verification that the lienor or assignee have waived their interest in those funds, the attorney will be required to deposit the funds into court for disposition by the judge. Given the fact that both sides will incur expense and delay in the event this step is taken, it would be appropriate to encourage the client and the creditor to resolve their differences promptly and amicably.

C. THE ATTORNEY SHOULD BE CAREFUL NOT TO INDUCE RELIANCE ON THE PART OF THE THIRD PARTY CREDITOR?

Any number of questions may arise regarding a client's "entitlement" to funds being held by the attorney. The Committee believes that care should be taken to dispel any confusion which might arise regarding the attorney's obligations under these circumstances.

If, for instance, an attorney receives a letter from a medical provider to the effect that he or she is owed money for services provided to the client relating to the subject matter in question, that does not, in the Committee's view, create a presumption that the client is not entitled to receive the funds in question at his or her request. However, the Committee believes that the attorney in that instance should respond to the letter and convey to the medical provider the fact that this is a matter between the client and the medical provider. The medical provider should be on notice that the attorney will not be assuming the responsibility for payment of the client's bills relating to the subject matter in question; that is the client's responsibility.

The Committee believes it is inappropriate for the attorney to remain silent after having received notice of such a potential claim. While the attorney may believe that his or her silence in the face of receiving such notice is or may be interpreted as a constructive denial of the creditor's position, it is just as likely that the third party creditor may view that silence as implicit or tacit acceptance of the third party claim.

The situation is ripe for confusion, and the Committee believes the attorney should take the affirmative step of responding to these claims by shifting the burden back where it belongs, namely on the third party creditor and the client.

In conclusion, the Committee believes that an attorney is not ethically obligated to arbitrate claims between creditors and his or her client. With respect to third party creditors who have not received an assignment from the client, or who have not perfected a statutory lien, and assuming the attorney has followed the recommendations outlined in Section C above and informed the creditor that the claim should be taken up directly with the client, the attorney should be free to follow the client's instructions with respect to return of client property. Even though the attorney may be aware of a potential problem in this regard, the Committee does not believe this vitiates the client's "entitlement" to return of his or her property, pursuant to DR 9-102(B)(4).

If a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly take the appropriate steps to segregate those funds in question, and to inform the client that, absent a resolution which is satisfactory to all parties concerned, the attorney will be obliged to deposit the funds into court for disposition by the judge.

The requirements and procedures governing the holding and distribution of client funds by Alaska lawyers are found in Rule 1.15. This rule defines the obligations of every lawyer engaged in the practice of law in Alaska regarding the management of trust accounts and funds which are or which should be held in a lawyer’s trust account.

The applicable sections of Rule 1.15 are (d) and (e), which requires a lawyer to:

> *(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the funds or property.*
>
> *(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim conflicting interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.*

The Comment to Rule 1.15 provides helpful guidance on the lawyer's ethical duty when faced with third party claims asserted against the funds that the lawyer is handling:

> Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

When Is a Third Party "Entitled" to Funds Held By the Lawyer?

Rule 1.15 (d) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (d) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.[3] From the comments to this rule we know that "when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved." Thus, in the absence of a valid third party interest in the funds, the lawyer would owe no duty to a creditor of the client and must act in the best

[3] *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000); Utah Bar Advisory Op. No. 00-04; *Advance Finance Co. v. Trustees of Client's Security Trust Fund of Bar of Maryland*, 652 A.2d 660 (Md. App. 1995) (holding that since Rule 1.15 imposed fiduciary obligations to maintain funds for benefit of clients or creditors, the state fund that pays for lawyers' violations of fiduciary obligations was liable to a creditor).

interests of the client.[4] **The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer**.[5] Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.[6] Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an interest in specific funds trigger a duty under Rules 1.15 (d) ***even though the lawyer is not a party to such agreement or has not signed any document*****, if the lawyer is aware that the client has signed such a document.[7]** In other words, a third party's interest in specific funds held by the lawyer is created by some source of obligation other than Rule 1.15 itself.[8] Whether they create binding contractual obligations, assurance of payment from the lawyer may also create ethical duties to third parties under Rule 1.15.[9] The basis for such duties is the fundamental duty of lawyers to deal honestly with third parties. Rules 4.1 and 8.4(c). Before the lawyer may give a third party an assurance of payment, the lawyer should discuss the matter with the client, because it is ultimately a matter for the client to decide.[10] If the lawyer is asked to sign a document assuring payment, the lawyer should explain to the client the ramifications, including the lawyer's potential ethical and civil liability, ensure that the client is competent to understand the explanation, and obtain the client's informed consent.[11]

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[4] *Klancke v. Smith*, 829 P.2d 464 (Colo. App. 1991); Alaska Bar Assn. Ethics Comm. Op. 92-3.

[5] *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), *cert. dismissed*, 699 A.2d 151 (Conn. 1997).

[6] For example, a judgment lien creditor of a client may garnish funds held in a lawyer's trust account. *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 652 S.E.2d 777 (2007) (lien of a writ of fieri facias validly executed against lawyers' trust accounts by client's judgment lien creditor to whom lawyers directed to pay funds).

[7] *See, e.g., Virginia State Bar v. Timothy O'Connor Johnson,* CL 09-2034-4 (August 11, 2009) (while Respondent did not sign the agreement, his client did, and Respondent was aware that his client had directed that his chiropractor be paid directly out of settlement proceeds administered by his lawyer). *See also* LEO 1747 and Comment 4.

[8] Alaska Bar Ass'n Ethics Comm., Op. 92–3 (1992); Colo. Bar Ass'n Ethics Comm., Op. 94–94 (1993); Conn. Comm. on Prof 'l Ethics, Informal Op. 02–04 (2002) and Informal Op. 95–20 (1995); Utah Ethics Advisory Op. Comm., Op. 00–04 (2000).

[9] R.I. Ethics Advisory Panel, Op. 94–46 (1994) (lawyer's response to hospital's inquiry about status of the personal injury case that the payment of bills was ''contingent upon a 'successful' outcome'' was sufficient to raise Rule 1.15 duties).

[10] Colo. Bar Ass'n Ethics Comm., Op. 94–94 (1993). Va. Rule 1.2, Comment 1 (lawyer should defer to client regarding expenses to incurred).

[11] ABA Standing Comm. on Ethics and Prof 'l Responsibility, Informal Op. 1295 (1974).

Thus, the basis for a third party lien or claim to funds held by the lawyer may be based on statute, contract, assignment of rights or benefits, ERISA plan documents, protective letters or assurances of payment given to the third party by the lawyer or the client.

What if the Lawyer is Uncertain or Unable to Determine Whether a Third Party has a Claim or Entitlement to Funds Held by the Lawyer?

Obviously, there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. *Rule 1.15 (e) does not require the lawyer to make that determination.* Moreover, to avoid a conflict of interest when faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.[12] Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party.[13] When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court.[14] As a way to avoid some of these problems, risk management best practices dictate that at the outset of the representation, preferably in the engagement letter or contract, the lawyer should clearly explain that medical liens will be protected and paid out of the settlement proceeds or recovery.

What if the Third Party Has Not Fulfilled the Legal Requirements Necessary to Assert a Lien or Claim to Funds Held by the Lawyer?

On the other hand, if the third party has not taken the steps necessary in order to perfect its lien or claim to the funds in the lawyer's possession, or has no contract, order or statute establishing entitlement to the funds, the lawyer's primary duty is to the client. Under those circumstances, the lawyer may ethically follow the client's direction to disregard the third party claim and deliver the funds to the client.[15] Of course, if the lawyer releases the

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[12] *Virginia State Bar v. Timothy O'Connor Johnson, supra* (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor funds less than the full amount of the lien); LEO 1747.

[13] See *In re Smith*, 625 So. 2d 476 (La. 1993) (lawyer disciplined for improperly withholding client's money to pay outstanding medical bills); see also Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money to third person over client's objection); Pennsylvania Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay arrearage in child support, cannot release escrow proceeds from real estate sale without client consent).

[14] Ariz. Comm. On Rules of Prof 'l Conduct, Formal Op. 98–06 (1998); Ga. State Disciplinary Bd., Advisory Op. 94–2 (1994); Va. Standing Comm. on Legal Ethics, Op. 1747 (2000)

[15] *Janson v. Cozen & O'Connor*, 676 A.2d 242 (Pa. Super. Ct. 1996) (lawyer who holds client's funds in escrow owes no special fiduciary duty to third person who makes claim against funds where there is no agreement between client and third person regarding those funds); *Farmers Ins. Exch. v. Zerin*, 61 Cal. Rptr.2d 707 (Cal. Ct. App. 1997)

funds to the client, the lawyer should inform the client of the risks involved in disregarding a third person's claim.[16] For example, the lawyer should explain that while the lawyer may not have an *ethical* duty under the rules to deliver funds to the third party, the third party may nonetheless have a civil claim or other remedies against the client that may be pursued after the funds have been released to the client.

Does a Lawyer Have a Duty to Investigate Potential Liens Against a Settlement?

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether a third party has a lien or claim against the settlement? While Alaska has not formally addressed this question, Virginia has issued an interesting opinion that does address it. In Legal Ethics Opinion 1865, the VA ethics committee answered this question with a qualified "yes." In that opinion, a lawyer was faced with a situation in which an ERISA plan claim had not been asserted and the lawyer had no documents or information to support a claim. The committee concluded that,

> under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

To support this conclusion, the committee explained:

> A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to

(lawyer who recovered tort settlement on clients' behalf is not legally obligated to clients' medical insurer to withhold portion of funds from distribution to ensure insurer's reimbursement); Maryland Ethics Op. 97-20 (1997) (lawyer may disburse entire settlement to client where hospital failed to timely submit bills to insurer and thus had no legally valid claim). See also Arizona Ethics Op. 88-6 (1988) (third-party claim that is not perfected lien or assignment does not affect client's right, and lawyer should advise claimant to take issue up with client); Colorado Ethics Op. 94 (1993) (lawyer must distribute promptly to client if third person's claim against client property does not arise out of statutory lien, contract, or court order); Connecticut Informal Ethics Op. 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests or to investigate whether third persons have interests in client property); Maine Ethics Op. 116 (1991) (lawyer who represents client in both real estate transaction and divorce must turn real estate proceeds over to client even if lawyer reasonably believes that client does not intend to comply with divorce order); Maryland Ethics Op. 97-9 (1997) (settlement money may be disbursed to client even though two lawyers assert claim to proceeds for services in other, unrelated matters); Philadelphia Bar Ass,n Ethics Op. 86-134 (1986) (lawyer must disburse to client without retaining anything for physicians who are owed payment, provided that there is no agreement between doctors and client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

[16] Cleveland Ethics Op. 87-3 (1988); South Carolina Ethics Op. 93-31 (1993).

> affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. [Assuming the lawyer's file contains no relevant documents or information], [t]he lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled. By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

While the lawyer may not have an ethical duty under the Rules of Conduct to pursue an investigation of the third party's claim under these particular circumstances, the lawyer still has ethical obligations that must be fulfilled:

> A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement. If after warning the client of the possible consequences of not reimbursing the Plan, the client directs the lawyer to not communicate or further investigate the Plan's right of reimbursement, the lawyer should confirm in writing the client's direction and the possible consequences of that course of action.[17] Although the lawyer will not violate Rules 1.15(b)(4) or (b)(5) and is therefore not subject to professional discipline by the bar, the lawyer and/or the client may suffer civil liability under federal law if the Plan seeks reimbursement of medical expenses that have not been paid out of the settlement. Therefore, the lawyer has an ethical duty to advise the client of the potential liability of disbursing the funds without preserving any funds to reimburse the Plan. *See* Rules 1.2 and 1.4.

