The Supreme Court of Ohio

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OPINION 2016-1

Withdraws Advisory Opinion 96-4

Issued February 12, 2016

Flat Fee Agreements Paid In Advance Of Representation

SYLLABUS: It is proper for a lawyer to enter a flat fee agreement requiring a client[1] to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct. Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as "earned upon receipt" or similarly, and only may withdraw the fees as they are earned or the expenses as they are incurred. This is a change from former DR 9-102(A). Even if a flat fee paid in advance of representation is deemed "earned upon receipt," "nonrefundable," or similarly, Prof.Cond.R. 1.5 requires a lawyer to return any unearned portion of the fee if the lawyer does not complete the representation for any reason. Additionally, the Rules also require that a flat fee must not be excessive under Prof.Cond.R. 1.5(a); that a lawyer shall not provide financial assistance to a client, aside from advances of court costs and expenses of litigation under Prof.Cond.R. 1.8(e); and a lawyer is required to provide competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

OPINION: This opinion addresses a flat fee agreement requiring a client to pay a fixed amount in advance of representation. It does not address payment of a retainer to an attorney to secure availability of the lawyer's services over a period of time without regard to a specific matter.

QUESTION:

Is it proper for a lawyer to enter a flat fee[2] agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter?

Fee agreements must comply with Rule 1.5 of the Ohio Rules of Professional Conduct. Prof.Cond.R. 1.5(a) is the cardinal rule governing fee agreements and provides that a lawyer shall not "make an agreement for, charge, or collect an *illegal* or clearly excessive fee." Several factors should be considered in order to determine if a fee is reasonable:

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[1] The Board acknowledges that the Adv. Op. 96-4 addressed this issue in the context of criminal matters; however, the Board has elected to consider the issue in other contexts.

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

Prof.Cond.R. 1.5(a)(1)-(8). These factors are not exclusive. Prof.Cond.R. 1.5, Cmt. [1]. Additionally, fixed fees are expressly recognized as a type of legal fee in Prof.Cond.R. 1.5(a)(8).

A lawyer is not permitted to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case. Prof.Cond.R. 1.5(d)(2). As a result, fixed fee agreements are required in criminal representations.

A flat fee is a type of fixed fee. Fixed fees or flat fees are considered an alternative to hourly billing in different types of matters because they provide the client a degree of certainty about the cost of the legal services. Douglas R. Richmond, Understanding Retainers & Flat Fees, 34 J. LEGAL PROF. 113 (2009). A flat fee is "a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed." Prof.Cond.R. 1.5, Cmt. [6A]. Flat fees are based on factors independent of the actual number of hours involved in a representation. A lawyer earns a flat fee by performing the services for which the fee was charged, and that fee is the maximum amount that will be charged for the services to be performed. Douglas R. Richmond, *Understanding Retainers & Flat Fees*, 34 J. LEGAL PROF. 113 (2009).

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. Time is one factor to consider when determining the reasonableness of a fee under Prof.Cond.R. 1.5(a). However, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) unequivocally disapprove of flat fees in death penalty cases because the client's interests are pitted against the lawyer's interest in doing no "more than what is minimally necessary to qualify for the flat payment."ABA Standards of Criminal Justice: *Providing Defense Services, Commentary to Standard 5-2.4* (3d ed. 1993).

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[2] As used in this Opinion, the terms "fixed fee" and "flat fee" are afforded the same meaning and are used interchangeably. The Board acknowledges that there are other types of fixed fees, such as a fixed hourly rate. A fixed fee may not necessarily be a "flat fee."

This Board has addressed the use of flat fees in the context of a flat fee agreement between a law firm and an insurer/third party administrator of group health benefit plans. In Opinion 95-2

(1995), the Board advised that the propriety of a flat fee agreement is based upon a variety of factors. A fixed flat fee is subject to the restriction in former DR 2-106(A) [now Prof.Cond.R. 1.5(a)] that it not be excessive. A fixed flat fee cannot circumvent the requirement of DR 5-103(B) [now Prof.Cond.R. 1.8(e)] that clients must remain liable for expenses of litigation. Additionally, a fixed flat fee agreement must not limit an attorney's duties of competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

When the payment of a flat fee is made in advance of representation, there are additional ethical considerations, such as when a flat fee is required to be placed into the lawyer's client trust account, and what, if any, portion of the fee is refundable. See, Prof.Cond.R. 1.5(d)(3), Cmt. [6A].

When a flat fee is earned affects whether or not it must be placed in the lawyer's trust account. Prof.Cond.R. 1.5, Cmt. [6A]. Prof.Cond.R. 1.15(a)[3] requires a lawyer to keep the property of clients separate from the lawyer's own property. Client and third-person funds paid to a lawyer or a law firm must be maintained in an insured, interest bearing account, designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title, and in a financial institution in the state where the lawyer's office is located. Prof.Cond.R. 1.15(a). Additionally, under Prof.Cond.R. 1.15(c), lawyers are required to place legal fees and advances on litigation expenses paid by the client into a trust account, unlike DR 9-102(A), which precluded a lawyer from placing client advances into a trust account.

An "earned upon receipt" fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. Prof.Cond.R. 1.5, Cmt. [6A]. When a fee is denoted as "earned upon receipt," those fees are considered the lawyer's funds, and not the client's funds. As a result, those fees should not be placed in the lawyer's IOLTA account, as it is impermissible to commingle a lawyer's own funds with those of a client.

A lawyer who receives a flat fee paid in advance for representation in a legal matter is obligated to return any unearned portion of the fee.[4] Prof.Cond.R. 1.5(d)(3), 1.16(e). Even if a fee is designated as "earned upon receipt," "nonrefundable," or similarly, Prof.Cond.R. 1.5 requires a lawyer to refund any unearned portion of a fee paid in advance if the representation is not completed for any reason. Additionally, Prof.Cond.R. 1.16(e) states that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17."

The Board withdraws Opinion 96-4, which analyzed former DR 9-102(A), and concludes that Prof.Cond.R. 1.15 requires flat fees paid in advance for representation must be placed in a client trust account. A flat fee for representation in a matter may not be placed into the attorney's business or

[3] Prof.Cond.R. 1.15 includes provisions that are not contained in former DR 9-102.

[4] See also, *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 143-44, 2006-Ohio-5342, ¶ 31, 855 N.E.2d 462, 469 (citations omitted) (A lawyer has a duty to account for and return any unearned fees).

operating account, unless it is designated as "earned upon receipt" or similarly and the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund. Prof.Cond.R. 1.5(d)(3).

CONCLUSION:

It is proper for a lawyer to enter a flat fee agreement requiring a client to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct.Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as "earned upon receipt" or similarly, and may withdraw the fee only as it is earned or the expense as it is incurred. If a lawyer designates a fee "earned upon receipt," "nonrefundable," or similarly, the client must be advised in writing that the client may be entitled to a refund under Prof.Cond.R. 1.16(e) for any part of an unearned flat fee paid in advance of representation. Under Prof.Cond.R. 1.5(a), the flat fee must not be excessive. Under Prof.Cond.R. 1.8(e), the lawyer shall not provide financial assistance to a client, aside from advances in court costs and litigation expenses. Under Prof.Cond.R. 1.1 and 1.3, the flat fee agreement must not interfere with an attorney's duties to provide competent and diligent representation to each client.

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OPINION 2016-2
Issued April 8, 2016
Withdraws Advisory Opinion 1990-1

Duty to Report Unprivileged Knowledge of Misconduct

SYLLABUS: A lawyer is required under Prof.Cond.R. 8.3 to report any unprivileged knowledge of a violation of the Rules of Professional Conduct to the Office of Disciplinary Counsel or a bar association's certified grievance committee. A lawyer shall not reveal privileged information relating to the representation of a client, including information protected by the attorney-client privilege. Prof.Cond.R. 1.6(a). A lawyer may reveal information relating to the representation of a client if the client gives informed consent under Prof.Cond.R. 1.6.

APPLICABLE RULES: Prof.Cond.R. 1.6, 8.3

QUESTIONS PRESENTED:

1). Whether a lawyer who represented a client against the client's prior lawyer has an ethical obligation under Prof.Cond.R. 8.3 to report the lawyer to the appropriate disciplinary authority.

2). Whether the information acquired from the client regarding their prior lawyer's conduct is privileged, thereby eliminating any duty to report?

OPINION: The requester seeks an advisory opinion regarding a lawyer's duty to report another lawyer's misconduct under the following facts. The lawyer represents a client against the client's prior lawyer to recover certain monies the lawyer allegedly misappropriated from the client. A settlement is reached, curing the delinquencies but without an admission of liability by the prior lawyer. The settlement contained a confidentiality provision.

Question 1:

The Rules of Professional Conduct do not contain a strict reporting requirement that a lawyer report all misconduct of which the lawyer has unprivileged knowledge. Rather, Prof.Cond.R. 8.3 requires a lawyer to report misconduct only when 1) the lawyer has unprivileged knowledge, and 2) it raises a question as to another lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects." Prof.Cond.R. 8.3 also requires lawyers to report their own misconduct. If a lawyer has reservations as to whether to report the misconduct, the Board

recommends the lawyer err on the side of reporting.

Lawyers are required to report misconduct to a disciplinary authority empowered to investigate or act upon such violation. Prof.Cond.R. 8.3(a). In Ohio, the proper disciplinary authority is the Office of Disciplinary Counsel or a bar association's certified grievance committee.The reporting duty is not fulfilled by reporting a lawyer's misconduct to a tribunal, since a tribunal does not have the authority to investigate or act upon reports of lawyer misconduct. However, in certain circumstances a lawyer may be required under another Rule of Professional Conduct to report the misconduct to the tribunal. *See*, Prof.Cond.R. 3.3, Adv. Op. 2007-1.

Additionally, in order to invoke the reporting requirement, a lawyer must have actual knowledge that another lawyer has violated a Rule of Professional Conduct. This requires more than a "mere suspicion" that misconduct has occurred. The term "'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Prof.Cond.R. 1.0(g); Adv. Op. 2007-01. *See* DC Bar Op. 246, citing N.Y. State Bar Opinion No. 635. Furthermore, a lawyer's duty to report is not removed when the lawyer being reported does not admit liability or even denies any misconduct.

Therefore, a lawyer who represents a client against the client's prior lawyer has an ethical obligation under Prof.Cond.R. 8.3 to report the prior lawyer's misconduct to the appropriate disciplinary authority if the lawyer has unprivileged knowledge and the violation raises questions as to the other lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."

Question 2:

A lawyer is not required to report misconduct where it would involve disclosure of privileged information. Prof.Cond.R. 8.3, cmt. [2]. Rather, the lawyer should use his or her professional judgment to determine whether the privileged information should be disclosed to report the misconduct. If the lawyer determines that the information should be disclosed, the lawyer should encourage the client to consent to such a disclosure, where it would not prejudice the client's interests. Prof.Cond.R. 8.3, cmt. [2].

Prof.Cond.R. 1.6 should be consulted when determining whether information is privileged or unprivileged. Under Prof.Cond.R. 1.6(a), a lawyer is prohibited from revealing any information related to the representation, including information protected by the attorney-client privilege, without client consent. However, Prof.Cond.R. 1.6(b) allows, but does not require, a lawyer to disclose confidential client information that may be protected by the attorney-client privilege to accomplish the limited purposes contained in Prof.Cond.R. 1.6(b)(1)-(b)(6). *See*, Prof.Cond.R. 1.6, cmt. [17].

Consequently, a lawyer's duty under Prof.Cond.R. 8.3(a) to report the misconduct of a client's prior lawyer is conditioned on the possession by the lawyer of unprivileged knowledge. This requires the use of professional judgment to determine whether the information is privileged or unprivileged. If the information is unprivileged, the duty to report misconduct under Prof.Cond.R. 8.3 is triggered. However, if the information is privileged, the lawyer is not required

to report under Prof.Cond.R. 8.3, but may encourage the client to consent to the disclosure of the privileged information if it would not substantially prejudice the client's interests. If a lawyer determines that he or she has a duty to report unprivileged knowledge of another lawyer's misconduct, failure to report is itself a violation of Prof.Cond.R. 8.3.

CONCLUSION:

A lawyer has a duty to report unprivileged knowledge of another lawyer's misconduct under Prof.Cond.R. 8.3. A lawyer is required to keep information related to the representation of a client confidential, including information protected by the attorney-client privilege under applicable law. A lawyer is not required to report privileged information of another lawyer's misconduct. A lawyer may, however, reveal information related to the misconduct of a lawyer if the client gives his or her informed consent to the disclosure under Prof.Cond.R. 1.6.

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OPINION 2016-3

Issued June 3, 2016

Lawyer Participation in Referral Services

SYLLABUS: A lawyer should carefully evaluate a lawyer referral service, or similar online model, to ensure that it complies with the Rules of Professional Conduct and the ethical requirements of the lawyer. Where the service meets all of the elements of a lawyer referral service, a participating lawyer must ensure that the service complies with Gov.Bar R. XVI, in order for the lawyer to comply with the Rules of Professional Conduct. A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a nonlawyer for each service completed for a client, is unethical. A lawyer must ensure that the lawyer referral service does not interfere with the lawyer's independent professional judgment under Prof.Cond.R. 5.4. A lawyer is responsible for the conduct of the nonlawyers of the service (Prof.Cond.R.

5.3), as well as the advertising and marketing provided by the service on the lawyer's behalf. Prof.Cond.R. 7.1, 7.2, 7.3. Additionally, a fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio. Prof.Cond.R. 1.5, Gov.Bar R. XVI.

QUESTION: A lawyer seeks guidance regarding whether a particular business model involving online lawyer referrals is permissible under the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. The proposed business model is an online referral service that matches a prospective client with a lawyer for a particular legal service. Although the client chooses the lawyer, the company defines the types of legal services offered, the scope of the representation, the fees charged, and other

parameters of the legal representation. Additionally, the model requires a lawyer to pay a "marketing fee," for each completed client matter. The "marketing fee" is based on the fee generated from the completed individual legal matter. The requesting lawyer asks whether this model constitutes impermissible fee splitting with a nonlawyer under Prof.Cond.R. 1.5, or if the lawyer's conduct would otherwise violate the Rules of Professional Conduct. This is a hypothetical

business model; however, the Board acknowledges that similar business models currently exist in the marketplace. The conclusions set forth in this opinion apply equally to the proposed business model and aspects of existing business models.

APPLICABLE RULES: Prof.Cond.R. 1.1, 1.6, 1.18, 5.3, 5.4, 5.5, 7.2, 7.3, 7.4; Gov.Bar R. XVI

OPINION: This business model presents multiple, potential ethical issues for lawyers. These include fee-splitting with nonlawyers, advertising and marketing, a lawyer's responsibility for the actions of nonlawyer assistants, interference with the lawyer's professional judgment, and facilitating the unauthorized practice of law.As similar online services that match lawyers and clients exist, the Board will evaluate this type of referral service generally to determine if a lawyer's participation would comply with the Rules of Professional Conduct.

ANALYSIS: The two most evident issues involving the Rules of Professional Conduct are that this business model would 1) operate as lawyer referral service not registered with the Supreme Court of Ohio, and 2) interfere with or limit the lawyer's professional independence from the lawyer-client relationship. There also are several other considerations under the Rules of Professional Conduct.

Lawyer Referral Service

This business model may not refer to itself as a lawyer referral service in Ohio, yet it proposes to function in a manner similar to a lawyer referral service. A lawyer referral service operates to refer prospective clients to lawyers, based on a number of factors, including area of practice, experience, and geographic location. Gov.Bar R. XVI, Section 1(A)(1), (7). A lawyer may participate in a lawyer referral service only if it meets the requirements of the Rules of Professional Conduct, and it is registered with Supreme Court of Ohio. Prof.Cond.R. 7.2(b)(2),(3), Cmt. [6]; Gov.Bar R. XVI, Section 1(A)(2), (B).

In Ohio, a lawyer referral service must meet certain requirements in order for a lawyer to participate ethically. First, the lawyer referral service must be open to any lawyer licensed to practice in Ohio who maintains professional liability insurance with a minimum amount of $100,000 per occurrence and $300,000 in the aggregate. Gov.Bar R. XVI, Section 1(A)(3), Section 2(A)(1). Second, a lawyer participating in a lawyer referral service is required to disclose disciplinary complaints. Gov.Bar R. XVI Sec. 2(A)(2), (4). Additionally, a lawyer referral service may require a participating lawyer to pay a fee, calculated as a percentage of the legal fee earned on the referred matter. Gov.Bar R. XVI, Section 2(C)(1). If a business operates as a lawyer referral service, even though it is called something else, it still must be registered with the Supreme Court of Ohio in order for a lawyer to ethically participate in it.

Nonlawyer Agents

In the business model, nonlawyers may perform legal or quasi-legal functions on behalf of the lawyer. The lawyer has no implied or apparent control or direction over the work of the nonlawyers at the company to ensure that they act in a manner that complies with the Rules of

Professional Conduct.

A lawyer is required to make reasonable efforts to ensure that any "nonlawyer employed by, retained by, or associated with" the lawyer conducts himself or herself in a manner that comports with the professional obligations of the lawyer. Prof.Cond.R.

5.3(a). A lawyer is responsible for the activities of a nonlawyer who engages in conduct

on behalf of the lawyer that, if performed by the lawyer, would violate the Rules of Professional Conduct, and if the lawyer "orders or, with the knowledge of the specific conduct, ratifies the conduct." Prof.Cond.R. 5.3(c).

In order to comply with the Rules of Professional Conduct, a lawyer involved in this type of referral service should verify that the nonlawyers of the company are not engaging in the practice of law, as the lawyer could be responsible for assisting in the unauthorized practice of law. Prof.Cond.R. 5.5(a); Gov.Bar R. VII. "A lawyer must make reasonable efforts to ensure the services are provided in a manner compatible with the lawyer's professional obligations." Prof.Cond.R. 5.3, cmt. [3].

Independent Professional Judgment of a Lawyer

Under the proposed business model, the company, not the lawyer, controls nearly every aspect of the attorney-client relationship, from beginning to end. The company, not the lawyer, defines the type of services offered, the scope of the representation, and the fees charged. The model is antithetical to the core components of the client-lawyer relationship because the lawyer's exercise of independent professional judgment on behalf of the client is eviscerated.

Under the Rules of Professional Conduct, a lawyer is responsible for approving, or tacitly approving, actions that involve the lawyer's practice of law. Prof.Cond.R. 5.4 outlines the professional independence of a lawyer and contains traditional limitations on nonlawyer involvement in the practice of law.