[17] Possible consequences that the lawyer should consider discussing with the client include the fact that the Plan documents might contain a requirement that the client notify the Plan of third party recovery actions and that the Plan might have the right to refuse payment of future medical expenses if the Plan is not reimbursed, as well as to hold the client civilly liable for non-payment.

C) Rogue Clients

One of Ian's examples involves a client who has apparently created false evidence by modifying the pictures; in that case, Rule 3.3 applies as well as Rule 1.2 and the lawyer is prohibited from offering any evidence that he knows to be false. Knowledge is, indeed, actual knowledge for purposes of Rule 3.3, but the client's statements here would certainly constitute actual knowledge in this situation. The other examples don't implicate Rule 3.3, at least not immediately, but they do involve Rule 3.4(a) and (b) as well as 1.2. The client who says he will not comply with a litigation hold is going to destroy or fail to preserve potential evidence, and therefore the lawyer cannot advise or assist the client in doing so in violation of Rule 3.4(a).

Ian's other example, involving a client's statement that he will "take care of" a witness, is even more complex for the lawyer to handle. It suggests that he's attempting to obstruct another party's access to that witness's testimony, and possibly to cause the witness to make himself unavailable as a witness, neither of which the lawyer can advise or assist in pursuant to Rule 3.4(a) and (b). Depending on the circumstances, the client's statement may indicate that he is planning to commit a crime to "take care of" the witness. This would potentially trigger the lawyer's obligations under Rule 1.6(b)(1) to report the client's intent to commit a crime reasonably certain to result in death or substantial bodily harm to another. The lawyer must discuss this issue with the client, urge the client not to follow through on his threat, and counsel the client that the lawyer will be ethically obligated to disclose the client's threat if it's not abandoned.

Beyond those specific examples, a lawyer's obligations when he suspects that his client is engaged in some kind of inappropriate behavior will really depend on the particular facts and circumstances, including the lawyer's overall relationship with and knowledge of the client and the client's activities. Kathy is correct to point out that many of the RPCs at issue here, including Rules 1.2 and 3.3, depend on actual knowledge of the client's actions or intent, but Andrew is also correct that willful blindness may not prevent a lawyer from being held responsible for a client's actions if the lawyer's knowledge could be inferred from the circumstances.[18] Bear in mind that a lawyer who mistrusts her client can always terminate the representation (or move to withdraw if the matter is before a court) rather than continuing the representation and trying to resolve her doubts about the client's actions. If any false evidence has already been presented to the court, though, the lawyer must also take remedial measures per Rule 3.3 and cannot simply withdraw.

One specific situation where this tension arises is known or suspected money laundering by clients. ABA Ethics Opinion 463 (2013) addresses the intersection of lawyers' ethical obligations to their clients with efforts to deter and combat money laundering and terrorist financing. The opinion concludes that the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing is consistent with lawyers' duties of loyalty and confidentiality and provides a good basis for lawyers to recognize and

[18] And see ARPC 9.1(h) which clearly states a person's knowledge may be inferred from the circumstances.

evaluate situations where their legal services might be used to aid illegal activities. The opinion urges lawyers to engage in appropriate client due diligence depending on the nature of the client, the country or region of origin, and the legal services involved. The opinion also points out that the lawyer's duty of competence may create a duty to inquire about a client's conduct and to examine whether the client is engaged in criminal or fraudulent conduct.

Another common situation where this issue comes up is with client-supplied evidence, especially as it relates to the conduct or communications of third parties. For example, a client in a domestic case may provide emails or texts from her estranged spouse's phone, or copies of documents belonging to the estranged spouse. This evidence is not automatically out-of-bounds; if the client obtained it legitimately and legally, and the lawyer reasonably believes that the evidence is authentic and unaltered, the lawyer is not ethically limited in what he can do with the evidence. However, many times the client has done something improper to obtain this kind of evidence, such as guessing her spouse's password or taking it from his belongings during a custody exchange. In that case, the lawyer may not use the information and must make every effort to avoid disclosing that his client obtained it for fear of exposing the client's wrongdoing. The question becomes how the lawyer can know the truth, and how much fact-checking the lawyer needs to do if the client claims to have obtained the evidence legitimately.

This is an area in which it is impossible to set out any black and white rules; the lawyer must evaluate the client's story based on what he knows about the client's circumstances, the client's history of honesty or dishonesty, as well as just common-sense judgment of whether the client's story is plausible. The lawyer is not required to be immediately suspicious of any and every client or information supplied by that client; but if there are red flags about the nature of the evidence or the client's actions in obtaining the evidence, a competent lawyer must probe to satisfy himself that the client's actions were proper and that using the information/evidence is in the client's best interests. The lawyer should also counsel the client about the potential consequences if the client is found to have wrongfully obtained or altered evidence. The bottom line is that lawyers generally can and should trust their clients, but firms should have processes in place so that red flags are identified and followed up on, both when considering whether to take on a representation and during the course of the representation.

The best way to avoid rogue clients is to engage in rigorous screening before deciding to accept a representation. Of course, not all problem clients can be identified immediately, but there are certain telltale signs to watch out for. In his article "Dishonest or Unworthy Clients: Pink Flags,"[19] Douglas R. Richmond identifies several categories to evaluate when looking for pink flags in a client's matter: client structure, client character, client characteristics (specifically, whether the client is a deadbeat, liar, or information hoarder), client's relationship with the firm, and the representation itself. He provides several pink flags/issues to watch out for in each category; for example, types of representations to scrutinize more closely include

[19] https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2018_cpr_meetings/2018conf/materials/session7_clients_go_rogue/dishonest_client_pink_flags.authcheckdam.pdf

those with a questionable business purpose, or where the client cannot adequately articulate the business purpose, deals that are too good to be true, or where the client asks for assistance to "protect" or "safeguard" assets by moving them overseas or by conveying them to different entities. Many of Richmond's pink flags apply to ongoing representations/established clients as well as to new client matters, and Richmond points out that some clients use unpaid bills as leverage to keep the lawyer involved in a questionable transaction by encouraging the lawyer's hope that the deal will close and the lawyer will get paid.

D] Duty of Confidentiality and Motions to Withdraw – Part 1

Even if withdrawal were to materially adversely affect the interests of the client, Alaska Rule of Professional Conduct 1.16(b)(5) permits a lawyer to withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." In addition, Rule 1.16(b)(6) permits withdrawal if representation poses "an unreasonable financial burden on the lawyer." However, if the lawyer represents the client in litigation, Rule 1.16(c) applies, and the lawyer must obtain leave of court before he may withdraw.

It is elementary that a lawyer must protect his client's confidential information:

> **RULE 1.6 Confidentiality of Information**
>
> *(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.*

The admonition that a lawyer "shall not reveal" confidential information is not, however, absolute, and Rule 1.6(b) specifies those circumstances when a lawyer may make disclosures of his client's otherwise confidential information. Kathy is thus correct: A lawyer is not ethically precluded from ever making disclosures of otherwise confidential information. The questions are whether a disclosure falls within an exception to Rule 1.6(a) and, if it does, what the limits on the extent of disclosure are.

In the context of a lawyer's proposed withdrawal from litigation based on a client's nonpayment of fees, excellent guidance is provided in American Bar Association Formal Opinion

476[20]. The relevant Alaska Rules of Professional Conduct are in substance the same as the Model Rules cited in the ABA Opinion, which concludes:

> In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under [Model] Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to [Model] Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

It is not the *fact* of withdrawal that lands the lawyer in ethical hot water, but the *manner* in which the lawyer has sought to accomplish it. For example, Virginia disciplinary tribunals have sanctioned lawyers for making "noisy" withdrawals, which disparaged clients and disclosed their confidential information, all without justification. The status of a client's account, the client's financial distress, and details of how difficult the client has been are confidences protected by Rule of Professional Conduct 1.6(a). A lawyer who files and argues a motion to withdraw does so during the course of the professional relationship. Thus, any disparagement of the client or revelation of confidences during the withdrawal process may violate Rule 1.6(a), unless one or both of the exceptions contained in Rules of Professional Conduct 1.6(b)(5) and (6) apply:

> **Rule 1.6. Confidentiality of Information.**
>
> *(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:*
>
> *(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or*
>
> *(6) to comply with other law or a court order.*

As of the time a lawyer files a motion to withdraw, he has not been ordered by a court to make disclosures of his client's confidential information. There has not yet been a challenge

[20] "Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation" http://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion476Final12%2013%202016.pdf

to his motion, made before the court. Accordingly, neither of the exceptions which permit disclosure of any confidential information has been triggered. At this stage, the lawyer should use plain vanilla, generic, references to his basis for withdrawal. The comments to Rule 1.16, (relating to mandatory withdrawal in court-appointed cases) suggests use of the term "professional considerations" in motions to withdraw. This terminology should be sufficient in a motion to withdraw in a civil matter, such as for nonpayment of legal fees.

If the motion to withdraw is contested by the client or opposing counsel, the court may call upon the lawyer to elaborate on his motion. Indeed, the court may seek additional detail, *sua sponte*, especially if a trial date is near and the court's docket might be disrupted were the lawyer granted leave to withdraw. ABA Formal Opinion 476 counsels lawyers to seek "to persuade the court to rule on the motion without requiring the disclosure of client confidential information, asserting all non-frivolous claims of confidentiality and privilege." However, if the court directs the lawyer to make disclosures which underpin his motion, or if it is evident to the lawyer that to succeed he must rebut the client's or opposing counsel's contentions that the withdrawal motion must be denied, then the lawyer may make the otherwise-confidential disclosures under the exceptions set forth above.

There is a delicate balance between protecting the client's interests and providing the court with sufficient information to permit the lawyer to secure a sound ruling on his motion to withdraw. A lawyer who is sensitive to the ethical issues inherent in this process will not be disciplined for ethical misconduct.

Duty of Confidentiality and Motions to Withdraw – Part 2

Rule 1.16 does not differentiate between, let alone mention, a lawyer's bases or authorization for withdrawal in criminal versus civil matters. Whether the lawyer seeks to withdraw from either a criminal or a civil case, disclosure of a client's confidential information protected by Rule 1.6(a) which is not authorized by Rules 1.6(b)(5) and/or (6), or mandated by another Rule, will be ethical misconduct. In addition, a disclosure of otherwise confidential information which *exceeds* what a "lawyer reasonably believes necessary" under the circumstances at hand could well result in a finding of ethical misconduct under Rules 1.6(a) as a breach of confidentiality.

Is client consent ever necessary when it comes to what can be shared? If not, must the client at least be informed, and if so, informed of what? Is the non-payment of fees always good cause for withdrawal?

As we have seen, a lawyer who moves to withdraw from representation may make limited disclosures of otherwise confidential information when permitted under Rules 1.6(b)(5) and/or (6). Those Rules are *exceptions* to the requirement contained in Rule 1.6(a) that client consent "after consultation" be obtained before confidential disclosures are made. No lawyer seeking to withdraw from a case should ask a client whether he may make disclosures of

confidential or disparaging information about the client to others any more than the lawyer should ask the client to consent to the lawyer's lack of diligence or competence.

With that said, the lawyer should consider the provisions of Rule 1.4(a):

RULE 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information. ***A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation****. [Emphasis supplied]*

A lawyer who wishes to withdraw from a case will presumably have discussions with a client in advance of filing a motion to withdraw. The lawyer should not, of course, threaten to make confidential and possibly disparaging disclosures concerning the client if the client opposes his withdrawal. However, Rule 1.4(a), at least arguably, would call for the lawyer to acquaint the client with the lawyer's potential need to rely on Rules 1.6(b)(5) and/or (6) should there be opposition to the lawyer's withdrawal. The lawyer should emphasize that while he will do all that he can to protect the client during the process of withdrawal, he should at the same time give the client information to "permit the client to make informed decisions regarding the representation." The lawyer provides himself with additional insurance against a successful bar complaint from a disgruntled client who opposed his withdrawal if he documents his file in a manner which shows the client was advised that the lawyer might need to disclose otherwise confidential information under Rules 1.6(b)(5) and/or (6) during the process of attempting to withdraw.

A lawyer may have a sound ethical basis for withdrawing from a case for nonpayment of fees, but whether to do so is, at the end of the day, a business decision[21]. A lawyer facing the prospect of working further for a client who is unable or unwilling to pay legal fees must assess the situation dispassionately. Should he withdraw and leave a penurious client to fend for himself with a half-finished case that he cannot afford to conclude with new counsel? Should he become aggressive with a client who can afford to pay, but won't, and threaten to withdraw if he doesn't, exacerbating an already bad situation if there is a reasonable prospect of voluntary payment down the road?

Despite the tensions created when a client either can't or won't pay his bills, lawyers may not see withdrawal as necessary if the penurious client will work out a payment plan and, perhaps, furnish security for payment, or if the recalcitrant client can be mollified and persuaded to make a payment in full or partial satisfaction of a large outstanding balance. If the amount of work remaining in the client's case is not substantial, might it not be more realistic to refrain from withdrawing before the litigation has been completed? A cost/benefit analysis must be applied, especially when part of the calculus is whether the lawyer might need to

[21] *See,* Guggenheim, Seth M., "Thinking of Withdrawing? Think Again," *Virginia Lawyer* (June, 2017).

devote future *unbillable* time defending his performance in the representation and his manner of withdrawal should he later attempt collection of the bill or face the client's bar complaint.

With all of this said, a lawyer would be wise to extricate himself from representation of a client with a large unpaid bill if much work remains to be done, the client is unreasonably demanding, refuses to take her lawyer's advice, has unattainable objectives, and will not authorize reasonable settlement demands or accept reasonable settlement offers. In these circumstances, withdrawal from representation is the lawyer's only realistic course because stop-gap measures would be but kicking the can down the road.

Vignette Two – The Bar Report

Questions to Consider

A) Once an attorney knows that another member of the firm has fraudulently billed a client, must the misconduct be reported? To whom, the Bar and/or the client? What if in reporting to the Bar, client confidences are disclosed or at least there is a risk that client confidences could be disclosed as part of a follow-up investigation by the Bar? Would that make client consent necessary? What if client consent isn't obtainable, perhaps the client has passed away, is no longer reachable, or simply fails to respond? Finally, let's change the facts just a little. Suppose the billing information was submitted to a court, must the court now be notified of the bill padding or does the client have some say in that decision?

B) Under what circumstances is the phrase "to prevent reasonably certain death or substantial bodily harm" found in Rule 1.6 intended to cover? Thinking about the story you just heard, must defense counsel share the information she knows about her client's addiction with the court given an attorney's duty to disclose information relating to a client's representation to the extent necessary to prevent reasonably certain death or substantial bodily harm?

C) While chatbots may be best described as AI light, artificial intelligence is making its way into the legal services sector on several fronts. Initially focusing on a lawyer's professional use of a chatbot, what ethical constraints do you see and how might they be responsibly addressed? Looking further out, what ethical and perhaps even regulatory issues do you see with a law firm's full-fledged adoption of AI in the delivery of legal services? Again, how might these issues be addressed? Here's one that might make your head hurt. When it comes to AI, do all of our ethical rules even apply? For example, think about Rule 5.3. How does a lawyer make sure that the AI's conduct is compatible with the professional obligations of the lawyer?

D) Let's cut to the chase. May a firm utilize the services of a company that provides text messaging advertising services as a way to drum up new business? Does your answer change if a firm decides to text potential new clients all on its own?

E) There is no outright prohibition on a lawyer's use of text messaging as a means of communicating with clients. That said, just because the tool is available, doesn't mean its use is a good idea. What potential issues do you see with sending texts and how might they be responsibly addressed? Are there any confidentiality concerns?

Rules to Consider

Rule 1.6 Confidentiality of Information
Rule 1.14 Client with Impaired Capacity
Rule 3.3 Candor Toward the Tribunal
Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
Rule 7.1 Communications Concerning a Lawyer's Services
Rule 7.3 Solicitation of Clients
Rule 8.3 Reporting Professional Misconduct
Rule 8.4 Misconduct

A) Awareness of Fraudulent Billing

In this vignette, a partner in Attorney Smith's law firm discovers that Smith has been padding his bills (overstating the amount of time worked) to a corporate client for quite a long time. Smith's misconduct is confirmed by an internal investigation. Now what? Does Smith's partner have to report Smith to the Bar? To the client? The short answers are "yes", with some qualifications, and yes.

Rule 8.4(c) of the Alaska Rules of Professional Conduct states that:

> *It is professional misconduct for a lawyer to:*
>
> *(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*

And Rule 8.3(a) states:

> *A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported.*

Falsifying a bill to a client as Smith has done would be "conduct involving dishonesty, fraud, deceit or misrepresentation." This conduct, having gone on for quite some time, and presumably causing significant financial harm to the client, would raise a substantial question

as to [Smith's] honesty, trustworthiness or fitness to practice and would trigger his partner's duty to report, pursuant to Rule 8.3. Just because they are law partners does not mean the duty to report does not apply. *See* S.C. Ethics Op. 05-21(11/18/05) (A lawyer's fiduciary duty to a partner or former partner does not limit the lawyer's duty to report misconduct under Rule 8.3); Connecticut Informal Opinion 89-21(7/28/89) (A lawyer whose partner missed a statute of limitation…and paid the client a sum of money that he told the client was a settlement from the defendant's insurance company must report the partner to the state bar). See also In Re Buckalew, 731 P.2d 48 (Alaska 1987) (A lawyer whose partner fabricated a false settlement document and then used embezzled funds to pay the client what client believed was due under the falsified settlement agreement was -fortunately for the partner -convinced to turn himself in.)

Before a report to the bar/disciplinary authority, however, Smith and/or the partner must inform the client regarding what has happened pursuant to their duties under Rule 1.4 to communicate with the client.

Notwithstanding a duty to report pursuant to Rule 8.3(a), if information necessary to make the report is confidential information of a client, a lawyer cannot use that information and cannot make the report unless the client consents. See Rule 1.6(a), Rule 8.3(c) and the Comments to Rule 8.3. [22]

The New York City Bar Association Ethics Committee's Formal Opinion 2017-2 addresses the issue of reporting a law partner for fraudulent billing and discusses the impact of possible disclosure of client confidential information:

> Having told the client about the fraudulent billing, the lawyer should explain that she is ethically obliged to report it unless doing so would breach her duty of confidentiality to the client. She should further explain that reporting the fact of the fraudulent billing to a disciplinary authority could result in further disclosure of confidential information contrary to the client's wishes. Even if the lawyer reported the fraudulent billing to the disciplinary authority without identifying the client, client confidentiality would be at risk because the disciplinary authority could respond by seeking further information. For example, the disciplinary authority might subpoena the firm for additional information about the client and underlying matter. Only if the information was protected by attorney-client privilege could the firm resist production.

[22]8.3(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers' or judges' assistance program.

From the Comments: A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

> Once the disciplinary authority had the information, it could unilaterally decide to take steps leading to its disclosure, e.g., in bringing formal charges against the perpetrator of the fraudulent billing. An explanation of these possibilities is necessary to enable the client to give "informed consent" to the disclosure or to make an informed decision to direct the lawyer not to report. See Rules 1.0(j), 1.4(b) & 1.6(a). However, the lawyer should take care to give a realistic assessment and not to overstate the risks. (Internal citations omitted).
>
> ***
>
> Whether the disclosure of information is "likely to be embarrassing or detrimental to the client" must be determined on a case-by-case basis. In many or most cases, disclosing that the client was the victim of billing fraud will not adversely affect the client. On occasion, however, a client would be embarrassed or harmed if others knew that the client was fraudulently billed by the client's law firm, even though the client is the victim of the fraud and even though the law firm might suffer the greater embarrassment. For instance, a particular client may be embarrassed if it becomes known that he or she hired an attorney who was untrustworthy or was taken advantage of and failed to engage in adequate oversight. In some cases, the very fact that the client secured a particular lawyer's services may be a source of embarrassment, as when a client secretly consults with a divorce lawyer or a criminal defense lawyer.
>
> The question is not whether the client would be embarrassed or harmed if the information were disclosed to the disciplinary authority specifically, but whether the client would be embarrassed or harmed if the information were disclosed to anyone….

If the client has died, cannot be found or contacted, or won't respond to communications, a lawyer must still protect the client's confidences. If the information necessary to make a report regarding the fraudulent billing would require use of confidential information, the lawyer cannot make the report without consent of the client. If the lawyer cannot contact the client / the client is unavailable, the lawyer cannot get consent and so cannot make the report. This is only the case if the information to make the report is confidential information. Rule 1.6(a) outlines what constitutes "confidential information":

> *(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the*

attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

Whether notifications or disclosures must be made to the court will depend on application of Rule 3.3 of the Alaska Rules of Professional Conduct, which addresses a lawyer's duty of candor to the tribunal. Rule 3.3(a) states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable and timely remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable and timely remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that are necessary to enable the tribunal

to make an informed decision, whether or not the facts are adverse to the lawyer's position.

In the Comment section to Rule 3.3 under Duration of Obligation we learn that "a proceeding has concluded…when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

A lawyer is required to carry out the duties outlined in Rule 3.3 regardless of how the client may try to direct the lawyer. If a lawyer is required to disclose information to the court in remediation of a misrepresentation, even if it will be to the detriment of the client, then the lawyer must do that and a client's direction to the contrary will not and cannot control. *See* Comments to Rule 3.3.

To answer the question posed, first, it will depend on whether the falsified billing information was material evidence offered in the case or whether failing to disclose would be necessary to avoid assisting the client in a criminal or fraudulent act. If either of these circumstances exist, the lawyer must make disclosure to the tribunal. But, second, it will depend on whether the proceeding in which this evidence was presented has concluded as defined in the Comments to Rule 3.3. If the proceeding has concluded, no disclosure is required.

B) The meaning of the phrase "to prevent reasonably certain death or substantial bodily harm."

Two comments to Rule 1.6 provide some guidance for lawyers considering whether to make a permissive disclosure to prevent reasonably certain death or substantial bodily harm under Rule 1.6(b)(1), including what qualifies as "reasonably certain" harm for purposes of that rule. Note that 1.6(b)(1), like all of paragraph (b) of the rule, is a *permissive* disclosure, and a lawyer is never required by Rule 1.6 to make such a disclosure.

From the Comments to Rule 1.6

> Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidences and secrets of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

……

Paragraph (b) permits but does not require the disclosure of confidences and secrets of a client to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

The Restatement (Third) of the Law Governing Lawyers §66 also identifies factors to be considered in deciding whether disclosure of confidential information is permitted by 1.6(b)(1), including:

1. The degree to which it appears likely that the threatened death or serious bodily harm will actually result in the absence of disclosure;
2. The irreversibility of the consequences once the act has taken place;
3. Whether victims may be unaware of the threat or may rely on the lawyer to protect them;
4. The lawyer's prior course of dealing with the client; and
5. The extent of adverse effect on the client that might result from disclosure contemplated by the lawyer.

Applying all this guidance from the Comments and the Restatement, this situation does not appear to rise to the level of reasonably certain death or substantial bodily harm. The client's drug use might cause future harm or even death, but there is no indication from the facts given that the harm/death is sufficiently definite and imminent as to trigger disclosure by the lawyer. Illinois State Bar Association Advisory Opinion 17-01, applying a version of the rule that requires rather than permits disclosure in the case of reasonably certain death or substantial bodily harm, reaches the same conclusion with a similar fact pattern.