Prof.Cond.R. 5.4(c) prohibits a lawyer from allowing a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. This rule ensures the lawyer will abide by the client's decisions concerning the objective of the representation and will serve the interests of the client, and not those of a third party. Although an exception exists for a lawyer's participation in attorney referral services registered with the Supreme Court of Ohio, a lawyer may not participate in any lawyer referral service or other type of activity that interferes with the lawyer's exercise of professional judgment in handling a client's case. Prof.Cond.R. 5.4(c), (d)(3).

A lawyer must be cautious when considering a referral service that makes decisions that are clearly within the scope of the lawyer's exercise of professional judgment on behalf of a client. Decisions such as setting limits on the amount of time a lawyer must spend on each client's case, specifying a number of cases that a lawyer must agree to handle, limiting the scope of a lawyer's representation of a client, or generally directing a lawyer's representation of a client are all decisions that a lawyer is duty-bound to make. Moreover, many of these decisions must be made in

consultation with the client, and not at the direction or control of a third-party referral service.

Fees and Fee Splitting

The proposed business model contains potential violations of the Rules of Professional Conduct where the client pays the fee in advance to the referral service, but payment is made to the lawyer by the referral service only after the representation is completed. This arrangement appears to make the fee contingent upon the outcome of the matter, which is prohibited in certain instances under Prof.Cond.R. 1.5(c), (d). Such an arrangement implicates prohibitions on fee-splitting with nonlawyers under Prof.Cond.R. 5.4(a). Additionally, a situation where a third-party is receiving and holding client funds may be contrary to a lawyer's duty to hold client funds in trust under Prof.Cond.R. 1.15(a).

The Supreme Court of Ohio has disciplined lawyers for sharing fees with nonlawyers. In *Cincinnati Bar Assn. v. Mullaney*, 2008-Ohio-4541, ¶ 21, three lawyers were disciplined for sharing legal fees with nonlawyers by accepting a portion of the fees paid to a company that purported to serve homeowners threatened with foreclosure. The company told prospective customers that a lawyer and legal services would be furnished to them as part of the fee. In *Disciplinary Counsel v. Stranke*, 2006-Ohio-4357, a lawyer was suspended for sharing fees with a bankruptcy counseling firm that solicited and referred clients to him. In *Cleveland Bar Assn. v. Nosan*, 2006-Ohio-163, a lawyer was suspended for sharing fees with debt-counseling company that advertised for clients and provided the lawyer with office space and support staff.

Even where a business model states that it does not engage in impermissible fee splitting because the fees are separated into two different transactions or are called a "marketing fee" or similar term, fee splitting with a nonlawyer likely occurs. Such fees are not traditional advertising fees, as outlined in Adv.Op. 2001-2. Unlike advertising fees that are fixed amounts and paid for a fixed period of time, these "marketing fees" are a percentage of the fee generated on each legal service completed by the lawyer. Therefore, a fee-splitting arrangement that is dependent on the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct. Similar fee arrangements should be examined closely by a lawyer before participating in the service.

Under the Rules of Professional Conduct, a client must be advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee, as required by Prof.Cond.R. 1.5(d). Where a company, not the lawyer, determines whether a dissatisfied client receives a refund, without mention as to whether the client is advised in writing about a refund, the conduct of the lawyer violates the Rules of Professional Conduct.

Advertising and Marketing

In the proposed business model, the lawyer lacks control over the content of the advertising, to whom it is sent, and how it is disseminated to prospective clients. Moreover, the

company does not advertise on behalf of a particular lawyer, but rather advertises the service of the company. A lawyer must ensure that all communications and advertising made on his or her behalf are accurate and do not mislead or create unjustified expectations. Prof.Cond.R. 7.1, 7.2, and 7.3. A lawyer is ethically responsible to ensure that any services provided by a third party comply with the Rules of Professional Conduct, and cannot simply rely on the information provided by the company as insulation against potential ethical violations.

In Ohio, a lawyer is prohibited from giving anything of value to a person for recommending a lawyer's services. Prof.Cond.R. 7.2(b). A lawyer may pay for advertising, but may not pay another person or a for-profit entity to channel professional work for the lawyer. Prof.Cond.R. 7.2(b). A lawyer cannot solicit clients if a significant motive in doing so is pecuniary gain. Prof.Cond.R. 7.3(a).

The Board previously issued an advisory opinion that distinguished advertising fees from referral fees. Adv.Op. 2001-2. The opinion identifies the following factors in determining whether a fee is a for advertising services or for providing a referral: 1) if the lawyer is required to pay an amount of money based on an actual number of people who contact or hire the lawyer, or an amount based on the percentage of the fee obtained from rendering the legal services; 2) if the third party will provide services that go beyond the ministerial function of placing the lawyer's information into public view; or 3) if the third party will not clarify that the information is an advertisement, but rather, makes the information regarding the lawyer appear as if the third party is referring or recommending the lawyer, or that the lawyer is part of the third party's services to its users.

When considering participating in a referral service similar to the proposed business model, a lawyer should ensure that it operates in a manner consistent with Adv.Op. 2001-2, as well as the Rules of Professional Conduct governing lawyer advertising and communications with third parties.

Other Rules of Professional Conduct

The proposed business model also implicates several other Rules of Professional Conduct that should be considered when a lawyer is evaluating whether to participate in such a service. At the most fundamental level, a lawyer is required to provide competent representation to a client. Prof.Cond.R. 1.1. A lawyer participating in a lawyer referral service, like the model or similar models, must ensure that he or she is competent to handle referrals in the areas of law listed on the website, is able to reject matters outside of the lawyer's areas of competence, and has the ability to limit the volume of matters to a size that the lawyer can competently handle in compliance with Prof.Cond.R. 1.1.

Prof.Cond.R. 1.6(a) requires a lawyer to maintain confidentiality of information relating to the representation of a client. A lawyer must be aware of confidentiality issues that may arise while participating in a lawyer referral service, and ensure that the client's confidences are preserved in

accordance with Prof.Cond.R. 1.6. A lawyer may not participate in a service that requires disclosure of information relating to the representation except as permitted or required by Prof.Cond.R. 1.6.

A lawyer owes duties to a prospective client ". . . who consults with a lawyer about the possibility of forming a client-lawyer relationship . . . ." Prof.Cond.R. 1.18. A lawyer who learns information from a prospective client, even if a lawyer-client relationship never forms, is not permitted to use or reveal the information except as permitted under Prof.Cond.R. 1.9. Prof.Cond.R. 1.18(b). If the referral service requires a lawyer to consult with a client before a client-lawyer relationship is formed, then the lawyer must ensure compliance with his or her duties to that prospective client.

CONCLUSION: A lawyer should carefully evaluate the operation of a lawyer referral service to ensure that the lawyer's participation in the referral service is consistent with the ethical requirements of the lawyer. Foremost, a lawyer must ensure that his or her participation in the referral service is consistent with the core obligations and duties owed to clients. The lawyer also must ensure that relationships with nonlawyers are conducted in accord with the Rules of Professional Conduct and that the marketing or advertising services provided on the lawyer's behalf are proper. Additionally, fees tied specifically to the number of individual clients represented or the amount of a legal fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio.

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OPINION 2016-4

Issued June 3, 2016

Imputation of Conflicts Involving Current and Former Legal Interns

SYLLABUS: A law student holding a legal intern certificate, issued by the Supreme Court under Gov.Bar R. II, is engaged in the limited practice of law and bound by the Rules of Professional Conduct. Conflicts of interest arising out of a legal intern's current or former representation of clients are imputed to all lawyers in a private law firm when the intern is employed simultaneously as a law firm clerk. The conflicts of a former legal intern, newly employed as a lawyer, are not imputed to the lawyers in a law firm, but necessitate the screening of the lawyer from any matter he or she had substantial responsibility.

QUESTION PRESENTED: Whether conflicts of interest arising from a legal intern's limited representation of clients in a law school legal clinic are imputed to the lawyers of a law firm where the legal intern is simultaneously employed as a law clerk.

APPLICABLE RULES: Prof.Cond.R. 1.7, 1.9, 1.10; Gov.Bar R. II.

OPINION:

Background

A law school legal clinic has asked the Board to consider whether conflicts arising out of an intern's legal practice are imputed to the lawyers in a law firm when a legal intern is employed there as a law clerk. The legal clinic asks whether imputed conflicts may disqualify both law firms and legal clinics from representing certain clients.

Ohio law school legal clinics, public defender and prosecutor offices, legal aid, and legal services organizations may retain law students, who possess a valid intern certificate issued by the Supreme Court of Ohio pursuant to Gov.Bar R. II, to perform legal services. 1 Legal interns are

[1] A law student attending an ABA accredited law school outside Ohio may apply for an Ohio legal intern certificate. Gov.Bar R. II, Section 3. If an Ohio-certified legal intern is employed as a law clerk in another jurisdiction or later admitted and working as a lawyer in another jurisdiction, any conflicts arising from his or her limited practice as a legal intern must be analyzed under the professional conduct rules of the jurisdiction in which he or she is working or admitted.

authorized by Gov.Bar R. II to engage in the limited representation of persons who qualify for free legal assistance, and the state of Ohio, or a municipal corporation in the handling and prosecution of civil and certain criminal matters. With client consent, and the approval of a judicial or administrative hearing officer, a legal intern may appear before a court or administrative agency without the presence of a supervising lawyer. A legal intern also is permitted to sign correspondence, pleadings, and legal documents on behalf of a client, with the designation "legal intern." Gov. Bar R. II, Section 4(D). A law student seeking certification as a legal intern swears or affirms an oath agreeing to be bound by the Rules of Professional Conduct. Gov.Bar R. II, Section 3. A legal intern is supervised by a lawyer who is admitted or temporarily certified to practice law in Ohio. Gov.Bar R. II, Section 7.

Because legal interns are engaged in the limited practice of law, employment as a clerk with a law firm, during or after their representation of clinic clients, may give rise to conflicts of interest that must be analyzed and resolved under the Rules of Professional Conduct.

Analysis

For all practical purposes, a legal intern is a lawyer engaged in the limited practice of law and is governed by the Rules of Professional Conduct. Gov.Bar R. II. A legal intern performs the essential functions of a lawyer, including meeting with clients, analyzing clients' legal problems, giving advice, and appearing before tribunals with or without the supervision of an admitted lawyer. Because a legal intern is bound by the Rules of Professional Conduct, a legal intern must analyze conflicts of interest that arise between his or her practice in a legal clinic and employment as a law clerk in a private law firm.[2]

The legal intern certificate issued under Gov.Bar R. II permits the limited practice of law with only those entities enumerated in the rule. Gov.Bar R. II, Section 1(B)(3). However, a law firm clerk, in possession of a legal intern certificate, is not permitted to practice law, sign pleadings, advise law firm clients, or appear on behalf of a law firm client before a tribunal, and is not considered a nonlawyer for purposes of analysis under Prof.Cond.R. 1.10.[3]

Law firm employment of legal interns

The employment of a law clerk who is or was engaged in the limited practice of law as a legal intern raises potential conflict of interest issues for the law firm. When the law clerk is

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[2] Bar Assn. of the City of New York, Opinion No. 79-37 (1980) (treating a clinic student certified under the student practice rule as a lawyer for the purpose of a conflict of interest analysis because "[h]e or she will be functioning as a lawyer" and "the clients involved justifiably will regard the student as a lawyer"). *See also,* Peter Joy and Robert Kruehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical Law Review 493 at 511 (2004) (students permitted to practice law under student practice rules should assume that as clinic students they will be treated as lawyers.)

[3] The Board acknowledges that Prof.Cond.R. 1.10, cmt. [4] addresses conflicts that arise from the employment in a law firm of nonlawyers, such as paralegals and secretaries, but the Board does not consider a legal intern simultaneously employed as a law clerk as a nonlawyer for the purposes of conflict analysis.

simultaneously working as a legal intern in a clinic, the law clerk and the firm must carefully review any conflicts that may exist due to the clerk's current or former representation of clients in the legal clinic. This is similar to a process law firms utilize to analyze conflicts when hiring a lawyer engaged in private practice who has both current and former clients.

Conflicts created by a legal intern's current or former representation of clients in a law clinic are imputed to the lawyers in a firm, even if the legal intern is employed as a law clerk. *See* Prof.Cond.R. 1.10. *See* Peter Joy and Robert R. Kruehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical Law Review 493 at 534 (2004) ("law clinic students who have duties on cases comparable to admitted lawyers may be treated as lawyers for imputation purposes and not as nonlawyer assistants."). For example, if a legal intern is representing Client A in a matter through the legal clinic, and the law firm where she works as a law clerk is representing Client B, who is directly adverse to Client A in any matter, the intern's conflict is imputed to all members of the law firm. Prof.Cond.R. 1.7(a). Using the same example, the legal intern's former representation of Client A equally prevents the law firm from representing Client B in the same or substantially related matter, when Client B's interests are materially adverse to former Client A. Prof.Cond.R. 1.9.

Conflicts arising from a legal intern's current or former clinic practice when employed as a law firm clerk may be resolved under procedures set forth for ameliorating conflicts through an appropriate screening method. Prof.Cond.R. 1.10(d). When a legal intern is disqualified personally under Prof.Cond.R. 1.9, the law firm can timely screen the intern from any participation and give written notice as soon as practicable to the former client. Prof.Cond.R 1.10(e) also removes the disqualification of the firm if a current client of the legal intern waives a conflict under Prof.Cond.R. 1.7. However, conflicts cannot be ameliorated through screening or client consent when the law firm is representing a person in a matter whose interests are materially adverse to the interests of a legal intern's former client, for whom the intern had substantial responsibility in the same matter. Prof.Cond.R. 1.10(c).

Conflicts arising for legal interns employed as a law firm clerk

No conflicts are imputed to other legal interns or supervising lawyers of a legal clinic by virtue of a legal intern's dual employment as a law firm clerk. Nonlawyer employees of a law office, including law clerks, owe duties of confidentiality by reason of their employment, but the duty of confidentiality is not imputed to others so as to prohibit representation of other clients at a current or subsequent employer like a legal clinic. Restatement of the Law (Third), *The Law Governing Lawyers* §123(f) (2016). Prof.Cond.R. 5.3, cmt. 2. To avoid the inadvertent disclosure of confidential client information, a legal clinic should implement screening methods sufficient to prevent a legal intern from participating in a matter being handled by the clinic that he or she also participated as a law firm clerk.

Conflicts after expiration of legal intern certificate

After the legal intern certificate expires pursuant to Gov.Bar. R. II, Sec. 4 and the former legal intern, now a new lawyer, joins a law firm, no conflicts arising from the legal intern's limited

practice are imputed to lawyers in the firm. However, the new lawyer must be screened from participation in any matter that he or she had substantial responsibility for a former adverse client in the same matter. Prof.Cond.R. 1.10, cmt. [4].

CONCLUSION: A legal intern certificate allows a law student to engage in the limited practice of law subject to the Rules of Professional Conduct. If a legal intern engages in simultaneous or future employment as a law firm clerk, any conflicts arising from his or her practice as a legal intern are imputed to the lawyers of the firm. Some imputed conflicts arising from a legal intern's practice may be waived with client consent, but matters in which the legal intern had substantial responsibility cannot be waived under Prof.Cond.R. 1.10. Conflicts that may arise from a legal intern's simultaneous employment as a law clerk in a law firm are not imputed to the legal interns or supervising attorneys in a legal clinic. Proper screening methods should be employed to prevent the exchange of confidential information possessed by the law clerk to the staff, legal interns, and supervising lawyers in the legal intern's clinic. Once a legal intern's certificate expires, and the former law student joins a law firm as a new lawyer, no conflicts from the lawyer's limited practice as an intern are imputed to the lawyers in the firm, but screening of the lawyer is required.

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OPINION 2016-5
Issued August 5, 2016
Withdraws Advisory Opinion 2005-3

Communication With Current and Former Corporate Employees

SYLLABUS: When a corporation is known to be represented with respect to a particular matter, Prof.Cond.R. 4.2 prohibits communication without the consent of the corporate lawyer with a current employee of the corporation who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter, who has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. A lawyer may communicate on the subject matter of the representation with former employees of the corporation, without notification or consent of the corporation's lawyer, as long as the former employee is not represented by counsel. A lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without the consent of a corporation's lawyer, even when a corporate lawyer asserts blanket representation of the corporation and all of its current and former employees.

QUESTION: May a lawyer who represents an interest adverse to a corporation communicate with current and former employees of the corporation without the consent of the corporation's lawyer, when the corporate lawyer asserts blanket representation of the corporation and all current and former employees?

APPLICABLE RULES: Prof.Cond.R. 1.6, 4.2, 4.3, and 4.4.

OPINION: A lawyer's communication with current and former employees of the corporation is addressed by Prof.Cond.R. 4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The rule "provide[s] protection of the represented person against overreaching by adverse

counsel, safeguard[s] the client-lawyer relationship from interference by adverse counsel, and reduce[s] the likelihood that clients will disclose privileged or other information that might harm their interests." ABA, Formal Opinion 95-396 (1995), Prof.Cond.R. 4.2, cmt. [1].

Current employees

Certain categories of current employees of a corporation are considered represented by the corporation's lawyer and are shielded from contact by adverse counsel. Prof.Cond.R. 4.2, cmt. [7] sets forth three categories of employees an adverse lawyer may not contact without permission of corporate counsel. Specifically, the comment provides that communication is prohibited with current employees who 1) supervise, direct, or regularly consult with the corporation's lawyer concerning the subject of the representation; 2) have the authority to obligate the corporation with respect to the matter; and 3) employees whose "act[s] or omission[s] in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." *Id.*

Extreme caution should be observed by adverse lawyers when interviewing current employees, even those employees who do not satisfy the categories set forth in Prof.Cond.R. 4.2, cmt. [7]. When an adverse lawyer interviews current employees, he or she may inadvertently violate Prof.Cond.R. 4.2 because the lawyer typically is not privy to which employees of the corporation regularly consult with the corporation's lawyer or have the authority to bind the organization. In close cases, it may be appropriate to notify the corporation's lawyer before making contact with current employees. If a legitimate basis for denying contact is given by the corporate lawyer, the adverse lawyer may need to conduct further investigation through other means or engage in limited discovery before initial contact with a current employee is made.

Former employees

Once a management employee has left the corporation, he or she no longer supervises, directs, or consults with the corporation's lawyer and cannot obligate the organization. Former employees cannot bind the organization and their statements cannot be introduced as admissions of the organization.[1] Geoffrey Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, Sec. 38.7 (3d ed. Supp. 2011). Similarly, under the law of agency, the former management employee is no longer acting on behalf of the organization. *See* Mich. Op. RI-360 (2013). Consequently, a lawyer may communicate on the subject matter of the representation with any former and unrepresented corporate employees, including those in management, without notification or consent of the corporate lawyer.

Communications are also permitted under Prof.Cond.R. 4.2 with unrepresented former employees whose prior acts or omissions committed while they were employed may be imputed to the organization and give rise to civil or criminal liability. This conclusion is supported by the distinction between current and former employees, referred to as "constituents" in comment [7] to

[1] Statements made by a "party's agent or employee on a matter within the scope of that relationship and while it existed" are non-hearsay statements admissible against the party. Consequently, only communications with current employees of a corporation are prohibited when their admissions would constitute admissions of the corporation under Fed.R.Evid. 801(d)(2)(D).

Prof.Cond.R. 4.2. The comment directs that, in the "case of represented organization, [the] rule prohibits communications with a constituent of the organization . . . whose act or omission may be imputed to the organization . . . ." (emphasis added.) This sentence is immediately followed by the statement that "[c]onsent of the organization's lawyer is not required for communication with a former constituent," thus clarifying that a lawyer's communication is permitted with former employees, even those whose prior act or omissions may eventually be imputed to the corporation. *Id*. (emphasis added.)

In 1991, the ABA concluded that Model Rule 4.2 did not prohibit communication with any former corporate employee, even if they were in one of the categories under which communication was prohibited while they were employed. ABA Formal Op. 1991-359 (a lawyer may communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.)

The Board previously interpreted former DR 7-104(A)(1), the predecessor to Prof.Cond.R. 4.2, as permitting communication with former employees whose prior acts or omissions may give rise to corporate or organization liability. Adv. Op. 1996-1. Federal courts are also in accord with the view that contact with all former unrepresented employees is permissible. In *United States v. Beiersdorf-Jobst, Inc.*, 980 F. Supp. 257, 262 (N.D. Ohio 1997) (citing with approval Adv. Op. 1996-1), the court held that contact with former employees was permitted under former DR 7-104(A)(1), based on the premise that the "unimpeded flow of information between adversaries . . . encourage[s] the early detection and elimination of both undisputed and meritless claims." The court made no distinction between different categories of former employees, *e.g.* management employees, employees with the authority to bind the corporation, or whose prior acts or omissions may be imputed, and suggested no exceptions to its general holding. *See also Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (*ex parte* contact with former employees is not subject to Rule 4.2).

Based on the foregoing, the Board reiterates its position in Adv. Op. 1996-1 and concludes that communication with a former employee, even one whose prior acts or omissions may be imputed to the corporation, is permissible under Prof.Cond.R. 4.2.

Before interviewing a former employee, a lawyer should disclose his or her identity, and fully explain that he or she represents a client adverse to the corporation. The lawyer also must immediately inform the former employee not to divulge any privileged communications that the former employee may have had with corporate or other retained counsel. Prof.Cond.R. 1.6, 4.4 (lawyers may not use methods to obtain evidence that violate the legal rights of third parties.) Consequently, a lawyer must endeavor not to solicit information from former employees that the lawyer knows or reasonably knows to be protected by the attorney-client privilege. *See* D.C. Bar Op. 287. Nor may a lawyer communicate *ex parte* with a former employee who is represented by independent counsel, or if the corporation's lawyer has agreed to provide representation in the matter. *See Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008).

Finally, Prof.Cond.R. 4.3 requires a lawyer not to give advice to an unrepresented former

employee other than advice to seek counsel in the matter. In essence, the rule requires an adverse lawyer contacting a former employee of an opposing corporate party to identify his or her role in the matter, the identity of the lawyer's client and the fact that the witness's former employer is an adverse party to the litigation.

Blanket representation of representation

A corporate lawyer's blanket assertion of representation of the corporation and all of its current and former employees is unsupported by the Rules of Professional Conduct. Such a declaration by a corporation's lawyer does not, by itself, establish legal representation of all employees and is fraught with potential and inherent conflicts of interest for the corporate lawyer.

A lawyer representing a corporation may not prohibit contact with all current and former employees. A similar view was expressed by the ABA: "[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization." ABA, Formal Op. 95-396 (1995).

CONCLUSION: When representing an interest adverse to a corporation, a lawyer may communicate without the consent of a corporation's lawyer with certain current and any former employees of the corporation. Prof.Cond.R. 4.2 prohibits communications without the consent of the corporation's lawyer with a current employee of the corporation who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter, has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. A lawyer's communication with unrepresented former employees does not violate Prof.Cond.R. 4.2, even if the employee's prior acts and omissions may be imputed to the organization. Subject to the three exceptions described above, a corporate counsel's blanket assertion of representation is not supported by the Rules of Professional Conduct. A lawyer must inform an unrepresented former employee not to divulge any information that is subject to attorney-client privilege and refrain from giving the employee advice.

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OPINION 2016-6

Issued August 5, 2016

Ethical Implications for Lawyers under Ohio's Medical Marijuana Law

SYLLABUS: A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.

A lawyer's personal use of medical marijuana pursuant to a state regulated prescription, ownership in, or employment by a medical marijuana enterprise, subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law.

QUESTIONS: Several lawyers seek guidance concerning Ohio Sub. H.B. 523, effective September 8, 2016, that permits the cultivation, processing, sale, and use of medical marijuana under a state licensing and regulatory framework. This opinion addresses three questions:

1) Whether an Ohio lawyer may ethically counsel, advise, provide legal services to, and represent state regulated medical marijuana cultivators, processors, and dispensaries, as well as business clients seeking to transact with regulated entities;

2) Whether an Ohio lawyer may operate, hold employment or an ownership interest in, a licensed medical marijuana enterprise; and

3) Whether an Ohio lawyer may ethically use medical marijuana with a prescription.

APPLICABLE RULES: Prof.Cond.R. 1.2(d), 8.4(b), 8.4(h).

OPINION: Ohio Sub. H.B. 523 permits a patient, upon the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition. Three state regulatory agencies are permitted to issue licenses to persons and entities for the purposes of cultivating, processing, testing, dispensing, and prescribing medical marijuana. The law provides that a

registered patient or caregiver is not subject to arrest or criminal prosecution for using, obtaining, possessing, or administering marijuana and establishes an affirmative defense to a criminal charge to the possession of marijuana. The law immunizes professional license holders, including lawyers, from any professional disciplinary action for engaging in professional or occupational activities related to medical marijuana. Notwithstanding this provision, this advisory opinion analyzes the questions presented in light of rules promulgated by the Supreme Court pursuant to Oh. Const. Art. IV, Section 2(B)(1)(g).[1]

On and after September 8, 2016, a direct conflict will exist between Ohio law and federal law. The federal Controlled Substances Act ("CSA") currently designates marijuana as a Schedule I controlled substance which makes its use for any purpose, including medical applications, a crime. 21 USC §§ 812(b)(1), 841(a)(1). Additionally, under the CSA, it is illegal to manufacture, distribute, or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or conspire to do so (21 USC § 846). Consequently, any Ohio citizen engaged in cultivating, processing, prescribing, or use of medical marijuana is in violation of federal law.

In 2013, the U.S. Department of Justice ("USDOJ") issued a memorandum stating its general policy not to interfere with the medical use of marijuana pursuant to state laws, provided the state tightly regulates and controls the medical marijuana market.

Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013) ("Cole Memorandum").[2] The Cole Memorandum does not override federal law enacted by Congress or grant immunity to individuals or businesses from federal prosecution.

The conflict between the Ohio and federal marijuana laws complicates the application of the Rules of Professional Conduct for Ohio lawyers. While Ohio law permits certain conduct by its citizens and grants immunity from prosecution for certain state crimes for the cultivation, processing, sale, and use of medical marijuana, the same conduct constitutes a federal crime, despite instructions to U.S. attorneys from the current administration to not vigorously enforce the law and therefore implicates Prof.Cond.R. 1.2 for lawyers with clients seeking to engage in activities permissible under state law.[3]

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[1] "The supreme court shall have original jurisdiction in * * * [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law."

[2] http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

[3] Federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes. Additionally, the federal government always may enforce its own criminal statutes. "Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized." *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013).

ANALYSIS:

Advice and Legal Services Provided to Clients Engaged in Conduct as a State Regulated Marijuana Enterprise

A lawyer cannot assist a client who engages or seeks to engage in conduct the lawyer knows to be illegal. Prof.Cond.R. 1.2(d). Nor can a lawyer recommend to a client the means by which an illegal act may be committed. Prof.Cond.R. 1.2(d), cmt. [9]. Prof.Cond.R. 1.2(d) embodies a lawyer's important role in promoting compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. The rule underscores an essential role of lawyers in preventing clients from engaging in conduct that is criminal in nature or when the legality of the proposed conduct is unclear. N.Y. Op. 1024 (2014).

Prof.Cond.R. 1.2(d) does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government. The first inquiry of a lawyer is whether the legal services to be provided can be construed as assisting the client in conduct that is a violation of either state or federal law. If the answer is in the affirmative under either law, Prof.Cond.R. 1.2(d) precludes the lawyer from providing those legal services to the client.[4]

Under Prof.Cond.R. 1.2(d), a lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law. The types of legal services that cannot be provided under the rule include, but are not limited to, the completion and filing of marijuana license applications, negotiations with regulated individuals and businesses, representation of clients before state regulatory boards responsible for the regulation of medical marijuana, the drafting and negotiating of contracts with vendors for resources or supplies, the drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services. *See also,* Colo. Op. 125 (2013). Similarly, a lawyer cannot represent a property owner, lessor, supplier or business in transactions with a marijuana regulated entity, if the lawyer knows the transferred property, facilities, goods or supplies will be used to engage in conduct that is illegal under federal law. Even though the completion of any of these services or transactions may be permissible under Ohio law, and a lawyer's assistance can facilitate their completion, the lawyer ultimately would be assisting the client in engaging in conduct that the lawyer knows to be illegal under federal law.

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[4] Jurisdictions in accord with this view include Connecticut (Conn. Op. 2013-02); Hawaii (Haw. Op. 49 (2015)); Maine (Me. Op. 199 (2010)); and Colorado (Colo. Op. 125 (2014)).

However, Prof.Cond.R. 1.2(d) does not foreclose certain advice and counsel to a client seeking to participate in the Ohio medical marijuana industry. Prof.Cond.R. 1.2(d) also provides:

A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

This portion of the rule permits a lawyer to explain to the client the conflict that currently exists between state and federal law, the consequences of engaging in conduct that is permissible under Ohio law but contrary to federal law, and the likelihood of federal enforcement given the policies of the current administration. A lawyer may counsel and advise a client regarding the scope and general requirements of the Ohio medical marijuana law, the meaning of its provisions, and how the law would be applied to a client's proposed conduct. A lawyer also can advise a client concerning good faith arguments regarding the validity of the federal or state law and its application to the client's proposed conduct.

In addition to the permissible range of advice permitted under Prof.Cond.R. 1.2(d), the rule does not preclude a lawyer from representing a client charged with violating the state medical marijuana law, representing a professional license holder before state licensing boards, representing an employee in a wrongful discharge action due to medical marijuana use, or aiding a government client in the implementation and administration of the state's regulated licensing program. With regard to the latter, lawyers assisting a government client at the state or local level in the establishment, operation, or implementation of the state medical marijuana regulatory system are not advising or assisting the client in conduct that directly violates federal law. The state or a local government is not directly involved in the sale, processing, or dispensing of medical marijuana prohibited by federal law, even though it is arguably enabling the conduct through the issuance of licenses and the maintenance of its regulatory system.

For these reasons, the Board concludes that a lawyer violates Prof.Cond.R. 1.2(d) when he or she transitions from advising a client regarding the consequences of conduct under federal and state law to counseling or assisting the client to engage in conduct the lawyer knows is prohibited under federal law. Colo. Op. 125 (2013). Unless and until federal law is amended to authorize the use, production, and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client's proposed conduct. However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses. To document compliance with his or her ethical obligations, a lawyer approached by a prospective client seeking to engage in activities permitted by Ohio Sub. H.B. 523 should enter into a written fee agreement with the client that encompasses a mutual understanding about the exact scope of services the lawyer is ethically and lawfully able to provide under Prof.Cond.R. 1.2(d).

The Board is mindful that the current state of the law creates a unique conflict for Ohio lawyers and deprives certain clients of the ability to obtain a full range of legal services in furtherance of activities deemed lawful by the General Assembly. The Supreme Court may amend the Rules of Professional Conduct to address this conflict.

Several jurisdictions have reached similar conclusions to those contained in this opinion and have amended, or are considering amending Rule 1.2 or the comments to that rule. These

states include Illinois, Alaska, Colorado, Nevada, Oregon, Washington, and Hawaii.

A Lawyer's Personal Use of Medical Marijuana and Participation in a Medical Marijuana Enterprise

Under current federal law, an Ohio lawyer's use of medical marijuana, even obtained through a state regulated prescription, constitutes an illegal act and subjects a lawyer to possible prosecution under federal law. Such activity may implicate Prof.Cond.R. 8.4(b) (commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness) and Prof.Cond.R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Whether the illegal act "reflects adversely on the lawyer's honesty or trustworthiness" under Prof.Cond.R. 8.4(b) only can be determined on a case-by-case basis. A lawyer is "answerable to the entire criminal law," but is only "professionally answerable" to those offenses that demonstrate a lack of honesty or trustworthiness. Prof.Cond.R. 8.4(b), cmt. [2]. For example, a single violation of the CSA by a lawyer using medical marijuana would not, by itself, demonstrate the requisite lack of honesty or trustworthiness to constitute a violation of Prof.Cond.R. 8.4(b). Other misconduct related to the illegal act, such as lying to federal investigators or obtaining a prescription for medical marijuana for purposes of resale or providing it to a minor, would need to be present to trigger a violation of Prof.Cond.R. 8.4(b). A nexus must be established between the commission of an illegal act and the lawyer's lack of honesty or trustworthiness. Colo. Adv. Op. 124 (2012). Similarly, multiple violations of federal law would likely constitute "a pattern of repeated offenses" indicating an "indifference to legal obligations" and constitute a violation of the rule. Prof.Cond.R. 8.4(b), cmt. [3]. *See Stark County Bar Ass'n v. Zimmer*, 135 Ohio St.3d 462, 2013-Ohio-1962 (respondent's multiple driving infractions constituted a violation of Prof.Cond.R. 8.4(b)).

Personal conduct involving medical marijuana that does not implicate a specific Rule of Professional Conduct may give rise to a standalone violation of Prof.Cond.R. 8.4(h). In these cases, a violation is found when there is clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness to practice law. *Disciplinary Counsel v. Bowling*, 2010-Ohio-5040 (magistrate charged, but not convicted, for marijuana possession under state law violated Prof.Cond.R. 8.4(h)).

Similar to the issue of personal marijuana use, a lawyer's personal ownership or other participation in an Ohio medical marijuana enterprise violates federal law. Consequently, under circumstances similar to those previously discussed in relation to personal marijuana use, a lawyer's ownership of a medical marijuana enterprise may implicate Prof.Cond.R. 8.4(b), Prof.Cond.R. 8.4(h), or both. Likewise, participating in a medical marijuana enterprise as an employee or personally investing or lending money to a medical marijuana enterprise, subjects the lawyer to the same criminal and professional liabilities as having an ownership interest in a medical marijuana enterprise.

CONCLUSION: Federal law currently prohibits the sale, cultivation, processing, or use of

marijuana, for any purpose. Prof.Cond.R. 1.2 prohibits a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is illegal under any law. The rule does not contain an exception if the federally prohibited conduct is legal under state law. However, a lawyer may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law, explain the scope and application of the law to the client's conduct, but a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business. A lawyer seeking to use medical marijuana or participate in a regulated business under Ohio law is in technical violation of federal law. A lawyer's personal violation of federal law, under certain circumstances, may adversely reflect on a lawyer's honesty, trustworthiness, and fitness to practice law in violation of Prof.Cond.R. 8.4(b) or 8.4(h).

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.

AMENDMENTS TO THE
OHIO RULES OF PROFESSIONAL CONDUCT

The following amendments to the Ohio Rules of Professional Conduct (Prof. Cond. R. 1.2(d)) were adopted by the Supreme Court of Ohio. The history of these amendments is as follows:

August 30, 2016 Initial publication for comment
September 20, 2016 Final adoption by conference
September 20, 2016 Effective date of amendments

OHIO RULES OF PROFESSIONAL CONDUCT

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

[Existing language unaffected by the amendments is omitted to conserve space]

(d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

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OPINION 2016-7
Issued October 7, 2016

Lawyer's Duty to Promptly Deliver Funds to a Client or Third Party

SYLLABUS: A lawyer may hold a client's funds in trust for a reasonable period of time to ensure that the check has cleared and the funds are available to distribute to the client or third party. Subject to the exceptions set forth in this opinion, a reasonable period of time consists of one week to ten days, given federal banking regulations and modern banking practices.

QUESTION PRESENTED: A lawyer seeks guidance regarding how long he may hold client funds in the firm's trust account to ensure that the check clears before distributing funds to the client, in light of Prof.Cond.R. 1.15 that requires lawyers to "promptly" deliver funds to a client or third party.

APPLICABLE RULES: Prof.Cond.R. 1.15.

OPINION: The determination as to how long a lawyer may hold client funds while waiting for a check to clear to ensure the funds are available to distribute to the client, must be analyzed under the Rules of Professional Conduct, the applicable federal regulations, and banking policies.

Professional Conduct Rule 1.15

Under Prof.Cond.R. 1.15(d), a lawyer is required to do the following with regard to client funds: (1) *promptly notify* a client or third person claiming an interest in the funds, upon receiving the funds; 2) *promptly deliver* the funds which a client or third person is entitled to receive; and 3) *render a full accounting* when requested by a client or third person.

There are three exceptions to a lawyer's duty to promptly deliver funds in a lawyer's possession to a client or a third person: 1) those stated in the rule; 2) those permitted by law; and 3) those by agreement with the client or third person, confirmed in writing. Prof.Cond.R. 1.15(d). Additionally, a lawyer is required to hold disputed funds in a trust account until entitlement to the funds is resolved. Prof.Cond.R. 1.15(e). When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds

to which a client or third person is entitled. *See*, Prof.Cond.R. 1.15, cmt. [4]; Adv. Op. 2007-7 (duty of lawyer to deliver funds/property when there is a dispute).