In this situation, where the client is the person facing potential harm, the lawyer should also consider Rule 1.14. Rule 1.14 also applies when a lawyer's client (but not a third party) has diminished capacity and is at risk of "substantial physical, financial or other harm" unless action is taken and cannot act in his own interest. This Rule authorizes a broad range of "reasonably necessary protective action" depending on the particular circumstances and on what protective actions are available. It's not clear from the question whether the client is currently unable to act in his own interest, as not all instances of diminished capacity will rise to that level, but Rule 1.14 should be considered any time a client appears to have diminished capacity. Note the different threshold for Rule 1.14(b) – it applies when, among other things, there is a risk of "substantial physical, financial, or other harm" to the client. This can apply to a number of

situations that would not constitute a threat of reasonably certain death or substantial bodily harm for purposes of Rule 1.6(b)(1).

Another consideration is the client's competence and ability to make decisions on his own behalf; even if the client is not in imminent danger of physical harm, it seems that his drug use may be impairing his ability to participate in the representation and make the decisions that are reserved to him under Rule 1.2. If that is the case, the lawyer needs to take appropriate action, including seeking a competence evaluation, in order to provide diligent and competent representation to the client and make sure that the client is making voluntary and informed decisions. As discussed above, this action would be permitted by Rule 1.14.

C) Chat Bots and Artificial Intelligence (AI)

Lawyers will not be replaced by technology but lawyers who do not use technology will be replaced by those who do.[23]

Law firms and business are increasingly using chat bots to deliver legal services and communicate with clients and potential clients about their legal needs. Powered by AI and machine learning smart personal digital assistants or "Chat bots" or "bots" are essentially computer programs that can conduct phone or text conversations that can be used in a variety of different ways. Examples we are familiar with include Alexa, Siri and Cortana, each of which are capable of performing tasks initiated by voice activated requests using natural language. Chat bots are what one often sees when visiting a retailer's website, and a pop-up chat box asks "can I help you?" If you've ordered a Domino's or Pizza Hut pizza through Facebook Messenger, then you've interacted with a chat bot.

A useful application of bots can be at the beginning of a conversation or interview with a client or potential client. Bots could perform an intake function or provide useful legal research or information. Bots could inform clients on the status of their pending legal matters and the costs or legal fees the client has incurred to date.

In July 2017 the ABA Online *Journal* reported that:

> In 2016, Joshua Browder became an instant sensation when his legal chat bot, "DoNotPay," overturned nearly 160,000 parking tickets on behalf of users in the United Kingdom and the United States. A computer science student at Stanford University, Browder designed the bot because he is, in his words, a terrible driver. "I got a bunch of tickets, and when I went to appeal them I found that I was

[23] Quote rephrased from original by Hari Krishna Arya ("Teachers will not be replaced by technology but teachers who do not use technology will be replaced by those who do.")

copying the same text over and over," says Browder, who claims that DoNotPay had successfully overturned 245,000 tickets in the U.K. and U.S. as of March.[24]

After consulting with immigration lawyers, Browder took a year to create a chat bot application for immigrants and political asylum refugees seeking entry in to other countries. [25] The chat bot asks the user questions and then auto-populates the immigration forms they need to adjust their status. Though far from perfect, chat bots with voice capabilities could eventually perform a wide range of legal services.

Other chat bots are providing self-help legal advice to consumers and small businesses:

- Coralie, a virtual assistant that helps survivors of military sexual trauma connect with services and resources. The chatbot recently won the Tech for Justice hackathon during ABA Techshow.
- Docubot, a chatbot that works through lawyers' websites to help consumers generate legal documents and that also performs client intake.
- LawDroid, a bot that helps users incorporate a business for free on a smartphone.
- LawGeex LawBot (not to be confused with the other LawBot above), a chatbot that can be added to Slack, where you can then send it legal contracts for analysis.
- Yet another LawBot, this one from Indian company LawRato, helps users get answers to legal questions and recommendations of a lawyer.
- Legalibot from Spain, which helps users compose legal documents and contracts through Facebook Messenger.
- Lexi from Australian company LawPath can be used to generate a free privacy policy or non-disclosure agreement.
- RentersUnion is a chatbot that provides legal advice on housing issues for residents of London. The bot analyzes a user's tenancy agreement and then helps generate letters or recommend appropriate action.
- Speak with Scout, from Australia, is a chatbot that works through Facebook Messenger to provide legal guidance and references to a lawyer.

See Robert Ambrogi, This Week In Legal Tech: Everyone's Talking About Chatbots, *Above The Law*, April 17, 2017 at https://abovethelaw.com/2017/04/this-week-in-legal-tech-everyones-talking-about-chatbots/

[24] Victor Li, "Chatbot apps help users communicate their legal needs," *ABA Journal*, (July 2017) at http://www.abajournal.com/magazine/article/talking_tech_chatbot_legal_services
[25] *Id.*

Dennis Garcia, Assistant General Counsel at Microsoft, spoke at the ABA's 44th Annual National Conference on Professional Responsibility in Louisville, Kentucky on June 1, 2018. In his written material, he explained:

> Bots may also reinvent how non-profit legal assistance organizations and our judicial system provide legal resources to citizens. Imagine a bot providing personalized assistance to enable individuals to navigate through the intricacies of local court procedures or to help someone, who cannot afford a lawyer, file the appropriate legal documentation to seek expungement of a prior conviction on his/her own. Using bots in this fashion coupled with easy-to-use and readily accessible communication platforms like Skype — which can translate foreign languages to better serve our growing diverse population — offers compelling opportunities to reimagine legal aid.[26]

Law firms and legal service organizations could employ AI to improve access to legal services by providing individuals and businesses with legal answers and information, including a "legal checkup" where a bot could ask a person questions to determine that person's unmet legal needs, i.e., landlord/tenant, housing, denials of coverage by health plans, work-related problems like wrongful discharge, harassment and discrimination, denial of government benefits, tax problems, insolvency, consumer fraud, estate planning, guardianship, insolvency, starting a business, etc.

As bots and AI are increasingly used by law firms and other alternative legal service providers, what are some of the ethical issues that emerge?

- Developing Policy and Law for the Use of AI
- Transparency
- Access and Inclusivity—AI should empower and engage everyone and be available to everyone
- Reliability and Trustworthiness
- Unlicensed or Unauthorized Practice of Law
- Professional Regulation—is the bot "practicing law?"
- Do lawyers have an ethical duty to train and supervise bots under Rules 5.1 or 5.3?
- Can a lawyer or law firm be disciplined for the conduct of a bot? What happens if the bot "goes rogue?"
- Confidentiality, Data Privacy and Cybersecurity. To do their work bots will need access to a person's PII and other sensitive financial and medical data. Law firms in the US that service international corporate clients will be subject to the requirements of the General Data Protection Regulation (GDPR) recently enacted in the EU.

[26] Dennis Garcia, Perspective: 'Chat Bots' Provide Opportunity to the Legal Profession, Bloomberg Law (April 28, 2016) at https://biglawbusiness.com/perspective-chat-bots-provide-opportunity-to-the-legal-profession/

- Competency-- Every young person needs to understand how computers work, how to navigate the internet, how to use productivity tools, and how to keep their computers secure. But they also need the opportunity to study computer science. Computer science teaches computational thinking, a different way to problem solve and a skill in high demand by employers.
- Liability and Accountability—who is accountable for giving bad advice? What happens if bots dispense inaccurate or offensive information that results in harm to others? Determining how liability should be apportioned in such situations and the types of online agreements that may need to be established with suitable limitation of liability provisions will require special attention. But see Ak. Rule 1.8(h):

> *(h) A lawyer shall not:*
>
> *(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or*
>
> *(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel.*

For trial lawyers, AI presents an opportunity for lawyers to quickly sort through huge amounts of data; to develop predictive capabilities based upon the facts presented in a client's case; to enable lawyers to predict judicial bias based upon a jurist's track record of decisions; to develop strategy by revealing meaningful patterns for particular courts or judges; to predict approximately how long a trial may last; and to obtain intelligence about opposing counsel, such as their client lists, total open cases, case results and relevant experience.

Legal Analytics can help lawyers and law firms collect and analyze data to help them price their services more aggressively and remain competitive and provide more accurate client billing estimates and better staffing decisions on cases.

At the ABA Conference referenced above, a panel of experts including Mr. Garcia agreed that AI will change radically how lawyers practice and what skill sets lawyers must have to succeed in the future. Competency in practicing law will require that lawyers sharpen their digital skills and expertise in computer science. See Rule 1.1, Maintaining Competence comment which states in part "Attention should be paid to the benefits and risks associated with relevant technology." Clients will not tolerate the use of old, inefficient and more expensive means of conducting legal research, predicting outcomes, conducting e-discovery, review of ESI. In legal environments, paralegals and law clerks now use "e-discovery" software to find documents.

The panel agreed that there are only three questions clients want answered:

1. How much will it cost?
2. How long will it take?
3. What will be the outcome (or Will I win?)?

As explained above, AI has the capability to equip lawyers to answer these three questions. Before long, AI will enable lawyers and other professionals to perform ordinary and mundane projects, and even more complex tasks, at higher efficiency, lower cost and greater output or production, freeing up more time for lawyers to take on more complex matters and problem solving. But lawyers and law firms will have to rethink the way they recruit and evaluate employees and assess their skills and performance to make sure that they are sufficient to meet the legal challenges in the future.

As bots and AI continue to evolve, we presumably will want them to think and behave like humans, i.e., empathy, compassion, fairness, trustworthiness, ethics, humanity, etc. Steve Jobs repeatedly said this may be the most important consideration of all—the cross pollination of science and engineering with liberal arts, humanities and social science:

> As computers behave more like humans, the social sciences and humanities will become even more important. Languages, art, history, economics, ethics, philosophy, psychology and human development courses can teach critical, philosophical and ethics-based skills that will be instrumental in the development and management of AI solutions. If AI is to reach its potential in serving humans, then every engineer will need to learn more about the liberal arts and every liberal arts major will need to learn more about engineering.[27]

D) Text messaging advertising services.

There is no ethical prohibition against lawyers using text messaging to advertise or solicit to clients in Alaska, as long as the process is in compliance with Rules 7.1, 7.2 and 7.3 of Alaska's Rules of Professional Conduct. And while Alaska has not formally addressed this question, North Carolina, Ohio and Florida have and all have given it a thumbs up, again as long as any firm using the tool complies with their respective advertising rules.

In Alaska, Rule 7.2 addresses the methods that lawyers can use to advertise:

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

Rule 7.1 prohibits lawyers from engaging in false or misleading advertising and Rule 7.3, with certain exceptions that are not relevant here, prohibits lawyers from directly soliciting prospective clients using real-time electronic contact. Whether a text messages constitutes a real-time electronic contact is unsettled in Alaska. That said, it is the opinion of several of the

[27] Microsoft, The Future Computed: Artificial Intelligence and its Role in Society (2018) at 18.

authors of this answer set that because all recipients of text messages can choose to read the content of a text message at their convenience and can delete a text message without ever having read it means that a text message does not constitute a real-time electronic contact. However, one significant challenge with text message advertising in Alaska does arise under Rule 7.2(c), which states:

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

While not insurmountable, this restriction must be kept in mind.

How does all of this apply to text message advertising by a lawyer through an advertising company? First, if the text messaging through the service is directed to the general public, and not to a specific person/s in need of legal services, the messaging typically will not constitute a "solicitation" as defined by Rule 7.3(a). However, the information sent out still must comply with Rule 7.1. It cannot contain false or misleading statements and the lawyer is responsible for making sure that any service she uses complies with the advertising rules. (See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers outside the firm who work on firm matters.)