The Rules of Professional Conduct do not provide a definition as to what constitutes "promptly"[1] delivering client funds; however, case law provides some guidance as to what time period is considered appropriate to hold client funds. The Court has found that delays of five, six, and nine months are too long to wait to notify a client that the lawyer received a settlement and to deliver the funds to the client. *See, Cleveland Metro. Bar Assn. v. Toohig*, 133 Ohio St.3d 548, 2012-Ohio-5202 (failure to remit settlement proceeds to client for over five months violates rule); *Cincinnati Bar Assn. v. Walker*, 28 Ohio St.3d 102 (1986) (failure to return client funds for six months violates rule); *Disciplinary Counsel v. Leksan*, 136 Ohio St.3d 85, 2013-Ohio-2415 (failure to distribute settlement funds to client for nine months violates rule). The Court also has found that a lawyer's complete failure or a significant delay of several years to deliver client funds violates the rule requiring lawyers to promptly deliver client funds. *See, Disciplinary Counsel v. Folwell*, 129 Ohio St.3d 297, 2011-Ohio-3181 (failure to return client funds after two years violates rule); *Disciplinary Counsel v. Ranke*, 130 Ohio St.3d 139, 2011- Ohio-4730 (complete failure to return client funds violates rule); *Disciplinary Counsel v. Longino*, 128 Ohio St.3d 426, 2011-Ohio-1524 (failure to return client funds for over two years violates rule); *Columbus Bar Assn. v. Kiesling*, 125 Ohio St.3d 36, 2010-Ohio-1555 (failure to return client funds and property violates rule).

Conversely, problems may arise if a lawyer disburses funds to a client too quickly, before the bank has collected the funds. Disbursing client funds from the IOLTA before the check clears carries the risk of using funds belonging to another client to pay the check if the check is not honored. Lawyers in other jurisdictions have been disciplined in this type of situation. For example, the New Jersey Supreme Court issued a six-month suspension to a lawyer for misappropriating funds of one client to pay another because the lawyer disbursed funds to one client upon receipt of a check for that client, except that check was dishonored. *In re Moras*, 131 N.J. 164, 618 A.2d 1007 (1993); *see also*, *In re James*, 112 N.J. 580, 548 A.2d 1125 (1988). Lawyers also should be aware of internet and fraudulent check scams that could result in dishonored checks, and in turn, result in disbursing funds to one client that belong to another. *See*, *Iowa Supreme Court Atty. Disciplinary Bd. v. Wright*, 840 N.W.2d 295 (Iowa 2013) (lawyer violated professional conduct rules by failing to make competent analysis of purported bequest to client and by obtaining loans from that client and other clients to pay taxes allegedly owed on that bequest).

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[1] The dictionary defines "promptly" as "performed readily or immediately." *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003).

A lawyer is required to hold the funds of a client with the care of a professional fiduciary. Prof.Cond.R. 1.15, cmt. [1]. As such, a lawyer should be cognizant not only of the applicable Rules of Professional Conduct, but also of the federal rules and regulations and banking practices that apply to holding and disbursing client funds.

Federal Regulations and Bank Policies

Federal regulations, as well as banking practices, help determine what constitutes a reasonable time for a lawyer to hold client funds in trust and still promptly disburse those funds to the client.

Federal regulation 12 C.F.R. 229 governs the availability of funds for bank accounts, including lawyer trust accounts. Lawyers should be aware of 12 C.F.R. 229 and its requirements to ensure that client funds are "available" before distributing the funds to a client or third party. 12 C.F.R. 229.12 outlines an availability of funds schedule for when a check is honored or paid. If a check is not honored pursuant to 12 C.F.R. 229.30, banks are required to "expeditiously" return checks using one of two standards: 1) the two-day/four-day test, or 2) the forward collection test. Under the two-day/four-day test, a returned check is considered expeditious if a local check is received by the depository bank the second business day after presentment, and a non-local check, the fourth business day after presentment. 12 C.F.R. 229.30. Under the forward collection test, a returned check is expeditious if the paying bank returns a check in a manner that a similarly situated bank would normally handle the check. 12 C.F.R. 229.31. Both the two-day/four-day test and the forward collection test ensure that checks that are not honored are returned "expeditiously," which generally is within about one week[2].

Under 12 C.F.R. 229, et seq., banks are required to make deposited funds available to customers within certain timeframes, anywhere from one day to approximately one week from the date of deposit. In practice, although the funds are not physically in the bank, the funds are available for the customer to withdraw. This system works until there is a problem with a check and payment is refused. As a result, banks are required to return checks "expeditiously" using either the two-day/four-day rule or the forward collection test. 12 C.F.R. 229.30, 12 C.F.R. 229.31. A bank is required to provide notice of nonpayment if it determines not to honor a check of $2,500 or more. 12 C.F.R. 229.33.

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[2] This time may be longer for foreign checks.

In addition to federal regulations, lawyers should be cognizant of the policies of the bank where the lawyer maintains his or her trust account. A lawyer should know his or her bank's policies regarding when the bank is required to alert the account holder that a check will not be honored, especially in situations in which the lawyer has reason to question the check that he or she deposited into the trust account. This situation may be avoided through the use of certified checks or by wiring money to an account.

ANALYSIS: A reasonable time for a lawyer to hold client funds in trust prior to disbursement is dependent on Prof.Cond.R. 1.15 and the federal regulations governing the availability of funds. Based on the

applicable federal regulations, a check clears and a bank is notified that a check will be dishonored usually within one week, or possibly longer if it is a foreign check. Therefore, a reasonable time period for a lawyer to ensure that a check clears and funds are available is seven to ten days. If the check is a foreign check, a longer period of time may be considered reasonable. A lawyer who disburses funds to a client from his or her trust account before the bank has collected the deposited funds runs the risk of using funds belonging to another client to pay the check if the check is not honored. Even if the lawyer has no dishonest or selfish motive, this action of using another client's funds may constitute conversion or misappropriation of funds. As a result, a lawyer should be cognizant of his or her financial institution's check-clearing procedures and when funds become available for withdrawal, and should wait a reasonable time before disbursing funds.

A lawyer must inform and explain to his or her clients that simply because the federal regulations require banks to make funds available those funds actually may not be available until almost one week or longer, or perhaps not available if a check is denied for nonpayment.

A lawyer should take several precautions in practice when funds are received on behalf of a client. First, the lawyer should obtain a written, signed agreement with the client at the commencement of the representation, or shortly thereafter, that notifies the client of a possible delay of a week or two weeks in delivery of funds to the client due to banking regulations. Second, the lawyer should notify the client promptly upon receipt of any funds received on behalf of the client. Third, the lawyer should confirm in a letter to the client upon receipt of the funds the portion of the agreement regarding any delay in the distribution of client funds. Finally, if no prior agreement with the client exists regarding disbursement of the client funds, the lawyer should carefully explain to the client the lawyer's ethical obligations to hold the funds until the lawyer can confirm that the funds are available for distribution to the client.

CONCLUSION: In order to ensure compliance with Prof.Cond.R. 1.15, a lawyer who receives funds on behalf of a client should proceed with an abundance of caution and wait a reasonable period of time until the check clears and the funds are available before disbursing funds from the lawyer's trust account to the client. Subject to the exceptions set forth above, a period of one week to ten days is a reasonable period of time, given federal banking regulations and modern banking practices.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.

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OPINION 2016-08
Issued October 7, 2016
Withdraws Opinions 89-24, 2000-6

Client Testimonials in Lawyer Advertising and Online Services

SYLLABUS: A lawyer may include a client testimonial in advertising so long as it does not constitute a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services or create unjustified expectations for prospective clients. Testimonials generally referring to favorable outcomes for clients must contain an appropriate disclaimer to avoid unjustified expectations.

Client testimonials in an advertisement that state the amount of a settlement or verdict are inherently misleading even if a disclaimer is used.

A lawyer is responsible for monitoring testimonials and reviews made by clients on websites if the lawyer controls the content of the website. Online testimonials or reviews from clients about the lawyer or the lawyer's services that contain false, misleading, or nonverifiable communications must be removed by the lawyer when the lawyer has control over the online content.

QUESTION PRESENTED: Whether a lawyer may utilize client testimonials in advertisements that promote the lawyer or the lawyer's services.

APPLICABLE RULES: Prof.Cond.R. 1.6, 1.9, 7.1, 7.2.

OPINION: Client testimonials are commonly used by lawyers in advertisements to convey information about the lawyer or the lawyer's services in an effort to attract new clients. Lawyers have a First Amendment right to communicate truthful information about their services that is not false or misleading. *Bates v. State Bar*, 433 U.S. 350 (1977). Communications made by lawyers, including advertisements containing client testimonials, cannot be false, misleading, or nonverifiable. Prof.Cond.R. 7.1, 7.2. A communication about the lawyer or the lawyer's services is considered "false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially

misleading." Prof.Cond. R. 7.1. A communication is also misleading when there is a substantial likelihood that a reasonable person would form a conclusion about the lawyer or the lawyer's services without a reasonable factual foundation. Prof.Cond.R. 7.1, cmt. [2].

When a lawyer decides to use a client testimonial in an advertisement there are several considerations to ensure the communication will not be construed as false, misleading, or nonverifiable. A testimonial should consist of truthful remarks from an actual client, not those prepared by the lawyer or others. Client testimonials such as "I was pleased with the representation I received," and "The lawyer listened to my concerns," are examples of permissible client testimonials under Prof.Cond.R. 7.1 because they do not create unjustified expectations. However, testimonials containing statements that characterize the lawyer's skills, reputation, or record are nonverifiable and are not permitted by the rule. For example, "My lawyer never settles a case he knows he can win," and "My lawyer is the best criminal defense lawyer in Columbus," are types of communications that generally cannot be verified and therefore are not permitted under the rule.

More importantly, a client testimonial in an advertisement can be misleading when it leads a reasonable person to form an unjustified expectation that the same results can be obtained for other clients in similar matters. Prof.Cond.R. 7.1, cmt. [3]. Client testimonials containing dollar amounts of settlements or verdicts are particularly susceptible of generating unjustified expectations, even though the statements can sometimes be verified and accompanied by a disclaimer. For example, a testimonial stating "I was pleased my lawyer settled my case for over $50,000" only communicates the client's subjective value of the former client's case and does not take into account the nature or relative strength of the case, its true value, or the individual skills of the lawyer.

Furthermore, the stated amount of an award does not take into account a variety of important factors that affect award amounts (*e.g.*, availability of insurance coverage, severity of an injury, the total amount of damages, and issues raised at trial for purposes of appeal, etc.), and leaves out important information about the facts and circumstances of the case. In the Board's opinion, the use of client testimonials to communicate settlement or verdict amounts, without more information, is materially misleading under Prof.Cond.R. 7.1. Consequently, a disclaimer cannot temper the unjustified expectations that are inevitably invoked when settlement or verdict amounts are communicated through a client testimonial. *See also* N.C. Adv. Op. 2012-1.

On the other hand, when an advertisement contains a client testimonial describing *general* favorable results of the representation, an appropriate disclaimer *may* prevent a misleading communication by the lawyer, *e.g.*, "After my DUI charge, I was able to keep my driver's license" or "I was able to return to work after my workplace injury." Prof.Cond.R. 7.1, cmt [3]. A disclaimer may include:

- Prior results do not guarantee a similar outcome in your case; or

- Individual results may vary based on the facts, injuries, jurisdiction, venue, witnesses, parties, and other factors. The results and client testimonials provided are not necessarily representative of the results obtained by all clients or their satisfaction with the firm's services.

A disclaimer in a print or video medium should be clear, conspicuous, and not minimized or obscured. A written disclaimer should be placed in the same size font as the written testimonial. Disclaimers provided in an audio format should be placed at the beginning or end of the advertisement in a volume and speed that can be easily understood by the listener. *See, e.g.* N.C. Adv. Op. 2012-1.

When using a client testimonial in an advertisement, a lawyer should always be mindful of the limitations imposed by Prof.Cond.R. 1.6 and 1.9, requiring the lawyer to not reveal information relating to the representation of a client, unless the client gives informed consent in writing. Both rules prohibit the release of any statement made by the client, former client, or of the client's identity without the client's consent. A lawyer should obtain the written and informed consent of the client to use his or her testimonial, whether or not the actual client is identified by name, partial name, or likeness. In addition, the lawyer should inform the client of the timeframe in which the advertisement will run, and allow the client to withdraw his or her consent at any time.

Finally, a lawyer may not give anything of value to a current or former client for recommending the lawyer's services through a testimonial. Prof.Cond.R. 7.2(b). If the advertisement contains a photograph or video depicting a client, and the client is a portrayed by an actor, the advertisement should contain an appropriate disclaimer.

Online client testimonials and endorsements

A lawyer may place information about his or her services on a website or online legal directory. This information is a form of advertisement that a lawyer must ensure complies with Prof.Cond.R. 7.1 and 7.2. A variety of websites, online legal directories, and social media permit clients and others to endorse or post a review about a lawyer. A client typically provides a review on his or her own volition and waives the attorney- client privilege as to any information revealed in the review or comment. A lawyer with an online presence, who is able to control the content of his or her online profile, should periodically monitor the content of the profile to ensure the communications about the lawyer or the lawyer's services comply with Prof.Cond.R. 7.1. False, misleading, or nonverified testimonials in the form of client comments or endorsements should be removed by the lawyer when he or she has control over the content of the profile. *See* Penn. Adv. Op 2014-300 (2014). In those instances when the lawyer is unable to control the content of a website, caution should be exercised when responding to any reviews or comments, negative or otherwise, left by clients. When responding, the lawyer should never reveal information related to

the representation of the client. Furthermore, none of the exceptions to Prof.Cond.R. 1.6(b) permit the disclosure of client information in response to a negative review. *See* Tex. Adv. Op. 662 (August, 2016).

CONCLUSION: Client testimonials that are not false, misleading, or nonverifiable may be included in lawyer advertising. A lawyer should endeavor to ensure that the testimonial is verifiable and carries an appropriate and conspicuous disclaimer when *general* results of the representation are communicated. However, advertisements that use client testimonials in order to communicate the dollar amount of settlements or verdict awards are inherently misleading even if a disclaimer is utilized. A former or current client cannot be paid for his or her testimonial, and must give consent to the use of his or her statement, name, or likeness in the advertisement. If a lawyer has the ability to control the content of an online website, the placement of client comments, endorsements, or testimonials featuring the lawyer constitutes advertising that must be periodically monitored by the lawyer to determine compliance with Prof.Cond.R. 7.1 and 7.2.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.

OHIO ETHICS GUIDE

CLIENT FILE RETENTION

Board of Professional Conduct of The Supreme Court of Ohio

Client File Retention

At some point, most lawyers face the question of "What do I do with client files that are closed and dormant?" How long should the lawyer retain a client file? What documents in the file are required to be maintained by the lawyer? Which contents of the file belong to the client? Can the contents of the file be electronically scanned and then destroyed? What do the Rules of Professional Conduct require?

Lawyers are required to comply with a number of ethical and legal obligations related to client files and property. Applicable Rules of Professional Conduct include:

• Prof.Cond.R. 1.1
A lawyer shall provide competent representation.

• Prof.Cond.R. 1.3
A lawyer shall act with reasonable diligence and promptness.

• Prof.Cond.R. 1.4
A lawyer shall communicate with a client and comply promptly with all of a client's reasonable requests for information.

• Prof.Cond.R. 1.6
A lawyer shall keep a client's confidences.

• Prof.Cond.R. 1.15
A lawyer shall safeguard the property of the client.

• Prof.Cond.R. 1.16(d)
A lawyer shall, upon termination of representation, take reasonable steps to protect a client's interests including surrendering all papers and property to which the client is entitled.

Confidentiality of Files

What must be kept confidential?

Maintaining the confidentiality of client files is a duty imposed upon lawyers by Prof.Cond.R. 1.6. An important step toward complying with this duty is the maintenance of a paper or digital filing system with access limited only to authorized personnel.[1]

Confidentiality is further ensured by the requirement in Prof.Cond.R. 1.15 to identify and segregate the client file from the lawyer's property, and from the property of other clients and third persons. Equally important, a lawyer must use "reasonable efforts to prevent the inadvertent or unauthorized disclosure" or access to a client's file regardless of whether it is maintained in paper or digital format.[2]

Ohio's Client File Retention Requirements

How long must a lawyer maintain a closed client's file? The Rules of Professional Conduct do not prescribe a minimum period of time for the retention of client files, nor is a lawyer required to permanently preserve all files of current or former clients.[3] It is nearly impossible to establish a minimum retention period for client files that applies in all circumstances. The decision of how long to maintain a client file always lies within the professional judgment of the lawyer, and may be influenced by the nature and subject matter of the representation, relevant statutes of limitations, and potential malpractice issues.

NOTE: Ethics Guides address subjects on which the staff of the Board of Professional Conduct receives frequent inquiries from the Ohio bench and bar. The Ethics Guides provide nonbinding advice from the staff of the Board of Professional Conduct and do not reflect the views or opinions of the Board of Professional Conduct, commissioners of the Board, or the Supreme Court of Ohio.

However, lawyers should always be mindful of two time periods for document retention required by the Rules of Professional Conduct:

• The notice signed by the client stating that the lawyer does not maintain liability insurance must be kept for *five years* after termination of representation **(Prof.Cond.R. 1.4)**; and

• IOLTA/trust account records shall be kept by lawyer for *seven years* after termination of representation **(Prof.Cond.R. 1.15)**.

Despite the lack of minimum file retention requirements in Ohio, other jurisdictions suggest client file retention periods that run concurrently with IOLTA/trust account recordkeeping requirements. In these situations, a lawyer maintains both the required trust account and financial records and the underlying client file for the entire IOLTA retention period, *i.e.* seven years.

Although maintaining client files for the duration of the IOLTA retention period may be appropriate in many cases, certain client matters may require a longer or possibly an indefinite period of retention. For example, files related to minors, probate matters, estate planning, tax, criminal law, corporate formation, business entities and transactional matters should be retained until the files no longer serve a useful purpose to the current or former client. Consequently, a careful and particularized review of each client file, and the establishment of a specific file retention period for the file, may be necessary with regard to some matters. See also *Client File Retention Policy*, page 4.

***What are Client Papers and Property*?**

Certain documents in a client file are subject to surrender at the request of the client. Client property traditionally includes documents provided to the lawyer by the client.[4] Although Prof.Cond.R. 1.16(d) applies to a situation in which the representation of a client is terminated prior to completion, whether by the client or the lawyer, the rule's definition of "client papers and property" can provide guidance useful in the context of client file retention. The rule states that "'client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."[5]

The Board also has further held that "papers and property to which the client is entitled" to receive includes, but is not limited to materials acquired or prepared for the purpose of representing the client and other materials that might prove beneficial to the client, such as significant correspondence, investigatory documents, reports for which the client has paid, and filed or unfiled pleadings and briefs.[6]

Are a Lawyer's Notes and Related Documents Considered Client Property?

A client is not entitled to all materials possessed by the lawyer in the client file, such as the lawyer's work product. However, the lawyer's ethical obligations may "give [] rise to an entitlement to those materials that would likely harm the client's interest if not provided."[7] For example, a lawyer's notes regarding facts about the client's case, as well as any notes regarding legal theories, strategies, and analysis, may be reasonably necessary to the client's representation.[8]

Among the items in a client file that may not be items reasonably necessary to a client's representation and thus not client files or papers are:

1. A lawyer's notes "to himself or herself regarding passing thoughts, ideas, impressions, or questions will probably not be items reasonably necessary to a client's represenation;"[9]

2. A lawyer's notes, research, firm documents, internal memoranda generated for a lawyer's own purposes;[10] and

3. "Internal office management memoranda such as personnel assignments or conflicts of interest checks."[11]

Client File Retention Policy

A lawyer should adopt and consistently follow a client file retention policy. Such a policy should meet the needs of the lawyer's practice and comply with the Rules of Professional Conduct. A retention policy should include the step-by-step details necessary for the lawyer to close and store

the client file, transfer the file to the client, a third party or subsequent lawyers, and eventually destroy the file. The policy also should address document review processes and procedures, IOLTA records, backup and archival procedures of digital and paper documents, the designation and duties of

a firm client file custodian, and the creation of a destroyed client file register.

In developing a retention policy, a lawyer should consider the nature of his or her practice and the types of client materials that come into his or her possession. A different retention period may be required for each area of the lawyer's practice.

For example, a corporate practice may require the retention of closed files for the life of the corporation; a collections practice may require a retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Even if a lawyer concentrates his or her practice in a single area of the law, the retention policy may need to distinguish between different case types within that area of practice. For example, a lawyer practicing domestic relations law would likely

need to establish a longer file retention period for divorce cases involving minor children compared to the dissolution of a marriage with no children retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond

the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Notice to Clients

At the beginning of the representation, the lawyer should notify the client, in writing, of the general provisions of the firm's file retention policy. This

is best accomplished through a statement in the initial engagement letter or fee agreement explaining when the file will be returned to the client. It is also acceptable and strongly advised that the lawyer provide the client with copies of correspondence, pleadings, deposition transcripts and expert reports during the representation to keep the client reasonably informed as well as to comply with requests for information as required by Prof.Cond.R. 1.4(a)(3)-(4).[12] The release of materials to the client during representation does not relieve the lawyer of obligations to maintain

a complete client file or to turn over documents upon request.

The following is a sample statement in an initial engagement letter, regarding the final disposition of the client's file:

The firm will maintain your file for _ years after the date of the file closing letter. After that date, the file and all of its contents will be permanently destroyed. You may request your file and all of its contents at any time before the date of destruction.

The closing letter at the conclusion of representation should include a recitation of the firm's file retention policy and the date when the file will be destroyed. The letter should allow the client a reasonable period of time to request a copy of his or her file before it is destroyed.

The file closing letter may contain language similar to the following:

Under the firm's file retention and destruction policy, your file will be kept for _months/years from the above date after which time the file will be permanently destroyed. You may retrieve your file and its contents at any time prior to the date of destruction.

A file retention policy, explained in both the initial engagement and file closing letters, gives the client sufficient notice of the length of time the file will be retained and that it may not be kept indefinitely by the lawyer. A retention period for the client file should take into consideration the statute of limitations to bring claims against the lawyer or any retention period required by the lawyer's malpractice carrier. Special attention should also be given to the Ohio's discovery rule and its application to legal malpractice matters when establishing a file retention policy.[13]

A retention policy may still be adopted even after lawyer has been in practice for a significant period of time. When implementing a policy after accumulating flies for years or even decades, the lawyer should set a date for implementation and draft a letter to current and former clients detailing the retention policy, dates for file destruction, and the time period the client may request and obtain their file.

Closing and Transmittal of the Client File

A lawyer is required to take reasonable steps to protect the client's interest when a client file is closed at the end of representation.[14] This duty applies regardless of the reason for the termination of the representation.

A lawyer should take certain steps when closing a client file:

1. Determine that the matter has concluded (*e.g.*, file contains a dismissal entry, satisfaction of judgment, lease termination, etc.) and personally inventory the file to determine its contents;

2. Determine which documents the client is entitled to receive;

3. Determine whether the file contains other client property, such as, items provided by the client and original documents: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, cash, bonds, negotiable instruments, deeds, official corporate or other business and financial records, and settlement agreements produced during the representation; and

4. Cull, at the lawyer's discretion, publicly available documents such as pleadings and briefs, hard copies of transcripts available digitally, and work product (*e.g.*, internal firm correspondence, drafts of documents, and lawyer's notes.)

When the client file is transferred to the client at the end of representation, a letter listing the general contents of the file should be prepared with a receipt to be signed by the client. Clients should be encouraged to pick up the file from the lawyer's office whenever possible. A lawyer should maintain a copy of the signed receipt with his or her copy of the client file. Files mailed at the client's direction should be sent by certified mail. If the client directs the lawyer to send the file to a third party or another lawyer, the request should be made in writing with a signed release to transfer the file. If the location of the client is generally unknown, it is advisable to withhold all original documents or client papers for transmittal until the client's address is confirmed or the client contacts the lawyer. A lawyer may not charge the client for providing the file or making copies of the file.[15] Charging a client a separate fee to store his/ her file during any retention period is discouraged unless the expense was previously agreed upon in writing.[16]

Destruction of Retained Files

A file may be destroyed at any time with the client's consent. However, it is a best practice for a lawyer to retain either a paper or scanned copy of the file for the duration of the firm's file retention period. Even if the client previously has been advised of the file retention period, it is a best practice to send a final file destruction notice to the client before any client files are destroyed.

The file destruction notice should be sent to the last known address of the client. A lawyer is required to take reasonable steps, but not extraordinary measures, to locate missing clients.[17] For example, contacting known family members, placing a notice in a newspaper of general circulation, or a search of commonly used electronic databases, social media, or the internet are considered reasonable efforts to locate a client. The lawyer should document all efforts undertaken to locate the client.

Lawyers are not required to send a file destruction notice by certified mail, but unique circumstances may warrant the use of this method. For example, the use of certified mail may be prudent when a client has made contact with the firm requesting to pick up a copy of the file prior to its destruction, but has failed to do so after a reasonable period of time.

A file destruction notice should inform the client when the file will be destroyed:

You are advised that your file will be destroyed any time after _ pursuant to the file closing letter dated _. You may request the file at any time before that date.

Each file that is scheduled to be destroyed should be reviewed again by the lawyer. A lawyer should use care not to destroy or discard information that the "lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."[18] This will require a lawyer to consider all relevant statutes of limitations, substantive law, and the nature of the client's case before destroying the client's file. If a client cannot be located, but the file contains property owned by the client, it should be "segregated and preserved."[19]

Although the Rules of Professional Conduct do not prescribe any particular method for the destruction of client files, a lawyer is obligated to maintain client confidentiality even after the representation terminates, including when disposing of a client's file.[20] Cross-hatch shredding or incineration of closed files are recommended methods of destruction of client files. If third party vendors are contracted to destroy records, the lawyer is primarily responsible to ensure the vendor uses methods that minimize the risk of disclosure of confidential information. Destruction of email and other digital records also requires the use of technologically secure methods to preserve confidentiality. Lastly, it is recommended that physical hard drives be wiped pursuant to National Institute of Standards and Technology guidelines prior to resale or disposal of electronic devices.[21]

After a file is destroyed, a lawyer should maintain a permanent record of a "destroyed client file register" in either paper form or an electronic database organized by client and matter number that includes:

1. The date of the opening and closing of the file;
2. The date of the termination of the representation;
3. A copy of the letter to the client notifying him or her of the pending destruction of the file;
4. The name of the lawyer that reviewed the file at closing, prior to destruction, and authorized the destruction; and
5. Receipt for a file transferred to the client or a subsequent lawyer at the end of representation.

Electronic Correspondence

Email messages constitute papers or property to which the client is entitled under Prof.Cond.R. 1.16(d). Like other forms of client papers and property, a lawyer's ethical obligation to retain and safeguard materials relating to the representation of a client depends on the facts and circumstances of each representation.[22]

A lawyer should retain emails that have a substantive impact upon the client's future representation.

For example, a lawyer should retain an email that communicates and evaluates a settlement offer from an insurance company, but may discard a nonsubstantive email confirming a meeting or providing directions to a deposition.[23]

The retention and maintenance of client related emails should be incorporated into the firm's file retention policy. A lawyer is responsible for following the firm's email policy and understanding the underlying technology that creates and stores the emails.[24] Failure to do so may cause the inadvertent loss of important lawyer-client communications that adversely affect the client's future legal needs. Consequently, a lawyer should undertake steps to collect and store emails by client and matter to ensure they are physically or electronically associated with the client file.

Digital Media and "Cloud" Storage of Client Files

As law firms adopt digital records as the primary method for producing and storing client papers and files, lawyers must ensure client information is securely stored. Lawyers who continue to handle paper documents may consider digital scanning as an alternative to traditional file storage methods. The Rules of Professional Conduct do not prohibit the scanning and simultaneous destruction of paper documents; however, there are instances when original paper records may constitute part of the client's file and will still need to be maintained. Client property or originals of legally significant documents in paper form should never be destroyed after scanning, and should be returned to the client.

When using technology a lawyer is required to use the requisite "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" including making decisions concerning the maintenance of digital client files.[25]

The dual application of Prof.Cond.R. 1.6 and 1.15 requires that any internal or external digital file storage method employed by a lawyer must be secure, and that reasonable measures be taken to protect the confidentiality and security of the client property.

"Cloud" File Storage

Although not required to do so, a lawyer should inform clients regarding the use of "cloud" storage of all or part of the client's file.[26] Some clients may have legitimate concerns about the level of security employed by vendors selected by the lawyer. A lawyer must exercise due diligence in selecting a vendor that the lawyer has determined will provide services consistent with the lawyer's ethical obligations. Outside service providers hired for "cloud" storage of client files are considered nonlawyer assistants under Prof. Cond.R. 5.3(a), thus a lawyer must use reasonable efforts to ensure that a vendor's "conduct is compatible with the professional obligations of the lawyer."[27]

The ABA has concluded that the Model Rules of Professional Conduct allow for the outsourcing of legal and nonlegal support services, if the lawyer ensures compliance with the rules relating to competency, confidentiality, and supervision.[28] A lawyer has a supervisory obligation to ensure compliance with professional ethics standards even if the lawyer has an indirect affiliation with the selected service.[29]

The use of "cloud" storage systems should prompt the lawyer to consider a vendor's compliance with the same confidentiality standards set forth in Prof.Cond.R. 1.6. In selecting a vendor, the lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision or monitoring."[30] Consequently, a lawyer using the services of an outside service provider for digital "cloud" storage is required to undertake reasonable efforts to prevent the unauthorized disclosure of client information.[31] This may require a reasonable investigation by the lawyer of the methods employed by the third-party vendor. Factors to be considered in

determining the reasonableness of the lawyer's efforts to safeguard information include, the sensitivity of the information, the likelihood

of disclosure if additional safeguards are not employed, and the cost of employing additional safeguards.[32]

At a minimum, the lawyer employing "cloud" storage methods should ensure that:

1. The vendor understands the lawyer's obligation to keep the information confidential;

2. The vendor is itself obligated to keep the information confidential; and

3. Reasonable measures are employed by the vendor to preserve the confidentiality of the files.

Client Files and Succession Planning

A lawyer's duty of competent representation includes safeguarding the client's interests in the event of the lawyer's death, disability, impairment, or incapacity.[33] This can be ensured through a firm succession plan that contains explicit instructions to a named successor lawyer for the handling of open client files and matters, as well as closed

client files maintained pursuant to a file retention policy.[34] The instructions should include the location of the client files and, in the event the files are maintained electronically either locally or in the "cloud," any necessary passwords or login information.

The retirement or resignation of a lawyer can also present client file issues if the lawyer has never implemented an adequate file retention and destruction schedule. A lawyer considering retirement or resignation should take certain steps to ensure the proper transfer of the files to a successor lawyer, or begin the process

of inventorying and disposing of client files. The inventorying process should follow the aforementioned steps in this guide, including using reasonable efforts to contact former clients prior to the destruction of files.

Issued March 18, 2016.

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[1] *See* RESTATEMENT OF LAW III: THE LAW GOVERNING LAWYERS, Sec. 46.

[2] Prof.Cond.R. 1.6(c); "Reasonable" when used in relation to conduct by a lawyer means conduct of a reasonably prudent and competent lawyer. Prof.Cond.R. 1.0(i).

[3] *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1989).

[4] *Sacksteder v. Senny*, 2nd Dist., Montgomery, 25982, 2014-Ohio-2678 (June 20, 2014); ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 471 (2015).

[5] *See supra* n.2 for definition of "reasonable."

[6] Adv. Op. 1992-8.

[7] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

[8] *Id.*

[9] Adv. Op. 2010-2; ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1376 (1977).

[10] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (interpreting former Model Code of Professional Responsibility DR 9-102(B)(4).)

[11] Adv. Op. 2010-2 (interpreting Prof. Cond. R. 1.16(d).)

[12] *Id.*

[13] *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941; *Zimmie v. Calfee* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398.

[14] Prof.Cond.R. 1.16(d).

[15] Prof.Cond.R. 1.16, Comment [8A]; Adv. Op. 1992-8.

[16] Prof.Cond.R. 1.5(b).

[17] *See supra* n.3.

[18] *Id.*

[19] GEORGE CUNNINGHAM, JOHN MONTAÑA, THE LAWYERS' GUIDE TO RECORDS MANAGEMENT AND RETENTION, ABA (2006) at 117.

[20] Prof.Cond.R. 1.6. See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384; *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 1998-Ohio-439 (1998); *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 2009-Ohio-1385 (respondent disciplined for not properly disposing of client files and records in violation of Prof.Cond.R. 1.6(a) and 1.9(c)(2)); *Disciplinary Counsel v. Robinson*, 126 Ohio St.3d 371, 2010- Ohio-3829.

[21] NIST Special Publication 880-88 Rev. 1.

[22] *See supra* n.7.

[23] *Id.*

[24] Prof.Cond.R. 1.1, Comment [8].

[25] *Id.*

[26] *See* Prof.Cond.R. 1.4(a)(2).

[27] Prof.Cond.R. 5.3(b).

[28] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008).

[29] *Id.*; Adv. Op. 2009-06.

[30] Prof.Cond.R. 1.6, Comment [18].

[31] *See* Prof.Cond.R. 5.3

[32] *See supra* n.30.

[33] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 369 (1992).

[34] *Id.*

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November 15, 2016

OPINION NO. 2016-036

SYLLABUS: 2016-036

An assistant prosecuting attorney assigned to prosecute misdemeanor and felony offenses in the Athens County Court of Common Pleas may serve as a member of a board of township trustees of a township located in Athens County, provided that in his capacity as assistant prosecuting attorney he does not serve on the county budget commission as the designee of the prosecuting attorney, prepare the budget of the county for submission to the county budget commission, appear before the county budget commission to advocate in support of the county budget, or prosecute misdemeanor or felony offenses associated with the township in which he serves as a trustee. In his capacity as a member of the board of township trustees he shall refrain from discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township. (2001 Op. Att'y Gen. No. 2001-027 and 1999 Op. Att'y Gen. No. 99-027, followed.)

You have requested an opinion whether the office of trustee of a township in Athens County is compatible with a position of employment in the office of the Athens County prosecuting attorney. Specifically, you ask whether a person may serve as trustee of a township in Athens County while employed at the same time as an assistant prosecuting attorney assigned exclusively to prosecute misdemeanor and felony offenses in the Athens County Court of Common Pleas.

Whether two or more public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either of the positions a classified employment for purposes of R.C. 124.57?

2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?

3. Is one position subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there an impermissible conflict of interest between the two positions?

6. Are there local charter provisions, resolutions, or ordinances that are controlling?

7. Is there a federal, state, or local departmental regulation applicable?
1979 Op. Att'y Gen. No. 79-111.

"All seven questions must yield answers in favor of compatibility in order to conclude that two positions are compatible." 2013 Op. Att'y Gen. No. 2013-008, at 2-78. If any one question yields an answer in the negative, the positions are incompatible.

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September 30, 2016

OPINION NO. 2016-033

SYLLABUS: 2016-033

A person may not serve simultaneously as director of law of the City of Bucyrus and manager of the Crawford County Land Reutilization Corporation.

You have requested an opinion whether an elected director of law of a non-charter city may serve simultaneously as a manager of a county land reutilization corporation established within the county in which the city is located.

* * *

A county land reutilization corporation is organized as a nonprofit corporation. Pursuant to R.C. 1724.10(B)(1), service as a member of the board of directors of a county land reutilization corporation is not a public office or employment. 2012 Op. Att'y Gen. No. 2012-040, at 2-349 n.3. Additionally, Attorney General opinions have concluded that a community improvement corporation is not a political subdivision and have recognized that such corporations are organized as private, nonprofit corporations. Id. Therefore, it is appropriate to conclude that a person serving as an officer of such a corporation does not hold a public office or employment for the purpose of determining the compatibility of the positions you have asked about. See R.C. 1702.04; R.C. 1724.01; R.C. 1724.08;

2012 Op. Att'y Gen. No. 2012-040, at 2-349.

* * *

Compatibility Test

The following five questions are used to determine whether a person may hold a public position and private position concurrently:[2]

1. Is the public position a classified employment within the terms of R.C. 124.57?

2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?

3. Is there an impermissible conflict of interest between the two positions?

4. Are there local charter provisions, resolutions, or ordinances that are controlling?

5. Is there a federal, state, or local departmental regulation applicable?

2014 Op. Att'y Gen. No. 2014-014, at 2-115.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 473 February 17, 2016

Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information

A lawyer receiving a subpoena or other compulsory process for documents or information relating to the representation of a client has several obligations. If the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other initial demand on any reasonable ground. If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult with the client about whether to produce the information or appeal. If the client and the lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, the lawyer should consider withdrawing from the representation pursuant to Model Rule 1.16. If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal. When disclosing documents and information— whether in response to an initial demand or to an order, and whether or not the client is available—the lawyer may reveal information only to the extent reasonably necessary. The lawyer should seek appropriate protective orders or other protective arrangements so that access to the information is limited to the court or other tribunal ordering its disclosure and to persons having a need to know.