Second, if the text messaging through an advertising service *is* directed to a specific person/s in need of legal services and so would be a "solicitation", then the lawyer is responsible to make sure that all of the requirements of Rule 7.3 are satisfied, to include use of the words "Advertising Material".

Finally, as long as the fee owed to a text message advertiser isn't tied to the actual number of clients obtained, Rule 7.2(b)(1) allows a lawyer to pay the reasonable costs of advertisements or and communications permitted by the Rule, which means a lawyer may compensate vendors who are engaged to provide marketing or client-development services such a text message advertiser as long as the vendor does not direct or control the lawyer's professional judgment in violation of Rule 5.4(c). Moreover, this lead generator cannot recommend the lawyer, any payment to the lead generator must be consistent with Rule 5.4, and the lead generator's communications must be consistent with Rule 7.1 and 7.2. In order to comply with these Rules, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.

With regard to text message advertising directly by the lawyer, essentially the same analysis applies as that of text message advertising by a company. The key issue is whether the messaging is directed to the general public or to a specific person/s in need of legal services in a particular matter.

E) Text messaging as a means of communicating with clients.

Text messaging is not prohibited as a means of advertising/marketing nor as a means of general communication with clients. However, whether text messaging *should* be used for these purposes or is *best* to be used for these purposes, are entirely different questions. Use of text messaging raises concerns about whether and how confidentiality can be maintained in these communications and what steps a lawyer should take to ensure that client information is protected.

Rule 1.6(c) of the Alaska Rules of Professional Conduct states:

> *(c) A lawyer must act competently to safeguard a client's confidences and secrets against unauthorized access, or against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, by any other persons who are subject to the lawyer's supervision, or by others involved in transferring or storing client confidences and secrets. This duty includes guarding against unauthorized access to a client's confidences and secrets. See Rules 1.1, 5.1, and 5.3. A client may give informed consent to forgo security measures that would otherwise be required by this Rule. When transmitting or storing information that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.*

The comments to Rule 1.6 under the section "Acting Competently to Preserve Confidentiality" discuss in more detail what the term "reasonable precautions" means.

> … Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). The duty of safeguarding communications described in Rule 1.6(c) does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

ABA Formal Opinion 477 (5/11/2017) provides additional guidance and commentary regarding cybersecurity, generally, and a lawyer's duty, specifically, to keep client information secure when using electronic communications and storing client information electronically. [28]

While not addressing text messaging specifically, ABA Opinion 477 includes this warning which is particularly apt when considering communication and /or advertising by text messaging:

> …electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors[29] to determine what effort is reasonable.

With regard to text message advertising, the lawyer needs to be aware of who will be receiving these messages and what, if any, "real time" communications will be permitted from the recipient and to whom any responses are sent—the lawyer? The advertising service? What protections are there, or not, for receiving confidential information? Will there be disclaimers or warnings not to share confidential information? And if it is the lawyer directly sending these texts, the same concerns exist. If the opportunity for response and sharing of information is provided to the recipient, then the information transmitted will be considered confidential unless a disclaimer/warning to the contrary is posted. Given the immediacy of receipt and response to text messages, it may be best not to have any ability for the recipient to respond and send information, but rather, limit any text message advertising to general information about the lawyer or law firm.

As for texting to communicate with clients generally, a lawyer needs to be aware of who may have access to the client's mobile device/s and text messages and be satisfied that the client will be the only recipient. The lawyer should also counsel the client about use of texting to communicate and the risks to confidential communications. Certainly, be cognizant of the factors outlined in the Comments to Rule 1.6. It may be wisest not to communicate highly sensitive information to the client through texting.

[28] https://www.americanbar.org/content/dam/aba/administrative/law_national_security/ABA%20Formal%20Opinion%20477.authcheckdam.pdf

[29] These are the same factors as set forth in the Comments to AK Rule 1.6(c).

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Risk Management Comment: To Text or Not to Text, That's the Question

At times it's hard to believe. Not only have all of our kids reached adulthood, but every one of them is financially independent. Trust me, I checked that "raise the kids" item off my life's "to do" list with a tear in my eye! Now, although they are all living on their own, this doesn't mean my wife and I don't ever want to talk with them. We're still family, after all. To my surprise, however, trying to get ahold of any one of them during these adult years has turned out to be a bit more of a challenge than I thought it would be. While part of me actually likes that, because I can play the game as well, there are times when I can get a little irritated.

It seems like our kid's generation prefers to eschew email and voicemail. In fact, several of our kids at various times during their newfound independence went so far as to allow their voice mailbox to fill up so no one could ever leave a message. That one used to drive me crazy. Better yet, to this day if my wife or I send an email to any one of them, it may be read within several weeks of receipt; but I assure you that any response, let alone a timely response, is quite the rarity.

Don't get me wrong, it's all good in terms of our relationships with our kids. They just prefer to communicate in different ways than we older folks do. Yes, it took a few years; but we've come to learn that if we really need to talk with one of them, texting is the way to go. Most of our texts are answered quickly and sometimes they'll even accept a call in response to a text. We've been trained well.

Now, as I sit here writing about our kids, I also hear in my head my wife saying, what's your point? Well, my point is this. As tech continues to change our world at a seemingly ever-increasing pace, communication practices and preferences have been changing as well. I suspect our experiences with our own kids are not unique. Their generation's use of texting is just one example of the change in how people prefer to communicate as a result of tech advances.

Change has consequences, however, and that's what I really want to discuss. Texting is ubiquitous in our culture, which makes it too easy. Instead of taking the time to compose an email or pick up a phone, it takes far less time to send a quick text at any time, day or night, and regardless of the setting just like everyone else does. But, is texting a good thing, particularly for a lawyer? Think about Comment 8 to ABA Model Rule 1.1 Competency, which reminds lawyers that we are to "keep abreast of changes in the law and its practice to include the benefits and risks associated with relevant technology." If you are communicating with clients via text messaging, have you thought about the ramifications of doing so? Please understand that I'm not trying to suggest when your lawyer hat is on you should never send a text message. I just want to make sure you've thought about the associated benefits and risks before doing so.

Speaking personally, I think a decision to hand out your cell number to clients is a bad idea absent establishing some healthy boundaries upfront. It's a work/life balance issue for me. I'm not a fan of 24/7 availability because we all need downtime. But think about it, when people send a text they are generally expecting an immediate response, even if it's after you've gone home for the day. Are you prepared and able to manage that expectation?

I also get concerned about the informality of text messaging and the fact that it's often communication on the fly. Texts are typically short and succinct and that's problematic if texts are being used in furtherance of advising a client or as part of the client's decision-making process. Compounding the problem is the failure of so many to capture and preserve such exchanges as part of the client file. As I so often remind attorneys, in the context of a malpractice claim or disciplinary matter, if it wasn't documented, it wasn't said, or it didn't happen. Do you have the ability to capture and preserve any and all substantive exchanges and are you willing to make the commitment to actually do so? If not, I'd seriously limit the use of texting.

Do you charge for your time texting clients? I would assume you do. Do your clients know that? Text messaging is a very inefficient way to communicate, again in terms of trying to have some sort of substantive exchange. Allowing clients that option is an inefficient use of your time and can needlessly result in a larger bill than the client might be expecting. Why? It's simply due to the need to send multiple texts to make sure you have all the information you need as well as to confirm the client has correctly understood the exchange. Is this truly the way you want to communicate with your clientele?

Finally, how do you know if the texts you're sending will be received by the correct party? We often don't think about who might have access to the client's cell phone or even the family computer where text messages can show up. Making matters worse, how would you know that a client has texted you an urgent message when your phone is off because you're in court? They will assume you received it and may rely on that belief in some fashion. Could this be a problem for an attorney? It already has been.

Look, I have no problem using text messaging to pass along that there's been a delay, the courtroom where you were to meet your client has changed, that a voicemail has been left that needs the client's attention, or that you are now available. Those types of texts seem appropriate for the method of communication. And let's be honest, while I might choose not to give out my cell number, many of you already have or will. If you count yourself among the group that has or will, keep the above issues in mind and remember this. Just because we can do something, doesn't mean it's a good idea. Texting has its place. I'm just hoping to help you define what that place might look like in your own practice so you don't get caught unawares.

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Vignette Three

Questions to Consider

A) What does the term "generally known" mean in the context of Rule 1.9(c)? For example, if information has become part of the public record, does that in and of itself make it generally known? If Ian is correct that the "generally known" exception only applies to a lawyer's use of information, what does the word "use" mean and how does this impact a lawyer's desire to reveal or disclose information?

B) Thinking about the ethical limitations in play, when can and when can't a lawyer step into multiple client representation? Think about civil, criminal and non-litigated matters. Describe the steps, in terms of process, that every firm should have in place to assist in identifying, analyzing and resolving conflicts of interest concerns between or among potential joint clients. Some conflict situations will require the lawyer to obtain informed consent prior to proceeding. How does one obtain informed consent? Can consent ever be revoked? If so, under what circumstances and what happens then? What happens if a new conflict arises while the joint representation is underway?

C) What are the duties a lawyer must address upon discovering that a malpractice misstep has occurred? Is withdrawing from representation now mandatory? Is there a duty to self-report the error to the client? If so, are there any exceptions?

Now turn your attention to working with your malpractice insurer. What should you do when first learning that a malpractice claim has been made against you? How can you best help defense counsel and your insurance carrier defend you? What shouldn't you do? Finally, thinking about file documentation, what day-to-day practices make the most difference to defense counsel and your insurer in terms of enabling them to try and obtain the best possible outcome should a claim ever arise?

D) Given the increasing frequency and growing sophistication of ransomware attacks, having a well thought out backup process is essential. What are the backup best practices every firm should have in place today? If your firm currently does all that can be reasonably done in terms of the backup process, that's still not all you should be doing. Andrew was correct in stating that ongoing training is the necessary other half of the equation. What should be the focus of such training?

Rules to Consider

Rule 1.4 Communication: Case Status; Informed Consent; Malpractice Insurance Disclosure.
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: Current Clients
Rule 1.9 Conflict of Interest: Duties to Former Clients
Rule 1.10 Imputation of Conflicts of Interest: General Rule
Rule 1.13 Organization as Client

A) The Meaning of the Term "Generally Known."

Alaska Rule of Professional Conduct 1.9(c) provides as follows:

RULE 1.9. Duties to Former Clients.

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

*(1) **use** confidences and secrets to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or*

*(2) **reveal** confidences and secrets except as these Rules would permit or require with respect to a client. [Emphasis supplied.]*

Rule 1.9(c) is independent of any conflict of interest considerations that require an analysis of whether a prospective client's matter is the same or substantially related to a former client's matter and whether the parties would be adverse. The Rule protects a *former* client's confidences and secrets to the same extent that the lawyer is obligated to do under Rule 1.6(a) regarding a *present* client. However, just as a lawyer may, or must, make otherwise confidential disclosures under Rules 1.6(b) and 3.3 regarding a present client, he may or must also do so regarding a former client under Rule 1.9(c).[30]

Rule 1.9(c)(1) contains an exception for the "use" of former client information to the former client's disadvantage, however, when the information has become "generally known." The meaning of the term "generally known" is not on its face self-explanatory, but the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 479 on December 15, 2017, which contains a thorough and detailed presentation of how courts and commentators have interpreted its meaning.[31] The ABA Opinion, while focusing exhaustively on the meaning of "generally known," also points readers to the distinction between "use" and "reveal" as contained in the Rule:

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[30] Although Rule 1.9(c) does not expressly so state, a lawyer may of course use or reveal otherwise confidential information if the former client consents.

[31] "The 'Generally Known' Exception to Former-Client Confidentiality"
http://www.abajournal.com/files/FO_479_formatted_12_14_17.pdf
See, also, a March, 2018, ABA *Journal* article regarding Formal Opinion 479 which contains a critique of the Opinion:

http://www.abajournal.com/magazine/article/ethics_opinion_makes_confidentiality_exception_for_generally_known_info

Model Rule 1.9(c)(2) governs the **revelation** of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not **reveal** information relating to the representation except as the Model Rules "would permit or require with respect to a [current] client." **Lawyers thus have the same duties not to reveal former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.**

In contrast, Model Rule 1.9(c)(1) addresses the **use** of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not **use** information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become generally known." **The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may—but need not—occur at the same time. The generally known exception applies only to the "use" of former client confidential information. ***** [Emphasis supplied; footnote omitted.]

An example of a lawyer's "use" of "information relating to or gained in the course of the representation" might be the following: The lawyer knows that his former client owns a very valuable piece of jewelry which he helped her acquire in a divorce case. The lawyer's present client, in a matter unrelated to the lawyer's prior representation, is attempting to collect a debt from the former client. The lawyer could not *use* his knowledge of the former client's possession of the jewelry in an attempt to seize and sell it on behalf of his present client unless it were "generally known" that the former client possessed the jewelry in question. The lawyer could ethically "use" the former client's information, to her detriment, were she a celebrity who had displayed and exhibited the jewelry in question on television and articles about the former client and the jewelry were contained in the pages of popular fashion magazines and newspapers.

The ABA Opinion makes clear that "generally known" does not mean simply that the information in question has become part of a public record or that the information may be readily found by a search of public records:

> The generally known exception to the use of former-client information was introduced in the 1983 Model Rules. The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. **A number of courts and other authorities conclude that information is not generally known merely because it is publicly available or might qualify as a public record or as a matter of public record.** Agreement on when information is generally known has been harder to achieve. [Footnotes omitted and emphasis supplied.]

By way of example, in 2012, before ABA Formal Opinion 479 was issued,[32] Justice Lemons of the Supreme Court of Virginia addressed the meaning of "generally known" in a concurring opinion in *Turner v. Commonwealth*, 726 S.E.2d 325 (2012). The majority opinion in *Turner* reversed Mr. Turner's criminal convictions because the trial court abused its discretion when it declared that a witness who testified was nonetheless "unavailable" because he allegedly could not remember the subject of his prior testimony at a preliminary hearing. Over Mr. Turner's successor counsel's objection, the trial court permitted Mr. Keeley, Mr. Turner's former defense attorney, to testify against his former client regarding the "unavailable" witness's testimony at the preliminary hearing,

In his concurring opinion, Justice Lemons[33] determined that the trial court also abused its discretion when it permitted Mr. Turner's former attorney to testify against his former client. Justice Lemons also opined that the Virginia Court of Appeals erred when it found as follows on this subject:

> Neither Rule 1.6 nor 1.9 prohibits a lawyer from testifying in court regarding what occurred at a former public court proceeding when such testimony does not involve communications solely between an attorney and his client and the testimony concerns information that has become generally known. The Commonwealth only sought to elicit events and information conveyed by Poindexter at a prior public court proceeding, and did not seek to have any information disclosed that was privileged or uniquely related to Keeley's representation of Turner. Specifically, Keeley's testimony in this case did not involve any confidential information or secrets that he obtained "in the course of the representation" or "relating to the representation," Rule 1.9, nor was it "gained in the professional relationship" or if disclosed "would be embarrassing or would be likely to be detrimental to the client." Rule 1.6.

Turner v. Commonwealth, 58 Va.App. 567, 590, 712 S.E.2d 28, 39 (2011).

Justice Lemons opined not only that the Court of Appeals erred in the analysis approving Mr. Keeley's having been ethically permitted to testify, but also that Mr. Turner's former counsel violated Rule 1.9(c) when he testified for the Commonwealth. More is required before information becomes "generally known" than its being known by others or its having been revealed in a public and non-confidential setting:

> While testimony in a court proceeding may become a matter of public record even in a court denominated as a "court not of record," and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is "generally known." **There is a significant difference between something being a public record and it also being "generally known."**

[32] Justice Lemons' concurring opinion is cited in ABA Formal Opinion 479.

[33] The *Turner* opinion predates Justice Lemons' elevation to Chief Justice of the Court.

> In my view, the Court of Appeals erred in concluding that "Keeley violated no rule of professional conduct." *Turner,* 58 Va.App. at 590, 712 S.E.2d at 39. Keeley violated Rule 1.9 by testifying against Turner, his former client, about information gained in the course of the representation that was to Turner's disadvantage when such information was not "generally known." The trial judge abused his discretion by permitting this testimony.

Justice Lemons relies on a portion of Comment [8] to VA Rule 1.9 to conclude that a lawyer's duty to refrain from using information gained in the course of representing a former client as a matter of *loyalty*. Comment 8 to Rule 1.9 explains the lawyer's duty of loyalty to a former client, and states that "[i]nformation acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client."

The second sentence of Comment [8], which is not set forth in the concurring opinion in *Turner*, reads as follows: "However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client." This means that just because a lawyer once represented a client the lawyer is not thereafter forever prohibited from using information to the disadvantage of the former client if the information is not "relating to or gained in the course of the representation" of the former client.

Thus, in the example given above regarding a former client's valuable jewelry, the lawyer could seize and sell the jewelry without committing an ethics violation if he came to know of the existence of the jewelry from a friend of the former client after the representation had ended, and the matter handled for the former client was unrelated to the acquisition and preservation of the former client's personal property. The lawyer could so act on behalf of the present client, to the detriment of the former client, even if the former client's possession of the jewelry were not "generally known."

Justice Lemons' careful analysis of the meaning of "generally known" in the concurring opinion in *Turner* is in accord with the precepts contained in the later-issued ABA Formal Opinion 479. The ABA Opinion sets forth what it calls "A Workable Definition of Generally Known under Model Rule 1.9(c)(1)":

> **** [T]he Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced,

> discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

The Opinion goes on to characterize information which is *not* generally known:

> Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, **the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes**. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1). [Footnotes omitted; emphasis supplied.]

B) Multiple Client Representation

Rules 1.7 and 1.9 of the Rules of Professional Conduct control when determining whether a lawyer has a conflict in representation of clients. Rule 1.7 addresses conflicts generally and concurrent conflicts (conflicts between current clients) specifically. Rule 1.9 addresses conflicts with former clients. The Comments to Rule 1.7 outline the issues and considerations when representing multiple clients.

Whether the case is a civil or criminal matter, litigated or not, or transactional, multiple representation in the same matter can occur only if the parties are mutually aligned and do not have antagonistic legal matters or issues. Multiple representation is impermissible if the parties are directly adverse in "the same litigation or other proceeding before a tribunal" (Rule 1.7(a)(1) and (b)(3)).

From the Comments to Rule 1.7 we learn that:

> A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. (Conflicts in Litigation)

Representation of co-defendants in a criminal matter is permitted, but with great caution:

> The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met. (Conflicts in Litigation)

And:

> Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client. (Identifying Conflicts of Interest: Directly Adverse)

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. One client might disclose information to the lawyer that he/she does not want shared with the other joint client. Or, one client may want to redo a will that disinherits the other client. In both of these situations, the lawyer will now have a conflict. The lawyer should make clear his/her relationship to the parties involved. It is crucial to have an understanding up front, preferably in writing, that the information given by one client will be shared with the other client as a condition to joint representation. If situations arise as described in these examples, the lawyer likely will not be able to continue the joint representation if he/she cannot use and/or disclose the information to protect the other client's interests.

Another potential conflict situation can arise when a lawyer represents a company or organization, and the entity's interest may be or becomes adverse to those of one or more of its constituents. In such a situation, 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. The lawyer must take care 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. Ak. RPC Rule 1.13, Clarifying the Lawyers Role Comment.

Rule 1.13(g) of Alaska's Rules of Professional Conduct recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's

representation of both is controlled by the confidentiality and conflicts rules, Rules 1.6, 1.7 and 1.9. This dual representation can only occur if there is no adversity between the organization/company and the individual member of the organization. If any consent is required from the organization for a dual representation, Rule 1.13(g) requires that it be given "by an appropriate official of the organization *other than* the individual who is to be represented, or by the shareholders." (Emphasis added).

Lawyers "should adopt reasonable procedures, appropriate for the size and type of their firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. …If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). Comments to Rule 1.7 (General Principles). As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Ak. RPC 1.7, Comments.

Any conflict check system must also take into consideration Rule 1.10, Imputed Disqualification. The general rule is stated in Rule 1.10(a):

> *(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.*

In a firm, this means that a lawyer in a firm must review all new/ prospective clients against the current and former clients of all the other lawyers in the firm. The Comment to Rule 5.1 states:

> …Paragraph (a) [of Rule 5.1] requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. *These policies and procedures include those designed to detect and resolve conflicts of interest*, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised. [emphasis supplied]

Some conflict situations will require the lawyer to obtain informed consent prior to proceeding. How does one obtain informed consent? Can consent ever be revoked? If so, under what circumstances and what happens then? What happens if a new conflict arises while the joint representation is underway?

"Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 9.1(g) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Comments to Rule 1.7 (Informed Consent).

"With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." Comments to Rule 1.7 (Special Considerations in Common Representation).

"As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." Comments to Rule 1.7 (Special Considerations in Common Representation).

"Under some circumstances, it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases, the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests." Comments to Rule 1.7 (Informed Consent).

Even with informed consent, this consent is not a contractual obligation. Client consent may be withdrawn at any time and for any reason. "A client who has given consent to a conflict

may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result." Comments to Rule 1.7 (Revoking Consent). *See* D.C. Ethics Op. 317 (2002) for instructive analysis of revocation of consent. *See also,* Restatement of the Law Governing Lawyers §122, comment *f.*

"Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of Rule 1.7(b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b). Comments to Rule 1.7 (Consent to Future Conflict).

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Risk Management Comment: You Don't Get It Both Ways
One Downside of Joint Representation

Some time ago I was asked to review several different sample Consent to Joint Representation forms that a firm was using with their estate planning clients. What I found was troubling. To set the stage, this firm was accustomed to providing coordinated estate planning services to families in situations where such a plan was called for. In other words, they were involved in multigenerational joint representation. Now I have no problem with this initially as there is nothing inherently wrong with joint representation in and of itself. My problem was with what the firm tried to do with their waiver documents.

In one of the forms, the firm sought to inform their joint clients that a potential conflict existed. So far so good because disagreements on key decisions may arise after the representation has begun. Unfortunately, it went downhill from there. The waiver went on to state that each client will be treated as if they were being represented by separate counsel and

that, absent authorization, no secrets would be shared between clients even if the resulting plans were incompatible or that the plan of one client was detrimental to one of the other clients. Now I've got a problem with that!

To make matters worse, this waiver went on to state that each client had the right to loyal and diligent representation. While an accurate statement, in the context of the waiver document that the statement was placed, I don't see how an attorney could view the keeping of secrets in joint representation or the drafting of documents that may end up being detrimental to one or more of the jointly represented clients as meeting the definition of loyal and diligent representation. I also don't think any of the firm's clients would either, particularly if and when one eventually discovers they were the one harmed by their own attorney's act of drafting estate planning documents that ultimately proved to be detrimental to their interests. As the attorney, you don't get it both ways.

The way that I see it is this; one can't be partially loyal. The duty of loyalty is to be *equal* among all clients, period. It's an all or nothing kind of thing. Should one of the clients insist that a confidence be maintained and as a result an incompatibility in the overall estate plan arises in some fashion, it's over. You are out as the attorney and out for all. Don't try to pick one family member to continue on with, drop the rest, and maintain the secret. Not only would this be unethical (See MRPC Rule 1.7 Conflicts of Interest: Current Clients) but a viable malpractice claim may very well be on the horizon.