I. Introduction

Recently the Committee was asked to revisit Formal Opinion 94-385 (July 5, 1994) regarding subpoena of a lawyer's files because Model Rule 1.6(b)(6) was adopted in 2002, more than a decade ago (at that time as 1.6(b)(4)). Model Rule 1.6(b)(6) provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with *other law or court order*."[1]

When Formal Opinion 94-385 was issued, Model Rule 1.6(b) permitted a lawyer to disclose confidential information *in only two circumstances*: (i) to prevent certain crimes,

1. ABA MODEL RULE 1.6(b)(6) (2015) (emphasis added). The phrase "other law" refers, generally, to statutory or regulatory requirements. *See, e.g.*, State Bar of Michigan Advisory Op. RI-311 (1999) (regulation requiring lawyer to report the names and addresses of clients to the Legal Services Corporation); State Bar of Michigan Advisory Op. RI-54 (1990) (Internal Revenue Code requirement that cash transactions exceeding $10,000.00 be reported to the Internal Revenue Service). Although there is overlap in the two phrases, this opinion addresses principally the obligations of a lawyer who receives a subpoena or other initial demand that is or may be enforced by a court or other tribunal. Throughout this opinion, "subpoena," "demand," "compulsory process," and similar terms are used interchangeably to refer to any initial demand by an entity or person or government agency seeking information protected by Model Rule 1.6(a) that is or may be enforced by compulsory process. "Court" or "tribunal" refers to a court, an arbitrator in a binding arbitration proceeding or a legislative body, and an administrative agency or other body acting in an adjudicative capacity and includes any other "tribunal" within the meaning of Model Rule 1.0(m).

and (ii) to establish certain claims or defenses on behalf of the lawyer.[2] Relying in part on then Comment [20], Formal Opinion 94-385 advised that the lawyer "must comply with the final orders of a

court or other tribunal of competent jurisdiction requiring the lawyer to give information about a client."[3] The Opinion explained that this "does not mean that the lawyer should be a passive bystander to attempts by a governmental agency—or by any other person or entity for that matter—to examine her files or records."[4] Rather,

> [W]here a government agency serves on the lawyer a subpoena or court order directing the lawyer to turn over to the agency the lawyer's files relating to her representation of the client—the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available ground (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligation under Rule 1.6 apply. Only if the lawyer's efforts [at limiting the subpoena or order] are unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.[5]

In the twenty-one years since publication of Formal Opinion 94-385 and the fourteen years since the Ethics 2000 amendments, additional questions have arisen regarding how a lawyer should respond to subpoenas, demands, or other compulsory process for client information and documents. These questions include: If disclosure is to be made, how extensive should it be? What, if any, protective measures should or must the lawyer seek? Are the obligations different when the client is not available for consultation? When the client is available for consultation but responding to the demand is outside the scope of a current representation, how should the lawyer handle retention and fee arrangements? If the client and the lawyer disagree about how to respond—either to the initial demand or after disclosure is ordered—what are the lawyer's obligations? Must the lawyer appeal an adverse decision for a client who is unavailable? Should or may the lawyer provide for these contingencies in retainer letters? This opinion provides guidance on these and related questions. The advice offered here updates and extends the advice offered in Formal Opinion 94-385.

II. Discussion

Rule 1.6(b) permits but does not require a lawyer to disclose information relating to the representation of a client ("[a] lawyer may reveal information") that the lawyer would

2. *Compare* ABA MODEL RULE 1.6(b) (1994), *with* ABA MODEL RULE 1.6(b) (2015).
3. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385 (1994), at 2.
4. *Id*.
5. *Id.* at 3 (footnotes omitted).

otherwise be barred from disclosure under Rule 1.6(a). [6] Each of the seven 1.6(b) provisions specifies an exception to the 1.6(a) prohibition, and under each provision disclosure is permitted.[7]

For example, Rule 1.6(b)(6) makes clear that a lawyer cannot argue 1.6(a) bars compliance with a court order. Rule 1.6(a) permits disclosure of information relating to the representation, "if such disclosure is permitted by paragraph (b)," and subparagraph (b)(6) permits the lawyer to disclose information "to comply with other law or court order." A lawyer must obey a court order, subject to any right to move the court to withdraw or

modify the order or to appeal the order.[8] But a lawyer facing a court order requiring the

disclosure of client confidential information still is faced with complex, critical and fact- intensive questions on how to respond—e.g., what challenges should be considered, what specific information should be disclosed, and what protective measures should be sought. In making these judgments the lawyer must balance obligations inherent in the lawyer's dual role as an advocate for the client and an officer of the court. [9] In doing so, the lawyer

should disclose client confidential information only to the extent "the lawyer reasonably believes necessary" to comply with the order.[10] Provision (b)(6) enables—indeed calls upon—the lawyer to make these delicate judgments.

A. Notice and Consultation

The lawyer's obligations of notice and consultation upon receiving a demand for client files and information are essentially the same for current and former clients. First,

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6. ABA MODEL RULE 1.6(a) (2015) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

7. *See, e.g.*, ABA MODEL RULE 1.6(b)(1) (2015) (a lawyer *may* reveal confidential information "to prevent reasonably certain death or substantial bodily harm") (emphasis added); ABA MODEL RULE 1.6(b)(2) (2015) (a lawyer *may* reveal confidential information "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") (emphasis added). ABA MODEL RULE 1.6(b)(6) is, by its terms, and consistent with (b)(1) through (b)(5), also permissive. *See* ABA MODEL RULE 1.6(b)(6) (2015) ("[a] lawyer *may* reveal information . . . to comply with . . . a court order") (emphasis added). *See also* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 130 (Art Garwin ed., 2013); Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 451 (2002).

8. *See, e.g.*, ABA MODEL RULE 3.4(c) (2015) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal"); ABA MODEL RULE 8.4(d) (2015) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice"); ABA MODEL RULE

8.4(a) (2015) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct"). *See also* RESTATEMENT OF THE LAW GOVERNING LAWYERS (3d) § 105 (2000) ("In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.").

9. *See* Dike v. Dike, 448 P.2d 490, 493 (Wash. 1968) (discussing whether a lawyer should be ordered to disclose confidential information the court said, "[I]t is important to recognize that an attorney has a dual role [in this context] — he is both an advocate for his client and an officer of the court . . . . Neither duty can be meaningfully considered independent from the other.").

10. ABA MODEL RULE 1.6 cmt. [16] (2015).

the lawyer must notify—or attempt to notify—the client.[11] For former clients, the lawyer must make reasonable efforts to reach the client by, for example, internet search, phone call, fax, email or other electronic communications, and letter to the client's last known address. The specific efforts required to reach particular clients will depend on the circumstances existing when the lawyer receives the demand. But these efforts must be reasonable within the meaning of Model Rule 1.0(h), and should be documented in the lawyer's files.

The lawyer's obligations to the client will differ depending on whether the client is available for consultation. Where the client is available, the lawyer must consult the client about how to respond to the demand.[12] Model Rule 1.4 should guide this consultation.

Rule 1.4 directs the lawyer to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required and to "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions."[13] Rule 1.6(a) allows the lawyer to disclose information relating to the representation with the client's informed consent. [14] "'Informed consent' denotes the

agreement by a person to a proposed course of conduct after the lawyer has communicated

11. *See, e.g.*, State Bar of Michigan Advisory Op. CI-925 (1983) (lawyer must notify client upon receipt of a subpoena for documents relating to the lawyer's representation of the client) (citations omitted); Alaska Bar Ass'n Op. 96-3 (1996) (upon receiving a demand for confidential information or documents, the lawyer should attempt to contact the client concerning the request). *See also* Linda G. Bauer, *Subpoena Savvy: What To Do When Your Client's File is Subpoenaed* (Nov. 2002), www.mass.gov/obcbbo/subpoena.htm (". . . [T]he lawyer should first attempt to contact the former client to determine whether the client consents to the disclosure."); D.C. Bar Op. 14 (1976), at 2 ("an attorney should promptly notify his former client when he receives a subpoena asking for documents that came into his possession during the course of the representation of that former client or documents that affect or may affect that former client"); Pennsylvania Legal Ethics & Prof'l Responsibility Comm. Op. 2002-106 (2003) ("a lawyer may comply with an order issued in a private arbitration to reveal confidential client information, but must first raise the confidentiality issue with the arbitration panel and notify any clients whose confidences are implicated. The lawyer should try to limit the scope and impact of the disclosure.").

12. *See* ABA MODEL RULE 1.6 cmt. [15] (2015) (client consultation is required by Rule 1.4 before responding to an order or demand for information relating to a representation by "a court or by another tribunal or governmental entity"). The protection of 1.6 is provided to former clients through Model Rule

1.9(c)(1) and (2), which provide: "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 information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." *See also* Swidler & Berlin v. U.S., 524 U.S. 399 (1998) (obligations of confidentiality continue even after the death of a client); Jamaica Pub. Serv. Co. v AIU Ins. Co., 684 N.Y.S.2d 459, 462 (N.Y. 1998) (an attorney owes a "continuing duty" to a former client not to reveal confidences learned in the course of a professional relationship). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 fn8 ("[t]he lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client"); Rhode Island Supreme Ct. Ethics Advisory Panel Op. 2013-05, at 3 (2013) (obligations under 1.6 continue even after death of client; even then a "lawyer has a professional responsibility to seek to limit [a] subpoena or court order on any legitimate grounds such as attorney-client privilege, work product immunity, burden or relevance, to protect information to which obligations under Rule 1.6 apply") (citing ABA Formal Opinion 94-385).

13. ABA MODEL RULE 1.4 (2015).

14. *See* ABA MODEL RULE 1.6(a) (2015) (prohibiting a lawyer from revealing confidential information unless the client gives "informed consent").

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[15]

The content of the consultation will depend on the circumstances. It should include, at a minimum, (i) a description of the protections afforded by Rule 1.6(a) and (b), (ii) whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply, and (iii) any other relevant matter. Other relevant matters include, for example, "to the extent that the disclosure of confidential client information in

a civil proceeding may raise potential criminal liability for the client, the consequences should be explained to the client during the consultation process."[16] The lawyer also may need to discuss whether the subpoena or other demand is valid and whether the requested document contains self-incriminatory information that might form the basis of a Fifth Amendment privilege claim against disclosure.

If, after consultation, the client wishes to challenge the demand, the lawyer should, as appropriate and consistent with the client's instructions, challenge the demand on any reasonable ground. If, after making the challenge, the court or other tribunal rules against the motion to withdraw or modify the order or demand for production, "the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4."[17]

If the client decides not to appeal and gives informed consent to disclosure, the lawyer must produce the documents and information consistent with the client's instructions and as described in Part IIC of this opinion.

The lawyer has several options and some obligations if the lawyer and client disagree about how to respond to the initial demand or to an adverse ruling, or if the client wishes to retain new counsel. For a current client, where the initial demand or the appeal is within the scope of the retention, for example, the lawyer may seek to withdraw in compliance with Model Rule 1.16.[18] Where the initial demand or the appeal constitutes a

new matter for a current client or relates to a former client and the client wishes to seek other counsel, the lawyer should take reasonable steps to protect the client's interest during the client's search for other counsel.[19]

B. Fee Arrangements

When responding to a demand that is outside the scope of a current retention, or when the demand relates to information and documents of a former client, the lawyer may need to discuss fee and retention arrangements during the consultation. In doing so, however, the lawyer must comply with the relevant rules. For example, under Model Rule

1.5(b) "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in

15. ABA MODEL RULE 1.0(e) (2015).
16. *See* Bauer, *supra* note 11.
17. ABA MODEL RULE 1.6 cmt. [15] (2015).
18. *See* ABA MODEL RULE 1.16(b)(1), (4), (7) & 1.16(c) (2015).
19. *See* ABA MODEL RULE 1.16(d) (2015).

writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."[20]

Lawyers also may consider providing for these situations in initial retainer letters by including provisions that (i) the client will keep the lawyer informed on how to reach the client, even after the representation has ended, (ii) in the event the lawyer receives a subpoena or other demand for information protected by Model Rule 1.6, the client will promptly respond to the lawyer's request for instructions, and (iii) the client agrees to pay all reasonable fees and costs associated with any production or judicial proceedings in response to a subpoena or other demand. Even if no fee agreement is reached—either in the initial retainer letter or during a consultation following the lawyer's receipt of the demand—the lawyer nevertheless may be required to challenge the initial demand, as discussed below.[21]

C. Where the Client is Unavailable for Consultation

Where the client is unavailable for consultation after the lawyer has made reasonable efforts to notify the client, the lawyer "*should* assert on behalf of the client all non-frivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege or other applicable law."[22] The lawyer has this obligation to assert all reasonable objections and claims when the lawyer receives the initial demand.[23] During

20. ABA MODEL RULE 1.5(b) (2015).

21. *See, e.g.*, D.C. Bar Op. 288 fn4 (1999) (" . . . [even] if no agreement on fees and expenses is reached regarding the efforts to protect the confidential information [demanded by a subpoena], the lawyer must nevertheless take all ethically required steps to protect the privilege even if not compensated for the services by the client."). A later suit in *quantum meruit* for the services rendered may be available to the lawyer but that is an issue of law beyond the jurisdiction of this Committee. Alternatively, a lawyer may seek to withdraw as appropriate under Rule 1.16.

22. ABA MODEL RULE 1.6 cmt. [15] (2015) (emphasis added). *See* RESTATEMENT OF THE LAW, *supra* note 8, § 63 cmt. b ("A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information . . . from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented . . ."); Bd. of Prof'l Responsibility of the Supreme Ct. of Tennessee Formal Op. 2014-F-158 (2014) ("[i]n the absence of informed consent of the client, the lawyer must reveal the information or document if ordered to [do] so by the tribunal, but only after the lawyer has raised all non-frivolous objections that the information sought is protected against disclosure by the attorney-client privilege or other applicable law"); D.C. Bar Op. 288 (1999) (" . . . . A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential information . . . , unless disclosure would serve the client's interests . . . ." (citations omitted); D.C. Bar Op. 14 (1976) (". . . [W]hen documents are subpoenaed or an effort is otherwise made to compel their disclosure, it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to fail to do so might be prejudicial to the client"); Kentucky Bar Ass'n Op. E-315 (1987) (upon receiving a grand jury subpoena for client documents a lawyer "must respond by asserting any privilege (i.e., the attorney-client privilege) . . . .") (citations omitted); New Jersey Advisory Comm. on Prof'l Ethics Op. 145 (1969) (". . . if the client fails to respond to the attorney's letter his silence cannot be construed as consent and it would be improper to turn over copies of the [client's documents absent a court order] . . . .").

23. Appropriate objections and claims may vary with the jurisdiction. In some states, e.g., California, a lawyer may be *required* to raise certain claims or objections. *See, e.g.*, CAL. EVIDENCE CODE § 955 (1965) (lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of § 954). In other states, by contrast, a lawyer may be *forbidden* from raising certain objections or claims.

the proceeding before the court or other tribunal, the lawyer should explain the lawyer's diligent but unsuccessful efforts to reach the client. If the lawyer is ordered to produce the documents and records, paragraph (b)(6) permits the lawyer to comply with the court order, as discussed below.

D. Complying With the Court Order

As noted, relying in part on then Comment [20], Formal Opinion 94-385 declared that a "lawyer must comply with the *final* orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."[24] Other authorities also direct a lawyer to comply with "final" orders of a court or other tribunal.[25] Questions have arisen as to whether the reference to "final order" in Formal Opinion 94-385 and elsewhere requires a lawyer to appeal an adverse ruling when the client cannot be located or is unavailable for consultation.

Model Rule 1.6(b)(6) makes no reference to a "final" order. The comments adopted in 2002 make no reference to "final" orders. Comment [15] reads simply, "In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order."[26] The text thus suggests that

> omitting the reference to "final" orders was meant to relieve the lawyer from the added burden of pursuing an appeal or other "final" disposition, unless appropriate arrangements are made with an available client. The obligation of the lawyer with regard to an appeal is particularly relevant if the client or former client is unavailable.[27]

> Requiring a lawyer to take an appeal when the client is unavailable places significant and undue burdens on the lawyer. An appeal costs money and takes time away from other clients. Taking an appeal on behalf of an unavailable client forces the lawyer to act without consultation and direction. While such clients need and deserve protection in response to an initial demand—to avoid improper and unjustified access to information and documents that the rules protect even after the client's death[28]—the balance changes once a court or other tribunal has ruled on the lawyer's initial objection. In the absence of instructions from the client to appeal, the ethics rules do not require a lawyer to shoulder further burdens. Accordingly, a lawyer is not ethically required to take an appeal on behalf of a client whom the lawyer cannot locate after due diligence.[29]

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24. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385, at 2 (emphasis added). Prior to the adoption of the amendments in 2002, Comment [20] to Model Rule 1.6 also said, a "lawyer must comply with the *final* orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." *See* A LEGISLATIVE HISTORY, *supra* note 7, at 129 (emphasis added).

25. *See, e.g.*, Rhode Island Supreme Ct. Ethics Advisory Panel Op. 98-02 (1998) (upon receiving a demand for confidential information a lawyer "has professional responsibility to seek to limit subpoena [sic] or court order on any legitimate ground, such as attorney-client privilege, work product immunity, burden or relevance . . . . The . . . attorney must comply, however, with the *final* orders of a court requiring him/her to produce the documents sought or to give information about the former client" (emphasis added) (citing ABA Formal Opinion 94-385)). *See also* State Bar of Arizona Op. 00-11 (2000) (discussing, *inter alia*, a comment to Arizona RPC 1.6, which says, ""The lawyer must comply with the *final* orders of a court or other tribunal . . . [requiring disclosure]" but noting that "[w]hat constitutes a 'final order' is problematic. Criminal attorneys might well argue that before revealing any such confidential information . . . the lawyer must await a final order by the highest court of appellate review and the mandate is spread relative thereto, if the original order of the lower court is appealed") (emphasis added).

26. ABA MODEL RULE 1.6 cmt. [15] (2015).

27. *See* the Reporter's comment in A LEGISLATIVE HISTORY, *supra* note 7, at 132.

Once a lawyer determines disclosure is appropriate—in response to an initial demand or to an order and whether or not the client is available—the lawyer may produce documents and information "only to the extent the lawyer reasonably believes . . . is necessary . . . ."[30] The lawyer should seek appropriate protective orders and similar arrangements "to the fullest extent practicable."[31] "[D]isclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it . . . ."[32]

III. Conclusion

A lawyer receiving a subpoena or other compulsory process for information or documents relating to the representation of a client has several obligations. If the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other demand on any reasonable ground.