This is one of the risks inherent with joint representation. Significant conflicts can and sometimes will arise. When they do, the attorney often must completely withdraw. At ALPS, we have seen viable claims where an attorney lost contact with one of the joint clients in a personal injury suit and yet carried on with the representation of the remaining client. Often attorneys will attempt to justify such a decision by arguing that too much, in terms of time and money, was invested in the case and they were not about to walk away from that kind of an investment.

The decision to remain or withdraw cannot be based upon what would be best for you as the attorney. This will eventually be viewed as your putting your own financial interests above the best interests of your clients. This decision should be solely about what's best for, and only for, the clients. If proceeding with the representation of the remaining client/s could in any way be detrimental to the one client you no longer wish to represent, you're out. There are very few exceptions to this outcome. The same is going to be true in joint representation of any type; but of particular concern due to claims activity, is when attorneys attempt to jointly represent clients in a business transaction, a real estate transaction, or in an uncontested divorce. Tread carefully in these practice areas.

I do understand the temptation to try and anticipate conflict problems and avoid the necessity of having to withdraw by obtaining waivers in advance. It can be very hard to walk away. While waivers are valuable and quite necessary at times, one must also understand that waivers aren't a fix it all solution. Even though I am certain that a number of clients have signed

consent to joint representation forms just like the one discussed above, that doesn't necessarily make that waiver effective. Consent, informed as it may be, cannot make a nonconsentable conflict consentable and, for me, that's the bottom line. Again, you don't get it both ways. Nonconsentable conflicts do exist regardless of how much you might wish otherwise.

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C) Duties of Lawyer When Material Mistake is Made; Notification to Client; Withdrawal; and Negotiation to Settle Malpractice Claim

For the purposes of this part of the discussion, assume you have discovered that another lawyer in your firm made a material mistake in the drafting of a transaction that has now led to litigation. As lead trial attorney, you begin to realize that the drafting error committed by another lawyer in the firm will cause the firm's client to lose the pending breach of contract lawsuit and result in the client having to pay substantial damages to the plaintiff.

Lurking in the background is a nagging question over which lawyers agonize**:** Do we have an ethical duty to self-report our error to our client? If you discover that the primary reason for the transaction falling apart was a drafting error committed by your transaction partner, must you reveal this mistake to the client, who is now saddled with the costs and fees of litigating the consequences of this mistake? Is it ethical for the firm to continue representing the client in order to "save the client" from consequences caused by the law firm's own negligence?

In her law review article *Lying to Clients*, Professor Lisa Lerman conducted interviews of twenty (20) lawyers and concluded that lawyers deceive their clients more often than acknowledged by the rules of conduct or the organized bar.[34] Professor Lerman wrote "[o]ne of the most common reasons that lawyers deceive clients is to avoid having to disclose their mistakes."[35] However, our hypothetical litigation partner could well have assumed that the transactional partner's work was performed competently when he agreed to litigate the dispute.

But if the litigation partner later discovers that his corporate partner's legal work (e.g. the insertion of a poorly drafted term into the critical contract) may have been to blame for the failure of the deal and the subsequent litigation, then the firm may have an ethical obligation to report that fact to the client, and the lawyers involved might be subjected to discipline for failing to do so. *See, e.g.*, *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998)(Respondent attorney failed to explain adequately to his clients the effect of a dismissal of the tort claim in violation of Ind. Prof. Conduct Rule 1.4(b). Further, he continued to represent the clients after

[34] Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).
[35] *Id*.

it became apparent that the representation might be materially limited by the respondent's own interests, in violation of Prof. Cond. Rules 1.7(b) and 1.16(a)(1)).

The ethical misconduct would not be the drafting error itself, but rather the failure to communicate with and inform the client that a material mistake was made in the course of the representation. From an ethical perspective, concealing the mistake from the client is more serious than the mistake itself. The lawyer might also reasonably believe that whatever mistake was made can be "fixed" so that disclosure to the client is not necessary.

Support for the duty to self-report a material mistake to the client is found in the Alaska Rules of Professional Conduct. Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and also "explain[s] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Among the most critical decisions that the client has to make regarding the representation in this situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later and (2) whether to continue the current representation. Obviously, the client can't make an informed decision regarding these issues without being informed about the potential claim. The Comment to Rule 1.4 states in pertinent part "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." (Explaining Matters) And "A lawyer may not withhold information to serve the lawyer's own interest or convenience…" (Withholding Information) Unfortunately for the lawyer, this requires advising the soon to be former client of the possible claim the client may have against the lawyer and the advice to seek independent counsel.

According to *The Restatement (3d) of the Law Governing Lawyers* "[i]f the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client."[36] The only case cited in the Restatement for this proposition is *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982), a two-page attorney disciplinary opinion from the New York Appellate Division. In *Tallon*, the attorney allowed the statute of limitations to run on his client's claim for property damages resulting from an auto accident, and thereafter paid the client out of his own funds, without disclosure of his error. Citing New York DR 1-102(A)(4), which provides that a lawyer shall not [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation, the appellate court noted that "[a]n attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may have against him." The court found that Mr. Tallon was subject to discipline because, inter alia, "he had obtained a general release [from the client] without advising her . . . of the claim she had against him for malpractice in letting the Statute of Limitations run on her property damage claim."[37]

[36] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).
[37] 447 N.Y.S.2d at 51.

Aside from the duties set out in the Rules of Professional Conduct, the fiduciary duties of loyalty, candor and communication require that the lawyer disclose his or her malpractice on the client's matter. Not cited in the *Restatement* is *Neel, v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) where the court stated:

> Finally, the dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests… Thus the fact that a client lacks awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client. Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicate the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.

Similarly, another court observed, in deciding whether the statute of limitations for filing a malpractice claim against a law firm was tolled for nondisclosure:

> We are persuaded that the general rule, as distinguished from the discovery rule, may not be strictly applied in favor of an attorney, however, because, in addition to his position of trust and confidence with respect to his client, he also has a legally imposed duty to disclose facts material to his representation. *Rice v. Forestier*, 415 S.W.2d 711 (Tex. Civ. App. - San Antonio 1967, writ ref'd n.r.e.). This duty, and the effect of its breach, was not considered by the respective courts of civil appeals in Pack and Crawford. We conclude that the relationship creates the duty, and breach of the duty is tantamount to concealment. We, therefore, hold that the failure to disclose operates to toll the statute of limitations for so long as the duty exists, and that the duty to disclose ceases when the relationship giving rise to the duty ends. The Indiana Supreme Court expressed this rule in a case concerning the physician-patient relationship: "[W]here the duty to inform exists by reason of a confidential relationship when that relationship is terminated the duty to inform is also terminated; concealment then ceases to exist. After the relationship of physician and patient is terminated, the patient has full opportunity for discovery and no longer is there a reliance by the patient nor a corresponding duty of the physician to advise or inform. The statute of limitations is no longer tolled by any fraudulent concealment and begins to run." *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891, 895 (1956). It is clear that by "fraudulent concealment" the Indiana Court meant silence or breach of a duty to disclose rather than any other affirmative act of concealment. We believe this rule appropriate as well to the attorney-client relationship.

McClung v. Johnson, 620 S.W.2d 644 (Tex.App.Ct.1981).

Other authorities have likewise held that a lawyer has a duty to reveal his or her malpractice to the client.[38] For example, in N.Y. State Bar Ass'n, Ethics Op. 734 (2000), the ethics committee concluded that because lawyers have an obligation to keep their clients reasonably informed about a matter and to provide information that their clients need to make decisions relating to the representation, lawyers have an obligation to a client to disclose the possibility that they have made a significant error or omission.

Moreover, with or without disclosure to the client, doesn't the law firm have a conflict of interest continuing to represent the client in litigation while at the same time the client has a potential malpractice claim against the firm? *See, e.g.,* N.Y. City Bar Ass'n, Formal Op. 1995-2 (1995)(Where client has a possible malpractice claim against a legal services organization, the organization must withdraw from the representation, advise the client to get new counsel, and assist the client in obtaining new counsel.). Alaska Rule 1.7(a)(2) requires a lawyer to withdraw from representation if there is a significant risk that the representation will be "materially limited" by the lawyer's own personal interests; or obtain the *informed consent* of the affected client under 1.7(b). Again, this would necessitate disclosure of the lawyer's error and potential malpractice claim to the client. However, this type of conflict should not be curable with consent. A Comment to Rule 1.7 found in the Virginia Rules of Professional Conduct provides a well-reasoned explanation as to why. "When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." See Comment [19]. A disinterested lawyer could not reasonably believe that he could diligently and competently represent a client, and exercise independent professional judgment on behalf of a client who intends to sue the lawyer for malpractice on the very subject matter of the representation.

Given the above, what mistakes must be reported to the client? The general consensus is that the mistake or error has to be "material." Not every error a lawyer makes needs to be reported to the client. Minor errors such as a typo in a pleading and errors that can be corrected without any significant adverse effect on the representation need not be reported. For example, if a missed deadline can be overcome by obtaining an extension of time for filing a motion or pleading and has no meaningful consequences for the client, there is no obligation to report such matters to the client. On the other hand, if the client's claim is time-barred because the lawyer failed to file a complaint within the applicable statute of limitations, few

[38] *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (Under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests.), *abrogated on other grounds by Olds v. Donnelly*, 696 A.2d 663 (N.J. 1997); *Shumsky v.Eisenstein,* 726 N.Y.S.2d 365 (N.Y. 2001); *In re Tallon*, 447 N.Y.S.2d 50 (N.Y. App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); ABA Informal Op. 1010 (1967); Col. Bar Ass'n, Formal Op. 113 (2005) (discussing the ethical duty of an attorney to disclose errors to clients); N.J. Op. 684 (1998); N.Y. Op. 734 (2000); N.Y. City Op. 1995-2 (1995); *Beal Bank v. Arter & Hadden*, 167 P.3d 666, 672 (Cal. 2007)(stating in dicta that attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice.); and 2 Mallen & Smith, Legal Malpractice §14.22 (2007).

would argue that this should not be reported to the client. In other words, "materiality" comes down to (1) how bad was the mistake? and (2) what harm did it cause? Or, stated in terms of the communication duty under Rule 1.4, how important is the mistake to the client in making decisions about the goals and objectives of the representation and the continued representation of the client by the lawyer or law firm? Beyond these simple guidelines, though, figuring out the self-reporting duty will at times be quite difficult, contextual and fact-specific. But if the lawyer learns of an act, error or omission that could reasonably be expected to be the basis of a legal malpractice claim, the client must be informed. It would also behoove the lawyer or law firm to consult with their professional liability insurer's claims counsel or consultant before having any dialogue with the client.

Because of the resulting conflict of interest in this situation, the firm's need to withdraw from the representation, and the adversity between the interests of the client and the firm, it would be prudent for the lawyer, in communicating with the client, to treat the client as an unrepresented person under Rule 4.3, being careful to not provide any legal advice to the client other than advising the client to seek the advice of independent counsel. Once the lawyer has disclosed the error to the client, advised the client to seek the advice of independent counsel and withdrawn from the representation, it is not improper for the lawyer to negotiate a possible settlement of the malpractice claim with the former client. See Rule 1.8(h)(2).

This does not mean that it is prudent for a lawyer to negotiate settlement of a malpractice claim with a former client, rather only that the lawyer may not be subject to professional discipline for doing so. At the very least, the lawyer should contact his malpractice insurer first and seek guidance on how to proceed from that point.