If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult with the client about whether to produce the information or to appeal. If the client and the lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, the lawyer should consider withdrawing pursuant to Model Rule 1.16. If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal.

When disclosing documents and information—whether in response to an initial demand or to a court order and whether or not the client is available—the lawyer may reveal information only to the extent reasonably necessary. The lawyer should seek appropriate protective orders or other protective arrangements so that access to the information is limited to the tribunal ordering its disclosure and to persons having a need to know.

Where the client is available, the lawyer is not required to act without a fee but arrangements regarding the scope of the work and fee arrangements must conform to the relevant rules.[33] Where the client is unavailable to make retention and fee arrangements, the lawyer is nevertheless required to challenge the demand in the first instance. Lawyers should consider providing for these situations in retainer agreements.

28. Swidler & Berlin v. U.S., 524 U.S. 399 (1998) (obligations of confidentiality continue even after the death of a client); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 684 N.Y.S.2d 459, 462 (N.Y. 1998) (an attorney owes a "continuing duty" to a former client not to reveal confidences learned in the course of a professional relationship).

29. When challenging the subpoena or other demand in the first instance the lawyer should explain to the court or other tribunal the lawyer's efforts to locate the client and the client's unavailability.

30. ABA MODEL RULE 1.6 cmt. [16] (2015).

31. *Id.*

32. *Id.*

33. *See, e.g.*, ABA MODEL RULE 1.5 (2015).

FORMAL OPINION 474 April 21, 2016

Referral Fees and Conflict of Interest

Rule 1.5(e) allows lawyers who are not in the same firm to divide a fee under certain circumstances. A lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client.

Fee arrangements under Model Rule 1.5(e) are subject to Rule 1.7. Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.

When one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed before or within a reasonable time after the commencement of the representation.

The question presented is under what circumstances lawyers may divide a fee when one lawyer refers a matter to another lawyer outside the firm.[1] Our analysis starts with Model Rule 1.5(e), which reads:

A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

Comment [7] to Rule 1.5 explains that lawyers in different firms may divide a legal fee. This practice is often used when the fee is contingent and the division is between a referring lawyer and a trial lawyer.[2]

1. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Model Rule 1.5(e)(1) establishes two different standards for such division of fees: either the division must be in proportion to the services performed or the lawyers must assume joint responsibility for the representation.[3] Thus the Rule permits a lawyer to associate with another lawyer (often a trial lawyer) in a different firm, refer a client to that lawyer, and divide a fee either in proportion to the services performed by each lawyer, or by having each lawyer involved in the representation assume joint responsibility for the matter, provided that the client agrees to

the participation of all lawyers involved, including the share each lawyer will receive, the agreement is confirmed in writing, and the total fee is reasonable.[4]

Joint responsibility is not defined by the black letter of Model Rule 1.5(e). However, Comment [7] to Rule 1.5 provides guidance noting that "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."[5] Implicit in the terms of the fee division allowed by Rule

1.5(e) is the concept that the referring lawyer who divides a legal fee has undertaken representation of the client.[6]

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2. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. [7] (2016). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2016), which requires a lawyer to provide competent representation. Comment [6] to Rule 1.1 notes that "before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. . . . The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information."

3. There is wide variation in state adoptions of Model Rule 1.5(e). Some states have eliminated the specific requirement of proportionality or joint responsibility, simply requiring client consent and a reasonable total fee. *See, e.g.*, CALIFORNIA RULES OF PROF'L CONDUCT R. 2-200; CONNECTICUT RULES OF PROF'L CONDUCT R. 1.5(e); DELAWARE RULES OF PROF'L CONDUCT R. 1.5(e); MICHIGAN RULES OF PROF'L CONDUCT R. 1.5(e); OREGON RULES OF PROF'L CONDUCT R. 1.5(d). A limited number of states either prohibit referral fees altogether or have declined to adopt any version of subsection (e). *See, e.g.*, COLORADO RULES OF PROF'L CONDUCT R. 1.5(e) & WYOMING

RULES OF PROF'L CONDUCT R. 1.5(f). LOUISIANA RULES OF PROF'L CONDUCT R. 1.5(e) requires the provision of

substantive legal services to justify a fee division, which would also appear to preclude fee division solely for a referral. Other states require that a fee division always be accompanied by ongoing joint responsibility, or joint financial responsibility, for the matter. *See, e.g.*, ARIZONA RULES OF PROF'L CONDUCT R. 1.5(e); ILLINOIS RULES OF PROF'L CONDUCT R. 1.5(e); WISCONSIN RULES OF PROF'L CONDUCT R. 20:1.5(e).

4. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. [7] (2016).

5. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. [7] (2016). Comments do not add obligations to the Rules but provide guidance. *See* MODEL RULES OF PROF'L CONDUCT, PREAMBLE AND SCOPE [14] (2016). The Ethics 2000 Commission is the source of the current language of Comment [7]. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 99 (Art Garwin ed., 2013). The Ethics 2000 Commission relied on ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 85-1514 for the amendments.

6. *See generally* Connecticut Bar Association Prof'l Ethics Comm., Informal Op. 2013-04 (2013); Maine

Bd. of Bar Overseers Op. 145 (1994).

Because the client is represented by both the referring lawyer and the lawyer to whom the client was referred, a referral fee arrangement under Model Rule 1.5(e) subjects both lawyers to the conflict provisions of Rule 1.7.[7] Model Rule 1.7(a) reads:

(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.

Illustration by Hypothetical: Part One

Application of Rule 1.5, and the relationship between Rules 1.5 and 1.7, can be illustrated using a hypothetical. Assume the following situation: for many years, Lawyer has represented The Flower Shoppe Inc., which is jointly owned by Daisy and Rose. Rose was in a car accident while on a personal errand driving a car owned by The Flower Shoppe. Rose, as a co-owner of the Shoppe, had permission to use the Shoppe vehicle to perform the errand. Rose was not at fault but was injured in the accident. Knowing Lawyer does not practice personal injury law, Rose asked Lawyer to refer her to a personal injury trial lawyer. Lawyer will not assist the trial lawyer in preparation of the case. Rose would like Lawyer to receive a referral fee, and Lawyer wants to accept joint responsibility for the matter. When Rose requests the referral, Lawyer reasonably believes that The Flower Shoppe will not be a party to the matter. Before assuming joint responsibility for the matter, Lawyer must determine whether a conflict of interest exists under Rule 1.7(a).

On the facts presented here, Lawyer can proceed with the referral to the trial lawyer because there is no conflict of interest under Rule 1.7(a). The representation of one client is not directly adverse to another client and there is not a significant risk that the referral of Rose will be materially limited by Lawyer's responsibility to The Flower Shoppe. Thus, the requirements of 1.7(a) are satisfied.[8]

7. The Commission on Evaluation of Professional Standards (commonly referred to as the Kutak Commission) explained, "A fee arrangement [envisioned by this paragraph of Rule 1.5] is subject to the conflict provisions of Rule 1.7 and 1.8." *See* PROPOSED FINAL DRAFT, MODEL RULES OF PROFESSIONAL CONDUCT 37 (1981). *See also* Illinois State Bar Ass'n, Advisory Op. 90-26 (1991); Massachusetts Bar Ass'n Op. 80-10 (1980); State Bar of Michigan, Informal Op. RI-116 (1992).

8. We assume that when Lawyer conducted the conflict check, Lawyer determined that Lawyer's representation was also not limited by Lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of Lawyer.

Illustration by Hypothetical: Part Two

Assume again that for many years, Lawyer has represented The Flower Shoppe Inc., which is jointly owned by Daisy and Rose. Rose was in a car accident while on a personal errand driving a car owned by The Flower Shoppe. Rose, as a co-owner of the Shoppe, had permission to use the Shoppe vehicle to perform the errand. Rose was injured. Fault is in dispute. Rose asked Lawyer to refer her to a personal injury trial lawyer. Lawyer will not assist the trial lawyer in the representation. Rose would like Lawyer to receive a referral fee, and Lawyer wants to accept joint responsibility for the matter.

Lawyer recognizes that sometime in the future the other driver in the accident will file a claim against Rose and may file a claim against The Flower Shoppe as owner of the car. If the other driver adds The Flower Shoppe as a party and Lawyer continues to represent The Flower Shoppe, Lawyer believes that there is a significant risk that Lawyer's representation of Rose will be materially limited by Lawyer's responsibilities to The Flower Shoppe and vice versa.[9]

Therefore, in order to receive a referral fee for referring Rose to a trial lawyer, Lawyer must meet the requirements of Model Rule 1.7(b).[10]

Illustration by Hypothetical: Part Three

Assume again that for many years Lawyer has represented The Flower Shoppe Inc., which is jointly owned by Daisy and Rose. Rose was in a car accident while on a personal errand driving a car owned by The Flower Shoppe. Rose, as a co-owner of the Shoppe, had permission to use the Shoppe vehicle to perform the errand. Rose was injured. Fault is in dispute. Rose asked Lawyer to refer her to a personal injury trial lawyer. Lawyer will not assist the trial lawyer in the representation. Rose would like Lawyer to receive a referral fee and Lawyer wants to accept joint responsibility for the matter.

The other driver has filed a claim against Rose and The Flower Shoppe, and Lawyer has determined that Rose's interests in the suit are adverse to The Flower Shoppe's interests. While

Lawyer does not expect to represent The Flower Shoppe in the suit, The Flower Shoppe will

9. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [8] (2016) explains that a conflict of interest exists "if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. . . . The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." In this hypothetical, the facts provide that Lawyer reasonably believes that there is a significant risk that Lawyer's representation of Rose and The Flower Shoppe will be materially limited by Lawyer's responsibilities to the other. Thus Lawyer's reasonable belief establishes the conflict under Rule 1.7(a)(2).

10. Circumstances at the outset also could make accepting a referral fee improper. Changing a few facts in this hypothetical would prohibit Lawyer from referring Rose to the trial lawyer and receiving a referral fee. For example, if at the outset the other driver sued both Rose and The Flower Shoppe Inc., Lawyer represented The Flower Shoppe in the suit, and Rose and The Flower Shoppe asserted claims against each other, then Lawyer would have a conflict that a client could not consent to. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2016).

continue to be Lawyer's client. Lawyer's representation of Rose, through the referral, is a conflict of interest under Rule 1.7(a)(1).[11]

To receive a referral fee for referring Rose to the trial lawyer, Lawyer must meet the requirements of Model Rule 1.7(b).

Informed Consent to the Conflict

Rule 1.7(b) reads:

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.

Assuming that Lawyer reasonably believes that Lawyer will be able to provide competent and diligent representation to each affected client, that the representation is not prohibited by law, and that at this time the representation does not involve the assertion of a claim by The Flower Shoppe against Rose in the same litigation, then under Rule 1.7(b)(4) Lawyer must still secure the informed consent, confirmed in writing, of each affected client.[12] Under hypotheticals two and three, Lawyer needs the informed consent of both Rose and The Flower Shoppe to refer Rose to the trial lawyer outside the firm and divide the legal fee.

Informed consent is defined by Model Rule 1.0(e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

11. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2016) provides, "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, *even when the matters are wholly unrelated*. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client." (Emphasis added).

12. MODEL RULES OF PROF'L CONDUCT R. 1.0(b) (2016) explains, "'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[13] Comment [6] to Model Rule 1.0 explains:

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives . . .

Before Rose or The Flower Shoppe can provide informed consent to the conflict of interest, Lawyer must provide both with information about the conflict of interest. For example, if Lawyer is representing The Flower Shoppe in the suit as noted in hypothetical two, and if after Lawyer has referred Rose to the trial lawyer the other driver sues both Rose and The Flower Shoppe Inc. resulting in Rose and The Flower Shoppe Inc. asserting claims against each other,

then a conflict under Model Rule 1.7(b)(3) would prohibit representation.[14]

Rule 1.5(e) Fee Disclosures

Rule 1.5(e) requires that a client agree to the fee division and that the agreement be confirmed in writing.[15] The agreement must describe in sufficient detail the division of the fee between the lawyers including the share each lawyer will receive.[16] Rule 1.5(e)(3) mandates that the total fee be reasonable. If a contingent fee is divided between a referring lawyer and another lawyer, the total fee cannot be increased because of the referral.[17]

Rule 1.5(e)(2) uses the future tense in the phrase "including the share each lawyer *will receive*" to describe what the fee division agreement must include, and Comment [7] to Rule 1.5 explains "the client must agree to the arrangement, including the share that each lawyer *is to receive* . . . ." The use of the future tense envisions that the fee division agreement will precede the division of fees. Such an agreement should not be entered into toward the end of such a relationship. Instead, the division of fees must be agreed to either before or within a reasonable

time after commencing the representation.[18]

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13. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2016).

14. This opinion does not address whether Lawyer would be required to withdraw from representing both Rose and The Flower Shoppe in hypothetical two, if such a conflict did arise. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [29] (2016). Nor does this opinion address under what circumstances Lawyer might also be required to repay a referral fee that was already paid to and received by the Lawyer.

15. MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(2) (2016).

16. *Id.*

17. *See, e.g.*, Illinois State Bar Ass'n, Advisory Op. 90-18 (1990).

18. At least two courts have questioned the efficacy of fee division agreements signed after settlement. Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010) (rejecting referring lawyer's argument that "technical" requirement of joint responsibility letter required by

Conclusion

Rule 1.5(e) allows lawyers who are not in the same firm to divide a fee under certain circumstances. A lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client.

Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.

When one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed before or within a reasonable time after the commencement of the representation.

New York Rule DR 2-107 could be satisfied by complying "before fees have been paid"; court explained that fee division provision "clearly anticipates compliance with its requirements early on in the representation. . . . Moreover, the undertaking of joint responsibility is difficult (to say the least) to accomplish, other than as a charade, after a settlement with the defendant has been reached."); Saggese v. Kelley, 837 N.E.2d 699, 706 (Mass. 2005) (while affirming the enforcement of an agreement to divide fees that client agreed to "toward the end of the attorney-client relationship," court holds that after the issuance of the decision, referring lawyer required to disclose fee sharing before the referral is made and secure client's consent in writing). *But see* Cohen v. Brown, 93 Cal. Rptr. 3d 24, 38 (Ct. App. 2009) (California's Rule 2-200 "requires only that the client's consent to a division of fees be given prior to the actual *division* of the fees. It does not require client consent prior to the commencement of work by the associated-in attorney/law firm."). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [6] (2016) "before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client . . . ."

2016 WL 4897463
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v. KRAMER.

No. 2015–2000.
|
Submitted March 9, 2016.
|
Decided Sept. 13, 2016.

Synopsis

Background: Disciplinary counsel filed grievance with Board of Professional Conduct. Board recommended that attorney be suspended from practice of law for one year, with suspension stayed in its entirety.

Holdings: The Supreme Court, O'Connor, C.J., held that:

[1] stayed one-year suspension from practice of law was appropriate sanction for attorney's misconduct, and

[2] disciplinary counsel was not precluded from reviewing and investigating grievance filed by anonymous grievant regarding attorney's purported timekeeping discrepancies by fact that county inspector general had already investigated separate grievance arising from same misconduct and dismissed complaint.

Stayed one-year suspension ordered. French, J., concurred in judgment only.

Kennedy, J., filed dissenting opinion in which Pfeifer and O'Donnell, JJ., joined.

Attorneys and Law Firms

Scott J. Drexel, Disciplinary Counsel, for relator. Mary L. Cibella, Cleveland, for respondent. **Opinion**

O'CONNOR, C.J.

***1 O'CONNOR, C.J.**

{¶ 1} Respondent, Roger Stephen Kramer of Shaker Heights, Ohio, Attorney Registration No. 0019210, was admitted to the practice of law in Ohio in 1977. On December 14, 2015, the Board of Professional Conduct filed its report recommending that Kramer be suspended from the practice of law in Ohio for one year, with the suspension stayed in

its entirety. Relator, disciplinary counsel, requests that we reject the board's recommendation and instead impose a one- year actual suspension. Kramer requests that any suspension ordered be stayed in its entirety and that the court consider certain issues that "have broad impact on the entire disciplinary system in Ohio." We adopt the board's recommendation.

RELEVANT BACKGROUND

{¶ 2} In May 2011, the Cuyahoga County Council appointed Kramer, a former prosecutor, to be a hearing officer at the county's board of revision. As a hearing officer, Kramer was a county employee.

{¶ 3} In May 2013, the Cuyahoga County Office of the Inspector General informed the certified grievance committee of the Cleveland Metropolitan Bar Association ("CMBA") that an investigation of Kramer had revealed discrepancies between his time sheets and his actual hours worked. The inspector general's report, dated September 4, 2012, determined that there was "sufficient evidence to establish reasonable grounds to believe" that Kramer violated county rules, regulations, and/or policies regarding his work hours and time sheets by some 129 discrepancies between his timesheet and parking garage records. The report stated that Kramer was aware of the fact that he was paid for work he did not perform and acknowledged that he owed money to Cuyahoga County as a result. The inspector general recommended that the matter be referred to the county executive and human-resources department for potential disciplinary action.

{¶ 4} Prior to the issuance of the inspector general's report but pending the results of the investigation, Kramer was placed on administrative leave without pay. After release of the report, Kramer resigned from his position at the board of revision on September 14, 2012. In his resignation letter, Kramer denied any violation of law and asserted that a review of the documents provided to his counsel "reveal a net discrepancy of six hours."

{¶ 5} The committee exercised its discretion and decided not to file a complaint against Kramer. By letter dated October
24, 2013, the committee notified the inspector general of the dismissal, stating, "The Committee believes Mr. Kramer has already been sanctioned by the loss of his employment and that further disciplinary action is not warranted." The letter also informed the inspector general how to obtain review of the committee's determination pursuant to Gov.Bar R. V(4)(I)(5) (now Gov.Bar R. V(10)(D)). The inspector general declined to pursue further review.

{¶ 6} *Prior* to the committee's dismissal of the grievance, a separate anonymous grievance was submitted to disciplinary counsel. According to disciplinary counsel, the grievance was received on October 17, 2013, and signed by a "citizen and employee of Cuyahoga County." Neither the inspector general's grievance to the committee nor the anonymous grievance submitted to disciplinary counsel is included in the record. However, disciplinary counsel described the contents of the grievance as follows:

***2** In the anonymous grievance, the grievant stated that he or she is employed by Cuyahoga County and "fear[s] that my employment might be put in jeopardy by reporting this matter." Attached to the anonymous grievant's letter was a copy of the September 4, 2012 Report of Investigation prepared by the Cuyahoga County Agency of Inspector General. In the closing paragraph of his or her grievance, the grievant stated that "I bring this to your attention because I believe it is important to the legal profession and to citizens of Cuyahoga County that misconduct be properly reviewed and appropriate consequences result to insure [sic] integrity in public life and in the legal profession."

{¶ 7} In November 2013, according to disciplinary counsel, he sent a letter of inquiry to Kramer asking him to reply to the information contained in the inspector general's report. In response, Kramer's counsel informed disciplinary counsel that the CMBA had already been referred the issue and dismissed a related grievance. After receiving this information,

disciplinary counsel requested a copy of the CMBA's file on Kramer and pursued an investigation that, by disciplinary counsel's description, "significantly exceeded the scope of the Inspector General's investigation."

{¶ 8} In December 2014, disciplinary counsel filed a formal complaint with the Board of Commissioners on Grievances and Discipline (now known as the Board of Professional Conduct) alleging that Kramer's conduct regarding his timekeeping violated the Rules of Professional Conduct—specifically, Prof.Cond.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

{¶ 9} Kramer answered the complaint and moved to dismiss, arguing that the committee's dismissal of the prior grievance should be dispositive of the matter. On April 9, 2015, a three-member panel of the board denied the motion to dismiss, concluding that "[w]hile the first grievance filed by the inspector general arises out of the same set of facts and circumstances as the grievance that gave rise to the present complaint, nothing in Gov.Bar R. V precluded the filing of a separate grievance by a different grievant." Specifically, the panel found:

CMBA declined to file a complaint based on its view that the allegations were of the nature of an employment dispute and did not determine whether any conduct of [Kramer] constituted a violation of the Rules of Professional Conduct. On the other hand, the Disciplinary Counsel independently investigated a grievance filed by someone other than the Cuyahoga County Inspector General and discovered facts not reviewed or considered by the CMBA.

{¶ 10} In August 2015, the panel held a formal hearing on the complaint. On December 14, 2015, the board considered the matter and adopted the panel's findings of fact, conclusions of law, and recommendation that Kramer be suspended from the practice of law in Ohio for one year, stayed in its entirety.

***3** {¶ 11} Disciplinary counsel objects to the board's recommendation and requests an actual suspension of one year. Kramer requests that any suspension be stayed in its entirety and that the court consider addressing issues that, he asserts, have not been addressed in prior disciplinary decisions. One of these issues is whether a dismissal of a grievance by a certified grievance committee is final if not appealed and, relatedly, whether another disciplinary agency must give the prior dismissal full faith and credit.

* * *

RULEMAKING AND THE DISMISSAL OF A GRIEVANCE

{¶ 22} Initially, Kramer requests that the court determine whether a dismissal by a certified grievance committee that is not appealed by the grievant should become final and be given full faith and credit by another disciplinary agency. In other words, Kramer asks this court to address whether disciplinary counsel had the authority to investigate and pursue disciplinary action on the separate, anonymous grievance.

* * *

{¶ 28} Regardless of whether the grievances against Kramer alleged the same misconduct, nothing in the rules currently limits the authority of disciplinary counsel to investigate a grievance that alleges attorney misconduct. To the contrary, Gov.Bar R. V(9)(C) specifically requires disciplinary counsel to review *any matter* that comes before it and authorizes it to investigate any matter.

The dissent attempts to frame its indefensible stand as an interpretation of the rules, but it reads into the rules a limitation that does not exist. The dissent's approach circumvents the stability inherent in the consistent application of the Rules of Professional Conduct on a case-by-case basis. This does our profession no good.

{¶ 34} Because the rules, as they exist today, do not restrict disciplinary counsel's authority to investigate the anonymous grievance that is the basis of this disciplinary action, nothing precludes the imposition of the board-recommended sanction here.

CONCLUSION

{¶ 35} For these reasons, we find against relator and adopt the recommendation of the board. Accordingly, Roger Stephen Kramer is suspended from the practice of law in Ohio for one year, with the suspension stayed in its entirety on the condition that he engage in no further misconduct. If Kramer fails to comply with the condition of the stay, the stay will be lifted and he will serve the entire one-year suspension. Costs are taxed to Kramer.

Judgment accordingly.

LANZINGER and O'NEILL, JJ., concur. FRENCH, J., concurs in judgment only.

KENNEDY, J., dissents, with an opinion joined by PFEIFER and O'DONNELL, JJ.

KENNEDY, J., dissenting.

***7 KENNEDY, J., dissenting.**

{¶ 36} I dissent. Lawyers across Ohio, be on the qui vive! Certified grievance committees be damned! Like the sinners in Dante Alighieri's Canto VII of the *Divine Comedy: Inferno*, the lead opinion's interpretation of our rules would subject members of the Ohio bar to the prospect of multiple disciplinary proceedings in connection with the same alleged misconduct involving the same alleged victim.

{¶ 37} Because the cornerstone of our disciplinary procedure is the filing, investigation, and disposition of "a grievance," Gov.Bar R. V(9), and the grievances at issue here involve the same victim (the taxpayers of Cuyahoga County) and the same misconduct (the falsification of timesheets), I would give full faith and credit to the disposition of the grievance before the Cleveland Metropolitan Bar Association ("CMBA") as explicitly required by the finality provision set forth in Gov.Bar R. V(10)(D), overrule the recommendation of the board, and grant the motion filed by respondent, Roger Kramer, to dismiss this action. Therefore, I dissent.

2016 WL 3344956
Supreme Court of Ohio.

CLEVELAND METROPOLITAN BAR ASSOCIATION
v. AZMAN.

No. 2015–2007.
|
Submitted Jan. 27, 2016.
|
Decided June 15, 2016.

Synopsis

Background: Bar association initiated disciplinary proceedings against attorney. The Board of Professional Conduct recommended a sanction of a one-year suspension with six months stayed.

Holdings: The Supreme Court held that:

[1] attorney's conduct in accessing e-mail accounts of his former employer without authorization and deleting e-mail messages violated the professional rules, and

[2] one year suspension from the practice of law, with six months stayed with conditions, was warranted. Suspension ordered.

Attorneys and Law Firms

Tucker Ellis, L.L.P., Seth H. Wamelink, and Paul L. Janowicz, Cleveland; and Heather Zirke, Bar Counsel, for relator.

McCarthy, Lebit, Crystal & Liffman Co., L.P.A., and Ian Friedman, Cleveland, for respondent.

Opinion

PER CURIAM.

***1 Per Curiam.**

{¶ 1} Respondent, Brandon Louis Azman of Arlington, Virginia, Attorney Registration No. 0087246, was admitted to the practice of law in Ohio in 2011, but he has been registered as inactive since February 5, 2015. Relator, Cleveland Metropolitan Bar Association, charged him with violating the Rules of Professional Conduct for accessing e-mail accounts of his former employer after his termination, deleting some of those e-mail communications, and then lying about his conduct under oath. Azman stipulated to the charges, and after a hearing, the Board of Professional Conduct recommends that we sanction him with a one-year suspension with six months stayed. Neither party has filed objections to the board's report and recommendation.

{¶ 2} Based on our review of the record, we adopt the board's findings of misconduct and the recommended sanction.

Misconduct

{¶ 3} Azman worked as an associate attorney for the Piscitelli Law Firm from March 2012 to August 29, 2013—when Frank Piscitelli terminated him. During his employment, Azman had learned the login credentials, including passwords, for the firm e-mail accounts of Piscitelli and three other employees. On August 30, 2013—the day after his termination—Azman began accessing those e-mail accounts without authorization. Indeed, over the following two-and-a-half weeks, he accessed the accounts at least 20 times. At one point, firm employees had changed their passwords, but Azman was able to obtain their updated login credentials so that he could continue viewing their e-mails.

{¶ 4} During this same time period, Azman sent two e-mails to Piscitelli asking whether he would be willing to write a letter of recommendation for Azman. When Piscitelli did not respond, Azman sent him another e-mail indicating that he had met with one of the law firm's clients, and he proposed the following:

[I]n exchange for you writing a letter of recommendation for me, I would be willing to negotiate a non-compete of sorts with you. I would agree to make no efforts whatsoever to contact former clients of mine for the purpose of bad mouthing you, to try and steal them away or to convince them to terminate the services of the Piscitelli Law Firm.

{¶ 5} In a reply e-mail, Piscitelli indicated that he had terminated Azman for poor work performance and therefore he would not provide a letter of recommendation. Piscitelli also threatened potential legal action against Azman if he contacted any firm clients, harassed any firm employees, or made any additional threats against Piscitelli or the law firm. Piscitelli forwarded this e-mail exchange to another employee in his office.

{¶ 6} After receiving Piscitelli's reply, Azman logged into the law firm's e-mail accounts and deleted the communications between him and Piscitelli from both Piscitelli's and the other employee's accounts. Azman also deleted other e-mails he had sent Piscitelli after his termination. The following day, Piscitelli discovered that the e-mails were deleted, and members of his firm contacted local police, who traced the unauthorized access to an IP address registered at Azman's residence.

***2 [1]** {¶ 7} Piscitelli later agreed not to sign a criminal complaint against Azman relating to his unauthorized access to firm e-mail accounts on the condition that Azman report his conduct to relator. Without a criminal complaint, the local police decided against filing criminal charges against Azman. On October 11, 2013, Azman, through counsel, notified relator that Azman had violated the Rules of Professional Conduct, and on November 1, 2013, counsel notified relator that after Azman's termination from the Piscitelli Law Firm, he had viewed e-mail accounts of attorneys and staff in the firm without their consent or knowledge. However, during a subsequent deposition by relator, Azman denied that he had purposely deleted any law firm e-mails. Not until his disciplinary hearing did Azman finally admit that he had also deleted e-mails while he had access to the accounts.

[2] [3] {¶ 8} The board found that Azman engaged in the following professional misconduct: (1) by deleting the e-mail exchanges in which Piscitelli had threatened potential legal action based on information in Azman's prior e-mail, Azman violated Prof.Cond.R. 3.4(a) (prohibiting a lawyer from unlawfully altering, destroying, or concealing material having potential evidentiary value) and 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice), (2) by accessing firm e-mail accounts without authorization and then deleting e-mails, Azman violated Prof.Cond.R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and (3) by making an untruthful statement during his deposition, Azman violated Prof.Cond.R. 8.1(a) (prohibiting an attorney from knowingly making a false statement of material fact in connection with a disciplinary matter).

{¶ 9} We agree with these findings of misconduct.

48 N.E.3d 557, 2016 -Ohio- 657

145 Ohio St.3d 270
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v. BROCKLER.

No. 2015–0280.
|
Submitted May 6, 2015.
|
Decided Feb. 25, 2016.

Synopsis

Background: Lawyer disciplinary proceeding was instituted against assistant county prosecutor who created a fictitious social networking account to contact alibi witnesses of a defendant who had been indicted for murder.

Holdings: The Supreme Court held that:

[1] assistance prosecutor's misconduct violated professional rules, and

[2] the misconduct warranted conditionally-stayed one-year suspension.

Conditionally-stayed suspension ordered.

O'Connor, C.J., dissented with an opinion in which Lanzinger, J., joined.

Misconduct

[1] {¶ 4} Before he was indicted, Dunn denied any involvement in Adams's death and told Cleveland police that at the time of the murder, he was with his girlfriend, Sarah Mossor, and her friend Marquita Lewis. Brockler did not believe that Dunn's alibi was true, but Mossor and Lewis refused to talk with him on numerous occasions when he identified himself as the assistant prosecutor assigned to the case.

{¶ 5} As part of his investigation, Brockler listened to recordings of telephone calls that Dunn had made from the Cuyahoga County Jail. On the morning of December 14, 2012, he listened to a recording of a heated conversation in which Dunn and Mossor argued over Dunn's fear that Mossor would not be a reliable witness and Mossor's belief that Dunn had not been faithful to her. Mossor suspected that Dunn had had a romantic relationship with a woman named "Taisha" and indicated that if her suspicion was true, she would end her relationship with Dunn. Believing that Mossor's relationship with Dunn was near a breaking point, Brockler saw an opportunity to exploit her feelings of distrust and get her to recant her support for Dunn.

{¶ 6} Recalling a Facebook ruse he had used in a prior case, Brockler planned to create a fictitious Facebook identity to contact Mossor. He attempted to obtain assistance from several Cleveland police detectives and the chief investigator in the ****559** prosecutor's office, but they were not available. Believing that time was of the essence, Brockler decided to proceed with the Facebook ruse on his own approximately one hour after he heard the recording of Mossor and Dunn's conversation. He created a Facebook account using the pseudonym "Taisha Little," a photograph of an African–American female that he downloaded from the Internet, and information that he gleaned from Dunn's jailhouse telephone calls. He also added pictures, group affiliations, and "friends" he selected based on Dunn's telephone calls and Facebook page.

{¶ 7} Posing as Little, Brockler simultaneously contacted Mossor and Lewis in separate Facebook chats. He falsely represented that Little had been involved with Dunn, that she had an 18–month–old child with him, and that she needed him to be released from jail so that he could provide child support. He also discussed Dunn's alibi as though it were false in an attempt to get Mossor and ***272** Lewis to admit that they were lying for Dunn (or would lie for him in the future) and to convince them to speak with the prosecutor.

{¶ 8} After chatting for several hours, Brockler sensed that Mossor and Lewis were suspicious, so he shut down the chat and deleted the fictitious account. He testified that he printed copies of the chats and placed them in a file—with the intent to provide copies to defense counsel—before he deleted the account, but those copies were never found. He attended five pretrial conferences from January through April 2013 but did not disclose the circumstances or content of his conversations with Mossor or Lewis.

{¶ 9} Brockler was scheduled to take an extended medical leave beginning April 16, 2013, and assistant prosecutor Kevin Filiatraut was assigned to handle the Dunn case in his absence. Brockler gave his file to Filiatraut, reviewed the case with him, and attended a pretrial conference with him. Brockler also disclosed that he might need to be a witness at trial because both Mossor and Lewis had told him they would not support Dunn's alibi, although they were afraid to say so in court. Brockler did not disclose *how* he obtained that information.

{¶ 10} On the second day of Brockler's leave and less than one week before Dunn's trial, a police detective gave Filiatraut several documents, including a transcript of Lewis's chat with "Taisha Little" (obtained from Lewis) and Lewis's written statement about the chat. Filiatraut immediately made the documents available to defense counsel and began to investigate Little.

{¶ 11} Although Filiatraut quickly informed Brockler about this new information, Brockler waited nearly three weeks to disclose that he was "Taisha Little." Upon learning of Brockler's ruse, Filiatraut reported this information to his superiors. The prosecutor's office withdrew from the case and the court appointed the attorney general to serve as a special prosecutor. Shortly after Brockler returned from his medical leave in June 2013, his employment was terminated.

{¶ 14} Approximately one year after Brockler's termination, Dunn was convicted of aggravated murder, murder, felonious assault, and having weapons while under disability. The parties stipulated in January 2015 that his conviction was on appeal, but it has since been affirmed, *see State v. Dunn*, 8th Dist. Cuyahoga No. CR–12–568849–A, 2015- Ohio-3138, 2015 WL 4656534.

{¶ 15} Brockler admitted that the Facebook ruse violated the plain language of Prof.Cond.R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), but he urged the board to carve out an exception for "prosecutorial investigation deception."

{¶ 16} Noting that a comment to Prof.Cond.R. 8.4 already recognizes an exception for lawyers who supervise or advise nonlawyers about lawful covert investigative activities and that this court has found in two cases that lawyers in private practice violated the analogous provisions of DR 1–102(A)(4) by personally engaging in investigatory deceptions, the board refused to carve out a broader exception to the rule. *See* Prof.Cond.R. 8.4, Comment 2A; *Columbus Bar Assn. v. King*, 84 Ohio St.3d 174, 702 N.E.2d 862 (1998) (finding that two attorneys engaged in dishonest conduct by conspiring for one of them to place a phone call while posing as someone else in order to generate evidence in furtherance of a client's case); *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶ 17 (finding that an attorney engaged in dishonesty, fraud, deceit, or misrepresentation when she intimidated a deposition witness by creating the false impression that she possessed compromising personal information that could be offered as evidence).

{¶ 17} Instead, the board found that Prof.Cond.R. 8.4(c) requires an assistant prosecutor to refrain from dishonesty, fraud, deceit, or misrepresentation when personally engaging in investigatory activity and that Brockler's Facebook ruse therefore violated the rule.

{¶ 28} Accordingly, Aaron James Brockler is suspended from the practice of law in Ohio for one year, fully stayed on

the conditions that he engage in no further misconduct and pay the costs of this proceeding. If he fails to comply ***276** with the conditions of the stay, the stay will be lifted, and he shall serve the full one-year suspension. Costs are taxed to Brockler.

Judgment accordingly.

PFEIFER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

O'CONNOR, C.J., dissents with an opinion in which LANZINGER, J., joins. O'DONNELL, J., dissents, with opinion.

O'CONNOR, C.J., dissenting.

{¶ 29} The preamble to the Ohio Rules of Professional Conduct, entitled "A Lawyer's Responsibilities," lays out broad obligations, recognizing that "a lawyer not only represents clients but has a special responsibility for the quality of justice" and that that responsibility extends "to practicing lawyers even when they are acting in a nonprofessional capacity." Prof.Cond.R., Preamble [1], [3]. By imposing a marginal sanction—a fully stayed one-year suspension—on respondent, Aaron Brockler, the majority minimizes his significant ethical violations and does so based upon a myopic view of the Rules of Professional Conduct. The men and women who serve as prosecutors in this state are authorized to enforce the law and administer justice, one of the noblest pursuits an attorney can enjoy. Accordingly, they must meet or exceed the highest ethical standards imposed on our profession. Given the significant ethical violations Brockler committed, I cannot implicitly condone the imposition of a negligible sanction for his egregious misconduct.

{¶ 38} In light of the series of lies and misrepresentations here and the impact they have on the profession and our communities, I would indefinitely suspend Brockler's license to practice law in this state.

{¶ 39} Because I believe that the court's sanction in this case is entirely incongruous with Brockler's behavior, I cannot subscribe to it. For his ethical misdeeds, I would indefinitely suspend Brockler's license to practice law in the state of Ohio. Accordingly, I dissent.

LANZINGER, J., concurs in the foregoing opinion. O'DONNELL, J., dissenting.

{¶ 40} Respectfully, I dissent.

{¶ 41} Respondent engaged in unacceptable dishonest conduct that materially affected the administration of justice, and I would impose an indefinite suspension.

All Citations

145 Ohio St.3d 270, 48 N.E.3d 557, 2016 -Ohio- 657