More recently, the ABA's Standing Committee on Ethics and Professional Responsibility has weighed in on this issue stating that ABA Model Rule 1.4 requires a lawyer to inform a *current* client if the lawyer believed that he or she may have materially erred in the client's representation. ABA Formal Op. 481 (April 17, 2018). Interestingly, the committee concluded that no similar obligation exists to a *former* client where the lawyer discovers *after* the attorney-client relationship has ended that the lawyer made a material error in the former client's representation. This conclusion is reached in part on the basis the lawyer's duty to communicate with the client under Rule 1.4 applies only during the course of the representation. The ABA committee concludes that an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to prejudice or harm the client; or (b) of such a nature that it would reasonably cause a client to consider discharging the lawyer even if the absence of harm or prejudice.

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Working with Your Insurer Comment:

When Responding to a Malpractice Claim, Please Try Not to Make It Worse.

For the past 20 years, I have worked for an insurance company that insures lawyers for their malpractice. Trust me when I say I get it. There are going to be times when an insured doesn't necessarily agree with every decision the company must make in trying to resolve a claim. That's going to happen. What I don't get is when an insured makes a decision to prevent us from helping at all.

For example, sometime ago we were put on notice of a claim by an alleged former client of an insured. We repeatedly tried to contact the insured via multiple channels in order to obtain a copy of the file and any claim related communications between our insured and the former client that might be out there. Without this information, there is no way to properly evaluate the claim. Yet, despite of being the recipient of a policy limit demand, this insured refused to even acknowledge our efforts to contact her. I can't help but wonder why money was wasted on paying the premium if that was going to be her end game. It should go without saying that this lawyer's complete refusal to work with us made matters far worse than they otherwise would have been.

While this lawyer's response to a malpractice claim was atypical in the extreme, the actions or inactions of many other lawyers have ended up making it more difficult for us and defense counsel to effectively work the problem. With the hope of helping you avoid making matters worse should a claim ever arise, here are several practical does and don'ts that are worth keeping in mind. Taking them to heart will help your insurer and defense counsel best help you when you need them the most.

1) Don't fall on your sword and promise the client your insurance carrier will take care of this by paying some stated amount. Acknowledging that a statute of limitations date has been missed is one thing. Promising that your carrier will pay the $500,000 your client had coming is something else entirely. If you aren't sure about what to say to your client, call your carrier first. They'll guide you.

2) Immediately report the claim and share any insights you might have. If the claim happens to involve a specialized area of the law, help the carrier begin to evaluate the claim by sharing your thoughts on the merits and valuation of the claim. Be honest, forthright, and also prepared to promptly follow up on this initial reporting by providing a clear, concise and appropriately detailed statement of the underlying matter to include its current status. Identify the key parties, relevant dates, and any important procedural information. This will help jump start the evaluation process.

3) Once the claim has been reported, do not talk to the client or anyone else about the case. You should only talk with your carrier and defense counsel, that's it. Oh, and don't make it hard. Timely return calls from your carrier or defense counsel and for heaven's sake don't put your staff in the middle. If the carrier or defense counsel needs to speak with you, they mean it. They need to speak with you, period.

4) Secure the entire file and, yes this must be said, do not alter it in any way! Work with your IT folks if necessary. You need to make sure you have everything, to include all email; text messages; voicemail; recordings; and documents (digital and paper) to include drafts, notes, and all correspondence. Don't make the mistake of excluding items like email or notes that were for internal use only. Securing the entire file means gathering together everything, not just what you or someone else at the firm thinks is relevant. We all call that cherry picking, and trust me, that can prove to be a really bad idea down the road. If it helps, remember that the file is being prepared for use by your carrier and defense counsel, not the opposing party.

5) Unless instructed otherwise, provide a complete copy of the entire secured file to your carrier. While this process may take a few weeks, never let it get beyond that. The carrier and defense counsel need to know the good, the bad and the ugly up front, so again, provide everything. If they don't need certain things, they'll be returned.

6) Cooperate with defense counsel and treat him or her as you would have your own clients treat you. And I know this can be hard but remember in this situation you are the client not the lawyer. If your lawyer would like you to do a little research, she'll let you know. Finally, be forthright at all times because 99 times out of 100 an inconsistency will come out in discovery.

7) Also, cooperate with your carrier. For example, if everyone is in agreement that settlement is the way to go, don't change your mind at the last minute and refuse to settle. That puts defense counsel in a conflict and you've just made your claim much more difficult to resolve. Help them help you. After all, their help is what you purchased with your premium dollars.

8) Last but not least, try to not let your emotions get the best of you. Your carrier and defense counsel have been through this process more than a time or two. They know what they're doing. Try to stay calm, knowing that this too shall pass.

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D) Ransomware Prevention and Recovery

In working with over one thousand law firms through the years, I have observed that few lawyers really seem to know what's actually going on with the backup process. Earlier in my career, I was generally fine with that reality; but times have changed. The backup process is now a security process that needs to take center stage and it is the solo and small firm setting that I'm most concerned about. Such firms must make sure their process isn't something some guy like me might describe as state of the art for 1999 because it's just too easy to get comfortable with the way it's always been. Incremental backups, digital tapes, rotate off site, check. I don't think so. Not good enough anymore and much of it is due to the threat of ransomware.

You've got a very serious problem on your hands should your firm's computer network ever become infected with ransomware. Basically, your data will be encrypted and then you will be told how much you will need to pay in order to receive the decryption key which may or may not allow your IT staff to successfully recover your files. Whether you pay the ransom or not, and I advise not, you are going to need the services of an IT specialist and understand there are no guarantees here, she may or may not be able to restore the network.

It's important to understand that ransomware can infect your network via multiple channels, many of which involve some form of social engineering. A common attack vector looks like this. Someone in your firm is tricked into opening an attachment in an email that purports to be a business document or invoice. That's all it takes. Once enabled, the malware will start to encrypt your data.

Making matters worse and depending upon the specific family of ransomware you've been hit with, the ransomware can replicate itself and spread across an entire network , can scramble the file names of all encrypted files, can run several different encryption programs in a single attack, can identify and erase restore points, can erase all the data on the hard drives, can be programed to delay executing in order to infect backups, and the list goes on. In short, any IT specialist brought in to try and address the situation is going to run into serious problems trying to recover anything.

Again, there are no guarantees in terms of the having the ability to recover from a ransomware attack. Cybercriminals continually work to improve the effectiveness of their tools. Certain strains of malware can now jump to the cloud, many have been engineered to evade detection by antivirus software, and as stated above, can be programed to delay running. In light of all this, the institution of an effective backup process has become a critical component to an overall defensive strategy against ransomware and other forms of cybercrime.

Best practices today dictate having at least three copies of all your data, utilizing two different media formats and maintaining one backup off site. For example, you might utilize two external hard drives and a cloud backup provider. An approach like this would allow you to have access to a copy stored locally in case your internet connection is down and the cloud backup is sometimes the only good backup available to IT support as they try to help you recover from a ransomware attack. That said, a few side notes are in order. 1) Since ransomware can map drives and infect everything connected to the network, always disconnect backup drives (e.g. any external USB drives) from the network once the backup process has completed. 2) While cloud backups can be your salvation in the event of a ransomware attack, as with any backup process, sometimes the backup data set becomes corrupted. Thus, having multiple versions of the backup in the cloud is a good idea. 3) Given the rise of time-delayed attacks, maintaining an archive of backups locally or in the cloud would seem prudent because while losing a month or two's worth of data might be difficult, that's going to be far better than losing everything. 4) Look for cloud backup providers that allow you to control the encryption key as way to prevent anyone else from accessing your data.

Even with a well-designed backup process in play, the best defense to threats such as ransomware is an effective offense because, and for the last time, there are no guarantees that a full recovery is going to be possible. Often, it's not. So, in addition to instituting a backup process along the lines presented above, every firm regardless of size should prioritize mandatory ongoing training for all staff and attorneys. The training should focus on social engineering awareness to include presenting real-world examples that not only demonstrate how these types of attacks continue to evolve but also provide tips on how to spot them. Finding quality training like this, however, can be a bit of a challenge for some. To help with this, consider working with a security company like KnowBe4 (https://www.knowbe4.com/), whose entire focus is geared toward this kind of training.

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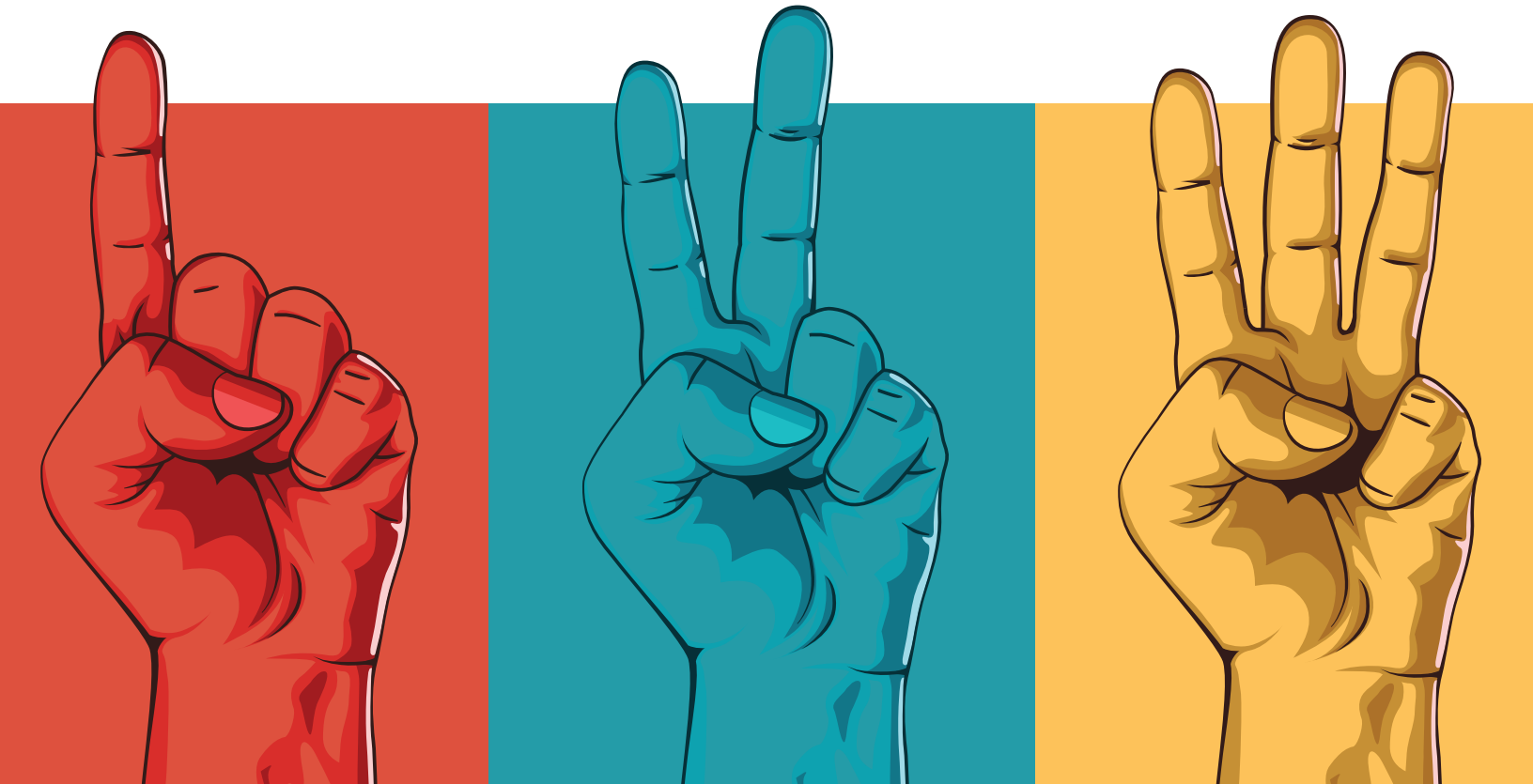

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